UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
TYLER DIVISION

ROBERTO RAMIREZ and THOMAS IHLE, Plaintiffs, -against- J.C. PENNEY CORPORATION, INC., MICHAEL DASTUGUE, JANET DHILLON, KENNETH HANNAH, MICHAEL KRAMER, RONALD JOHNSON, and MYRON E. ULLMAN, III, Defendants.	Civil Action No. 6:14-cv-00601-RWS-KNM CLASS ACTION

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR UNOPPOSED MOTION FOR FINAL APPROVAL OF SETTLEMENT, CERTIFICATION OF SETTLEMENT CLASS, AND APPROVAL OF PLAN OF ALLOCATION

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4 Alba Conte & Herbert B. Newberg,
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Pursuant to Federal Rule of Civil Procedure 23(e), named Plaintiffs Roberto Ramirez and Thomas Ihle ("Named Plaintiffs") respectfully submit this Memorandum in Support of Their Unopposed[1] Motion for Final Approval of Settlement and related relief (the "Motion"),[2] which moves this Court for an Order entering the Order and Final Judgment negotiated by the Parties to settle Named Plaintiffs' and the Settlement Class's claims against Defendants. The Court granted preliminary approval of the Settlement, conditional certification of the Settlement Class, and approval of the Class Notice in form and content, by Orders dated January 3, 2017 (Dkt. No. 76) (the "Preliminary Approval Order") and April 19, 2017 (Dkt. No. 79) (the "Revised Settlement Deadlines Order").

I. INTRODUCTION

The proposed Settlement[3] of this ERISA case for $4,500,000 will provide a substantial recovery to the Settlement Class members.[4] The proposed Settlement, if finally approved by the

[1] The Parties conferred on June 23, 2017, and Defendants' Counsel represented that Plaintiffs' Motion is unopposed.

[2] This Memorandum is filed only by Plaintiffs, and sets forth only the views of Plaintiffs about the strengths and weaknesses of the claims and defenses and the risks of further litigation. Unsurprisingly, there are significant differences between the views of Plaintiffs and Defendants about the strengths and weaknesses of Plaintiffs' claims and Defendants' defenses to those claims, as well as significant differences concerning the amount of recoverable damages if Plaintiffs prevailed. To be clear, Defendants deny any and all liability in the Action and disagree with many of the assertions made herein. Defendants also expressly disagree with the legal arguments made by Plaintiffs in this Memorandum. The proposed Settlement is a compromise of those differences. Further, Defendants are unopposed to class certification in this case only for purposes of this settlement. Defendants do not agree that this case would warrant class action treatment outside of the context of this settlement.

[3] Capitalized terms used herein are defined in the Class Action Settlement Agreement and Release, dated May 31, 2016 (the "Settlement Stipulation") (Dkt. No. 68-1).

[4] The Settlement Class members are: "All Persons who were participants in or beneficiaries of the J. C. Penney Corporation, Inc. Savings, Profit Sharing and Stock Ownership Plan (the "Plan") at any time from November 1, 2011 through Settlement Stipulation Execution Date, May 31, 2016 (the "Class Period"), and whose Plan accounts included investments in the J. C. Penney Common Stock Fund.

Court, will resolve all claims asserted by Named Plaintiffs and the Settlement Class. In light of the substantial Settlement Payment and the substantial risks of continued litigation (as to both liability and damages) discussed herein, Class Counsel believes the proposed Settlement is fair, reasonable, adequate and in the best interest of the Settlement Class and should be approved.

Class Counsel has vigorously prosecuted this Action on behalf of Plaintiffs, the Plan and its participants (the "Participants"). The Parties agreed to the Settlement only after arm's-length negotiations by experienced counsel, facilitated by a well-respected mediator, as discussed below. Resolving the case now allows the Parties to avoid continued and costly litigation that would deplete available resources, and which could result in a recovery of less than $4,500,000, or in no recovery at all. Indeed, the Settlement Class faces significant litigation risks absent settlement, as discussed below.

Prior to reaching the Settlement, Class Counsel reviewed and analyzed hundreds of thousands of pages of documents and hours of video footage produced by Defendants or publicly available and engaged in a series of extensive negotiations assisted by Robert A. Meyer, of JAMS, an experienced mediator (the "Mediator"). *See* Declaration of Samuel E. Bonderoff In Support of Plaintiffs' (1) Unopposed Motion for Final Approval of Settlement, Certification of Settlement Class and Approval of the Plan of Allocation, and (2) Motion for An Award of Attorneys' Fees, Reimbursement of Expenses and Case Contribution Awards to Named Plaintiffs[5] (the "Bonderoff Decl." or "Bonderoff Declaration") ¶¶ 6-9.

In reaching the Settlement, Class Counsel considered the numerous risks and uncertainties Named Plaintiffs and the Settlement Class would face if this litigation continued.

[5] Defendants have not reviewed and have no position on the assertions or arguments in Plaintiffs' Motion for An Award of Attorneys' Fees, Reimbursement of Expenses and Case Contribution Awards to Named Plaintiffs.

Even though Class Counsel believes that the claims asserted have substantial merit, this action involved complex legal and factual issues, as well as extraordinary risks with respect to issues of both liability and damages. Based on these extraordinary risks, Class Counsel has concluded that the Settlement is a fair and reasonable result for the Settlement Class.

Notice of the Settlement[6] has been provided to the Settlement Class in accordance with the Preliminary Approval Order.[7] As of the date of this submission,[8] no Class member has objected to the Settlement; thus, it appears that the Class supports final approval.[9] Class Counsel further respectfully submits that the Settlement Class should be certified and that the Plan of Allocation is fair, reasonable, and adequate, and should be approved by the Court.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Description of the Action and Procedural History

On July 8, 2014, Plaintiff Roberto Ramirez, a former J.C. Penney employee and a Plan Participant, filed the first ERISA class action complaint against Defendant J.C. Penney Corporation Inc. and several other J.C. Penney directors who were subsequently voluntarily dismissed from the action. Plaintiff Thomas Ihle, a current J.C. Penney employee and a Plan Participant joined Plaintiff Ramirez on an amended complaint filed on August 25, 2014. The

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[6] Defendants represent that they have complied with the Class Action Fairness Act ("CAFA"). *See* Declaration of Madeline C. Rea, counsel for Defendants, attached as Exhibit 3 to the Bonderoff Decl. ¶ 2.

[7] *See* Declaration of Abigail Schwartz of Rust Consulting, attached as Exhibit 2 to the Bonderoff Decl. (the "Rust Consulting Decl." or "Rust Consulting Declaration") ¶¶ 11, 15.

[8] The deadline for Settlement Class members to object to the Stipulation is July 10, 2017. Any objections filed will be addressed in a supplemental filing on or before July 19, 2017, in accordance with the Revised Settlement Deadline Order ¶ 6.

[9] Pursuant to the Settlement Agreement, the Independent Fiduciary is in the process of reviewing the Settlement. Plaintiffs hope to file notice of the Independent Fiduciary's determination before the Fairness Hearing or to advise the Court of the same at the Fairness Hearing.

amended complaint named additional defendants Michael Dastugue, Janet Dhillon, Kenneth Hannah, Michael Kramer, Ronald Johnson, and Myron E. Ullman, III.

On November 7, 2014, Defendants moved to dismiss Plaintiffs' amended complaint, which was later denied on September 29, 2015. On January 8, 2016, the Court ordered the Parties to pursue nonbinding mediation. On February 22, 2016, Defendants filed a Motion for Reconsideration of the Court's denial of their Motion to Dismiss.

B. Discovery Efforts

In accordance with the controlling discovery orders, the Parties had begun to move forward with substantial discovery efforts. When the mediation was scheduled, the Parties then narrowed their focus on discovery to facilitate settlement negotiations. Defendants produced what would be, if printed, in excess of 100,000 pages of trade data (the "Plan Data"). *See* Bonderoff Decl. ¶ 7.

C. Settlement Discussions

On January 8, 2016, the Court ordered the Parties to pursue nonbinding mediation through Mediator Robert A. Meyer, Esq. of JAMS. Later that same month, the Parties met and conferred and agreed to mediate this action on March 24, 2016, in Dallas, Texas.

In anticipation of mediation, Defendants produced voluminous Plan data and the Parties spoke several times via telephone conferences to set forth their positions regarding Plaintiffs' likelihood of successfully prosecuting their claims and the potential damages if Plaintiffs could prove their claims. The Parties then met for an in-person mediation on March 24, 2016, which commenced at 9:00 a.m. and continued until approximately 7:30 p.m. The mediation concluded favorably with the Parties executing a Term Sheet setting forth the material terms of the Settlement.

D. The Preliminary Approval Order, the Revised Settlement Deadlines Order, and Class Notice

The Motion for Preliminary Approval and related documents, including the initial Settlement stipulation (Dkt. Nos. 68, 71-72), were filed on June 1 and 2, 2016. This Court issued its Preliminary Approval Order on January 3, 2017 (Dkt. No. 76). A joint motion to reset the fairness hearing and revise settlement deadlines was filed with this Court on April 18, 2017 (Dkt. No. 78). The Revised Settlement Deadlines Order was issued on April 19, 2017 (Dkt. No. 79). As set forth in the Rust Consulting Declaration, Class Counsel and Defendant's Counsel have complied with the notice plan and the other deadlines established in the Preliminary Approval Order and the Revised Settlement Deadlines Order.

III. TERMS OF THE SETTLEMENT

After extensive negotiation of the various issues and analysis of the merits of the claims and the quantum of damages, Class Counsel agreed in principle to the proposed Settlement. Class Counsel negotiated the provisions of the Settlement and exchanged drafts of Settlement documents with Defendants' counsel. Those efforts resulted in the execution of the Settlement Stipulation, which provides for a $4.5 million payment to Settlement Class members, which will be prorated to Settlement Class members as set forth in the Plan of Allocation.

IV. THE NOTICE SATISFIES RULE 23 AND DUE PROCESS

In its Preliminary Approval Order and the Revised Settlement Deadlines Order, the Court directed that notice of the Settlement ("Class Notice") be sent to all potential Settlement Class members. Preliminary Approval Order ¶ 7; Revised Settlement Deadlines Order ¶ 3. There are "no rigid rules to determine whether a settlement notice to the class satisfies constitutional or Rule 23(e) requirements." *In re Heartland Payment Sys.*, 851 F. Supp. 2d 1040, 1060 (S.D. Tex. 2012) (quoting *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96,

113 (2d Cir. 2005)). Rather, the Fifth Circuit has clarified the standard for adequacy of a settlement notice in a class action under the Due Process Clause and the Federal Rules as being measured by reasonableness. *In re Katrina Canal Breaches Litig.*, 628 F.3d 185, 197 (5th Cir. 2010). Due process has been satisfied if the notice provides class members with the "information reasonably necessary for them to make a decision whether to object to the settlement." *In re Heartland Payment Sys.*, 851 F. Supp. 2d at 1060 (quoting *In re Katrina Canal Breaches Litig.*, 628 F.3d at 197). The "settlement notice must fairly apprise the prospective members of the class of the terms of the proposed settlement and of the options that are open to them in connection with the proceedings…." *Wal-Mart Stores, Inc.*, 396 F.3d 96 at 114. Thus, Courts deem a notice adequate when, as here, "it may be understood by the average class member." *Newby v. Enron Corp. (In re Enron Corp. Secs)*, No. MDL-1446, 2008 U.S. Dist. LEXIS 84656, at *43 (S.D. Tex. Sep. 8, 2008) (quoting 4 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* § 11:53 at 167 (4th ed. 2002)).

Pursuant to the Preliminary Approval Order and the Revised Settlement Deadlines Order, the Class Notice disseminated to the Settlement Class fairly and adequately (a) described the terms of the Settlement and effects of the Settlement Stipulation, the Settlement, and the Plan of Allocation; (b) notified the Settlement Class of Class Counsel's intention to seek attorneys' fees and reimbursement of expenses to be paid from the Gross Settlement Fund, and Class Counsel's intention to seek Case Contribution Awards for each of the Named Plaintiffs in an amount of up to $5,000 to also be paid from the Gross Settlement Fund, (c) gave notice to the Settlement Class of the time and place of the rescheduled Fairness Hearing, and (d) detailed the procedures for objecting to any aspect of the Settlement. *See Mehling v. New York Life Ins. Co.*, 246 F.R.D. 467, 477-78 (E.D. Pa. 2007). As shown by the Rust

Consulting Declaration, there is reason to believe 98.58% of the Class received direct notice. *See* Rust Consulting Decl. ¶¶ 11, 15-16.

In addition, the Summary Notice was published in *USA Today*. Rust Consulting Decl. ¶ 12. The Class Notice was also published on a dedicated Settlement website, www.jcperisaclassaction.com. *Id.* at ¶ 7. Accordingly, the notice program in this case reasonably apprised Settlement Class members of the Settlement and their options with respect thereto, and fully satisfied all due process requirements.

V. THE SETTLEMENT SHOULD BE APPROVED

A. Standard of Review

The settlement of complex class actions such as this one is strongly favored by courts. *See Schwartz v. TXU Corp.*, No. 3:02-CV-2243-K, 2005 U.S. Dist. LEXIS 27077, at *64 (N.D. Tex. Nov. 8, 2005); *see also TBK Partners, Ltd. v. W. Union Corp.*, 675 F.2d 456, 461 (2d Cir. 1982) (recognizing the "paramount policy of encouraging settlements"); *Cronas v. Willis Grp. Holdings, Ltd.*, No. 06-CV-15295, 2011 U.S. Dist. LEXIS 147171, at *7 (S.D.N.Y. Dec. 19, 2011) ("There is a strong judicial policy in favor of settlements, particularly in the class action context.") (citing *Wal-Mart*, 396 F.3d at 116).

Where, as here, a proposed settlement is reached after meaningful discovery and arm's-length negotiations conducted by the parties, it is entitled to a presumption of fairness. *See Slipchenko v. Brunel Energy, Inc.*, No. H-11-1465, 2015 U.S. Dist. LEXIS 8177, at *19 (S.D. Tex. Jan. 23, 2015) ("A presumption of fairness, adequacy, and reasonableness may attach if the Court finds that arm's length negotiations took place between experienced counsel after a period of meaningful discovery.") (*citing Wal-Mart*, 396 F.3d at 116); *see also In re Heartland Payment Sys.*, 851 F. Supp. 2d at 1063 (recognizing presumption of fairness, reasonableness, and adequacy); *In re PaineWebber P'shps Litig.*, 171 F.R.D. 104, 125 (S.D.N.Y. 1997) ("So

long as the integrity of the arm's length negotiation process is preserved, however, a strong initial presumption of fairness attaches to the proposed settlement, and 'great weight' is accorded to the recommendation of-counsel, who are most closely acquainted with the facts of the underlying litigation.") (internal citations omitted).

As discussed herein and in the Bonderoff Declaration, Class Counsel has engaged in comprehensive discovery, the Settlement negotiations were hard-fought and occurred at arm's length, and Class Counsel have considerable experience and knowledge in this field of litigation.[10] In fact, a presumption of fairness and adequacy applies with special force here, because the extensive arm's-length negotiations were conducted under the guidance of the Mediator. *See Duncan v. JPMorgan Chase Bank, N.A.*, No. SA-14-CA-00912-FB, 2016 U.S. Dist. LEXIS 122663, at *21 (W.D. Tex. May 23, 2016) (involvement of mediator in settlement negotiations "demonstrates a likelihood that the settlement was the result of informed, good-faith, arm's length negotiations rather than fraud or collusion); *In re Toys R Us Antitrust Litig.*, 191 F.R.D. 347, 352 (E.D.N.Y. 2000) (in approving settlement, noting that the parties reached settlement with assistance of highly experienced retired federal judge serving as mediator). The Settlement is therefore entitled to a presumption that it is fair, reasonable, and adequate.

B. The Settlement Satisfies All Relevant Criteria for Final Approval of a Class Action Settlement

Under Federal Rule 23(e)(2), the settlement of a class action requires a determination by the Court that the proposed settlement is "fair, reasonable, and adequate." *Klein v. O'Neal, Inc.*,

[10] *See, e.g.*, *In re Giant Interactive Group, Inc.*, 07-CV-10588, 2011 U.S. Dist. LEXIS 127634, at *14-15 (S.D.N.Y. Nov. 2, 2011) (finding settlement entitled to a presumption of fairness because: (a) parties were represented by estimable counsel experienced in litigating these types of claims; (b) settlement was product of prolonged, arm's-length negotiation and was facilitated by a respected mediator; and (c) case proceeded past pleading stage before settlement reached).

705 F. Supp. 2d 632, 639 (N.D. Tex. 2010) ; *see also Maher v. Zapata Corp.*, 714 F.2d 436, 455 (5th Cir. 1983) (Fifth Circuit recognizing that a district court may approve a class action settlement if it is fair, reasonable and adequate and not a product of collusion).

When evaluating a settlement agreement, the court should not substitute its judgment for that of the parties, nor is it to turn consideration of the adequacy of the settlement into a trial where the merits are decided. *Maher v. Zapata Corp.*, 714 F.2d at 455; *see also Authors Guild v. Google Inc.*, 770 F. Supp. 2d 666, 674-75 (S.D.N.Y. 2011). Rather, "the Court's responsibility is to reach an intelligent and objective opinion of the probabilities of ultimate success should the claims be litigated and to form an educated estimate of the complexity, expense and likely duration of such litigation and all other factors relevant to a full and fair assessment of the wisdom of the proposed compromise." *Authors Guild*, 770 F. Supp. 2d at 675.

In evaluating a settlement, the "only question" for the Court to determine "is whether the settlement, taken as a whole, is so unfair on its face as to preclude judicial approval." *McNary v. Am. Sav. & Loan Ass'n*, 76 F.R.D. 644, 649 (N.D. Tex. 1977). The Fifth Circuit has established a six-pronged test to determine the fairness of proposed settlements: "(1) the existence of fraud or collusion behind the 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 probability of plaintiffs' success on the merits; (5) the range of possible recovery; and (6) the opinions of the class counsel, class representatives, and absent class members." *Reed v. Gen. Motors Corp.*, 703 F.2d 170, 172 (5th Cir. 1983). As demonstrated below, the settlement easily meets these six criteria.

1. There Is No Fraud or Collusion Behind the Settlement

There has been no fraud, collusion, or complicity of any kind in connection with the negotiations for, or the agreement to, settle this class action. Bonderoff Decl. ¶ 3. This

proposed settlement is the product of extensive, arm's-length negotiations by adverse, represented parties. *Id.* Class Counsel's experience is set forth its firm biography. *Id.* at Ex. 1.

The non-collusive, extensive, arm's-length negotiations by experienced counsel took place during a one-day session in Dallas, TX before a Court-appointed mediator, Robert A. Meyer. In addition, preliminary negotiations took place over the course of numerous telephonic sessions. Very senior members of both Plaintiffs' and Defendants' counsels' firms negotiated this settlement. The negotiations were informed by the knowledge gained from the review of thousands of pages of documents obtained through public sources and discovery from Defendants and third parties. Based on their familiarity with the factual and legal issues, the parties were able to negotiate a fair settlement that took into account the costs and risks of continued litigation. In reaching the settlement, all legal and factual issues were evaluated, and all alternatives were considered. The negotiations were at all times hard fought and at arm's length, and have produced a result that the settling Parties believe to be in their respective best interests.

Accordingly, this factor supports final approval of the settlement. *See Faircloth v. Certified Fin. Inc.*, 2001 WL 527489, at *4 (E.D. La. May 16, 2001) ("there is typically an initial presumption that a proposed settlement is fair and reasonable when it is the result of arms length [sic] negotiations.").

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

This action has been actively litigated since its commencement on June 8, 2014 through the negotiation of the Settlement Stipulation. Class Counsel conducted a thorough investigation into the claims asserted in the highly detailed Amended Complaint, including review and analysis of voluminous publicly available documents, briefed and prevailed on a

motion to dismiss, and were involved in discovery at the time of settlement. Furthermore, Class Counsel reviewed and analyzed Plan and trade data obtained from Defendants and consulted with experts on the issues of loss causation and damages. Class Counsel's investigation and the discovery obtained from Defendants related to the key factual issues at the core of the litigation. Thus, by the time settlement discussions began, Class Counsel had a solid understanding of the strengths and weaknesses of Named Plaintiffs' claims, both legally and factually and were able to engage in a rigorous negotiation process with Defendants. There can be no doubt that the parties reached the instant settlement with a "full understanding of the legal and factual issues surrounding this case." *Manchaca v. Chater*, 927 F. Supp. 962, 967 (E.D. Tex. 1996).

3. The Probability of Success on the Merits

As in every complex case of this kind, Named Plaintiffs and the Class faced formidable obstacles to recovery at trial, both with respect to liability and damages.

a. The Risks of Establishing Liability Support Final Approval

Named Plaintiffs allege defendants violated ERISA's duty of prudence by permitting investment of Plan assets in J.C. Penney stock. In order to succeed on the merits, Named Plaintiffs would have to overcome several significant obstacles. Defendants would certainly assert affirmative defenses and would undoubtedly vigorously argue for a judgment in their favor at summary judgment and trial. A favorable result at trial would be uncertain; Class Counsel knows of only four ERISA company stock fund cases that have been tried, with defense verdicts in each.[11] As another court recently observed:

[11] *DiFelice v. U.S. Airways, Inc.*, 436 F. Supp. 2d 756 (E.D. Va. 2006), *aff'd*, 497 F.3d 410 (4th Cir. 2007) (the Fourth Circuit affirmed the district court's ruling that defendants did not breach ERISA mandated fiduciary duties by continuing to offer company stock as plan investment

> ERISA class actions based on the same theories as the present matter involve a complex and rapidly evolving area of law. This uncertainty, combined with the risks associated with a potential trial and the need to overcome likely summary judgment motions, indicates that Plaintiff faced significant risks in establishing liability and damages . . . .

Schering-Plough Enhance, 2012 WL 1964451, at *5. The same risks are inherent here, underscoring the Settlement's appropriateness. Indeed, this uncertainty is even greater here in light of the Supreme Court's opinion in *Fifth Third*, which eliminated a presumption of prudence while directing courts to evaluate other factors in evaluating claims, and left it for the lower courts to consider and develop common law consistent with its opinion. *See, e.g., Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459, 2473 (2014) ("*Fifth Third*"). The Parties have drastically different understandings of *Fifth Third*, as shown by the Amended Complaint, the fully briefed motion to dismiss, and Defendants' motion for reconsideration. If Defendants' interpretation of *Fifth Third* were adopted, there would be no recovery whatsoever.

b. The Risk of Establishing Damages Support Final Approval

Determination of damages, the potential range of which is discussed below, would require experts. Plaintiffs believe damages are the difference between what the retirement plan earned on the investment in question compared with what the plan would have earned from a prudent investment. *See Graden v. Conextant Sys. Inc.*, 496 F.3d 291 (3d Cir. 2007).

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option.); *Nelson v. IPALCO Enters., Inc.*, 480 F. Supp. 2d 1061 (S.D. Ind. 2007) (holding defendant fiduciaries did not breach their fiduciary duties under ERISA by failing to remove company stock as a plan investment option.); *Langraff v. Columbia Healthcare Corp*., 2000 U.S. Dist. LEXIS 21831 (M.D. Tenn. May 24, 2000) (same); *Brieger v. Tellabs, Inc*., 2009 WL 1565203 (N.D. Ill. June 1, 2009) (same); *cf. Peabody v. Davis*, 2010 WL 1416933 (N.D. Ill. Apr. 5, 2010) (finding at trial that fiduciaries of a retirement plan in a closely-held corporation breached their fiduciary duties under ERISA), *aff'd in part*, *rev'd in part*, *and remanded*, *Peabody v. Davis*, 636 F.3d 368 (7th Cir. 2011).

Defendants argue that there were no damages because there was no breach. Defendants also assert that the Plan's trading patterns further limit damages significantly, because it was a "net seller" of J.C. Penney common stock at relevant times, meaning that, even if Plaintiffs prevailed on liability, according to Defendants, Plaintiffs would not be entitled to any recovery.

Even assuming liability, the Parties and their experts would debate *when* holding or acquiring J.C. Penney stock violated ERISA (the "breach date") and how much J.C. Penney common stock was artificially inflated (and how much it was diminished by other factors such as J.C. Penney's financial performance). If the Court found the breach date was late in the Class Period, or Defendants were able to demonstrate that little of J.C. Penney's stock price decline was caused by artificial inflation, damages recoverable would be significantly decreased. Plaintiffs would argue that holder and purchaser damages (*i.e.,* damages arising from holding stock and damages arising from selling stock at a loss) are available, but Defendants would argue that only purchaser damages were available in light of, *inter alia*, *Fifth Third*, 134 S. Ct. at 2472-73, or that "holder" damages (*i.e.* damages for shares held at the start of the Settlement Class Period) were severely limited thereby. Where, as here, "[t]he parties . . . contemplate expert discovery on damages, which likely will result in competing expert opinions representing very different damage estimates that will present further ambiguity as to resolution on damages…[,]" it weighs in favor of settlement. *In re Processed Egg Products Antitrust Litig.*, 284 F.R.D. 278, 301 (E.D. Pa. 2012).

4. The Settlement Falls Within the Range of Reasonableness

The determination of a "reasonable" settlement is not susceptible to a single mathematical equation yielding a particularized sum. Rather, "in any case there is a range of reasonableness with respect to a settlement . . . ." *Newman v. Stein*, 464 F.2d 689, 693 (2d Cir. 1972); *Fickinger v. C.I. Planning Corp.*, 646 F. Supp. 622, 630 (E.D. Pa. 1986). To assess the

reasonableness of a proposed settlement seeking monetary relief, an inquiry "should contrast settlement rewards with likely rewards if case goes to trial." *In re Chicken Antitrust Litig. Am. Poultry*, 669 F.2d 228, 239 (5th Cir 1982). Thus, "there is no reason, at least in theory, why a satisfactory settlement could not amount to a hundredth or even a thousandth part of a single percent of the potential recovery." *Detroit v. Grinnell Corp.*, 495 F.2d 448, 455 n.2 (2d Cir. 1974); *Parker v. Anderson*, 667 F.2d 1204, 1210 n.6 (5th Cir. 1982); *McNary*, 76 F.R.D. at 650.

Under the proposed settlement, the Class will receive $4,500,000 – a substantial amount – in exchange for the release of all claims against Defendants. Named Plaintiffs respectfully submit that considering the risks of continued litigation (*see*, §III.A.3, *supra*), and the time and expense that would be incurred to prosecute the action through trial and appeals (*see*, §III.A.5, *infra*), the settlement represents a significant recovery that clearly falls within the range of reasonableness.

This is further bolstered by Named Plaintiffs' calculations that, during the Class Period, out-of-pocket losses for purchasers and holders based on the artificial inflation of the stock would be approximately $20 million. The Settlement Payment then represents approximately 22.5% of recoverable damages. This figure, even if attorneys' fees and expenses are deducted, compares very favorably to other settlements in this area of law and in this district. *See, e.g., In re Elec. Data Sys. Corp. "ERISA" Litig.*, 2005 U.S. Dist. LEXIS 17457 (E.D. Tex. June 20, 2005) (rejecting adequacy of settlement that, when attorney costs were factored out, represented only a two-to-three-percent recovery for plaintiffs).

5. The Complexity, Expense, and Likely Duration of Litigation

Another reason for the Court to preliminarily approve the proposed settlement is the complexity, duration, and risks of further litigation. *See Manchaca*, 927 F. Supp. at 966.

ERISA breach of fiduciary duty actions are difficult to prosecute and "involve a complex and rapidly evolving area of law." *In re Schering-Plough Corp. Enhance ERISA Litig.*, 2012 WL 1964451, at *5 (D.N.J. May 31, 2012) ("*Schering-Plough Enhance*"); *In re Wachovia Corp. ERISA Litig.*, 2011 WL 7787962, at *4 (W.D.N.C. Oct. 24, 2011). New precedents are frequently issued, and the demands on counsel and the Court are complex and require the devotion of significant resources. Indeed, *Fifth Third* recently abrogated a presumption that employer securities offered pursuant to the terms of an ERISA plan were prudent, setting the groundwork for undeveloped standards that presented large litigation risks that present significant risks to all Parties.

Absent settlement, there can be no doubt that continued litigation would require additional large expenditures of time and money and there would be a significant risk that the Class would obtain a result far less beneficial than the one provided by the Settlement Payment. For example, although Class Counsel has already completed a substantial amount of document discovery, the complex issues involved in this Litigation would require further review of documents by Class Counsel and their experts, significant motion practice, and the taking and defending of numerous depositions. The process of class certification alone involves substantial briefing, extensive and costly expert involvement, including deposition testimony by experts for both sides, and deposition testimony by the Named Plaintiffs. It also would have involved substantial risk to the Class. *See In re Seitel, Inc. Secs. Litig.*, 245 F.R.D. 263, 278 (S.D. Tex. June 26, 2007) (denying class certification based on a failure to demonstrate loss causation).

Additional risk and cost would have followed. After the close of discovery, the parties would then brief summary judgment and prepare for trial. The costs and risks associated with

litigating this action to a verdict, not to mention through the inevitable appeals, would have been high, and the process would require hundreds of hours of this Court's time and resources. *See Clark v. Lomas & Nettleton Fin. Corp.*, 79 F.R.D. 641, 651 (N.D. Tex. 1978), *vacated on other grounds*, 625 F. 2d 49 (5th Cir. 1980) (noting that the expense of trial can be "staggering," and carries with it the "distinct possibility" that the trial will result in no recovery).

Finally, if taken to trial, this case would easily require an additional one or two years before a recovery, if any, was obtained for the Class. *See Strougo ex rel. Brazilian Equity Fund v. Bassini*, 258 F. Supp. 2d 254, 258 (S.D.N.Y. 2003) ("'it is beyond cavil that continued litigation in this multi-district securities class action would be complex, lengthy, and expensive, with no guarantee of recovery by the class members'"). *A fortiori*, this factor supports final approval of the settlement.

6. The Opinions of Class Counsel, the Class Representatives, and Absent Class Members

"Counsel are the Court's 'main source of information about the settlement' . . . and therefore the Court will give weight to class counsel's opinion regarding the fairness of settlement." *Turner v. Murphy Oil USA, Inc.*, 472 F. Supp. 2d 830, 852 (E.D. La. 2007). "[W]here the parties have conducted an extensive investigation, engaged in significant fact-finding and Lead Counsel is experienced in class-action litigation, courts typically 'defer to the judgment of experienced trial counsel who has evaluated the strength of his case.'" *Schwartz v. TXU Corp.*, 2005 WL 3148350, at *21 (N.D. Tex. Nov. 8, 2005).

Here, Class Counsel has considerable experience in complex class action and securities litigation and believes the settlement merits approval. Named Plaintiffs actively monitored the

litigation, were aware of settlement negotiations, and approve of the Settlement. Accordingly, this factor weighs in favor of final approval.

For all of the foregoing reasons, Named Plaintiffs respectfully submit that the proposed settlement falls within the range of what could be found to be fair, reasonable, and adequate and warrants this Court's final approval.

VI. THE SETTLEMENT CLASS SHOULD BE CERTIFIED

Plaintiffs' Plan-wide claims for breach of fiduciary duty under ERISA are well-suited for class certification. *See, e.g.*, *Banyai v. Mazur*, 205 F.R.D. 160, 163 (S.D.N.Y. 2002) ("In general, the question of defendants' liability for ERISA violations is common to all class members because a breach of a fiduciary duty affects all participants and beneficiaries.... Class actions are generally well-suited to litigation brought pursuant to ERISA."); *Smith v. Aon Corp.*, 238 F.R.D. 609, 613 (N.D. Ill. 2006) ("Class action suits are the preferred method of dealing with these cases because plan participants or beneficiaries may only bring action to remedy a breach of fiduciary duty in a representative capacity, on behalf of the plan itself.").

On preliminary review of the Settlement, the Court found that the proposed Settlement on a class-wide basis was adequate and met the standards set forth in Fed. R. Civ. P. 23, permitting the proposed Settlement to proceed to final approval. Preliminary Approval Order ¶¶ 1-2. Plaintiffs now seek: (i) the certification of the Settlement Class in the Action pursuant to Federal Rule of Civil Procedure 23(b)(1); (ii) the designation of Named Plaintiffs as representatives of the Settlement Class; and (iii) the designation of Zamansky LLC as Class Counsel for the Settlement Class.

A. The Settlement Class Satisfies Rule 23(a)'s Requirements

1. Numerosity

Numerosity is generally presumed when a class consists of forty or more members. *See, e.g., Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620, 624 (5th Cir. 1999) (finding a class of 100 to 150 members satisfies numerosity and any more than 40 members should raise a presumption that joinder is impracticable). Here, the Plan Data reveal there were over 55,000 Settlement Class members who held J.C. Penney common stock in their Plan accounts during the Settlement Class Period. In addition, the Settlement Class Members are too geographically dispersed to be easily joined into one action. *See, e.g., Eatmon v. Palisades Collection, LLC*, 2010 WL 1189571, at *4 (E.D. Tex. Mar. 5, 2010). Thus, numerosity is easily satisfied.

2. Commonality

The commonality requirement under Rule 23(a)(2) is met where, as here, "there is at least one issue, the resolution of which will affect all or a significant number of the putative class members." *Lightbourn v. County of El Paso*, 118 F.3d 421, 426 (5th Cir.1997). "By their very nature, ERISA actions often present common questions of law and fact, and are therefore frequently certified as class actions. 'In general, the question of defendants' liability for ERISA violations is common to all class members because a breach of fiduciary duty affects all participants and beneficiaries.'" *In re Marsh ERISA Litig.*, 265 F.R.D. at 142-43 (finding common questions satisfying Rule 23(a)(2) included: "(1) whether Defendants were fiduciaries of the Plan; (2) whether Defendants breached their fiduciary duties; (3) whether the Plan and its participants and beneficiaries were injured by Defendants' breaches; and (4) whether the Class is entitled to damages and, if so, the proper measure of damages." (quoting *Banyai v. Mazur*, 205 F.R.D. 160, 163 (S.D.N.Y, 2002)).

3. Typicality

The typicality requirement is satisfied because Named Plaintiffs' claims arise from a similar course of conduct and assert the same legal theories as the claims of all Settlement Class Members. *See James v. City of Dallas*, 254 F.3d 551, 571 (5th Cir. 2001) (typicality requires only that "the class representative's claims have the same essential characteristics of those of the putative class."); *Eatmon*, 2010 WL 1189571, at *6 ("If the claims arise from a similar course of conduct and share the same legal theory, factual differences will not defeat typicality."). Like every Settlement Class Member, Named Plaintiffs were participants in the Plan during the Settlement Class Period who invested in J.C. Penney common stock during that time. To succeed on the merits, Named Plaintiffs and Settlement Class members would have to prove the same or similar untrue statements and omissions of material fact.

Named Plaintiffs allege that they and all Settlement Class members sustained an economic loss arising out of Defendants' alleged violations of ERISA, a statute that explicitly states that §§ 409, 502(a)(2) claims are brought on behalf of retirement plans for planwide relief. *See In re Honeywell Int'l ERISA Litig.*, 2004 WL 3245931, at *15 (D.N.J. Sept. 14, 2004). Since the interests of Named Plaintiffs are aligned with the Settlement Class members, typicality is satisfied. *In re Schering-Plough/Merck Merger Litig.*, 2010 WL 1257722, at *7 (D.N.J. Mar. 26, 2010).

4. Adequacy

Named Plaintiffs have adequately represented the interests of the class and have retained counsel qualified to pursue the litigation. *See Unger v. Amedisys, Inc.*, 401 F.3d 16, 320 (5th Cir. 2005) ("[C]lass representatives, their counsel, and the relationship between the two are adequate to protect the interests of absent class members."). The adequacy requirement is met where "(1) the named plaintiffs' counsel will prosecute the action zealously and competently; (2) the named plaintiffs possess a sufficient level of knowledge about the litigation to be capable of taking an active role in and exerting control over the prosecution of the litigation; and (3) there are no conflicts of interest between the named plaintiffs and the absent class members." *Hamilton v. First Am. Title Ins. Co.*, 266 F.R.D. 153, 163-64 (N.D. Tex. 2010).

Named Plaintiffs and their counsel have fairly and adequately represented and protected the interests of all Settlement Class members, as demonstrated by the record showing vigorous prosecution of this litigation. Counsel has committed significant resources to represent the Settlement Class and has zealously prosecuted this case, opposing and defeating a motion to dismiss, engaging in discovery which included the review of thousands of pages of documents, and communicating regularly with plaintiffs. Named Plaintiffs have devoted substantial time and efforts to this action, and their interests are aligned with those of the Settlement Class in that all seek to prove Defendants' liability and maximize recovery. This alignment of interests also demonstrates that no conflicts of interest exist between Named Plaintiffs or their counsel and Settlement Class members. Thus, the adequacy test is easily met.

B. The Proposed Settlement Class Satisfies Rule 23(b)(1)

In addition to demonstrating that the requirements of Rule 23(a) are met, Plaintiffs must also establish that at least one subsection of Rule 23(b) is satisfied. Here, certification is proper under Rule 23(b)(1), which states that a class may be certified if:

> (1) the prosecution of separate actions by or against individual members of the class would create a risk of:
> (A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class, or
> (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests.

Courts most often grant class certification of ERISA claims under Rule 23(b)(1)(B) where, as here, the operative Complaint alleges breaches of fiduciary duties under ERISA because actions for breaches of fiduciary duty under ERISA are by law representative actions, which, if successful, will cause Defendants to be obligated to provide relief applicable to all Plan Participants. *In re Marsh ERISA Litig.*, 265 F.R.D. at 143-44 (collecting cases). That is why the Third Circuit Court of Appeals has stated that "[i]n 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." *In re Schering Plough Corp. ERISA Litig.*, 589 F.3d 585, 604 (3d Cir. 2009) (collecting cases) (emphasis added).

1. The Court Should Appoint Zamansky LLC As Settlement Class Counsel Under Rule 23(g)

Under Rule 23, "a court that certifies a class must appoint class counsel . . . [who] must fairly and adequately represent the interests of the class." Fed. R. Civ. P. 23(g)(1)(A), (B). In making this determination, the Court must consider counsel's: (1) work in identifying or investigating potential claims; (2) experience in handling class actions or other complex litigation, and the types of claims asserted in the case; (3) knowledge of the applicable law; and (4) resources committed to representing the class. Fed. R. Civ. P. 23(g)(1)(A). The Court appointed the law firm of Zamansky LLC to serve as Class Counsel (Dkt. No. 17) and then

preliminarily appointed Zamansky LLC as Class Counsel for the Settlement Class. Preliminary Approval Order ¶ 3. As shown in the firm resume presented to the Court in connection with the motions for appointment and preliminary approval of this settlement, this firm is comprised of experienced attorneys with broad-based, multi-jurisdictional experience in complex class action litigation, including extensive experience in the context of analogous ERISA claims based on imprudent retention of company stock as a plan investment option. Indeed, Class Counsel is highly qualified to prosecute this litigation, as shown by its firm biography, which is attached as Exhibit 1 to the Bonderoff Declaration filed contemporaneously herewith.

Therefore, the Court should appoint Zamansky LLC to serve as Settlement Class Counsel pursuant to Rule 23(g).

VII. THE PLAN OF ALLOCATION SHOULD BE APPROVED

"As a general rule, the adequacy of an allocation plan turns on … whether the proposed apportionment is fair and reasonable under the particular circumstances of the case." *Precision Assocs. v. Panalpina World Transp. (Holding) Ltd.*, 2015 U.S. Dist. LEXIS 152688, at *33 (E.D.N.Y. Nov. 10, 2015) (quoting *In re Painewebber Ltd. P'Ships Litig.*, 171 F.R.D. 104, 133 (S.D.N.Y. 1997) (*aff'd*, 117 F.3d 721 (2d Cir. 1997))). "An allocation formula need only have a reasonable, rational basis, particularly if recommended by experienced and competent class counsel." *Precision*, 2015 U.S. Dist. LEXIS 152688 at *33 (quoting *In re American Bank Note Holographics, Inc.*, 127 F. Supp. 2d 418, 429-30 (S.D.N.Y. 2001)). "Whether the allocation plan is equitable is squarely within the discretion of the district court." *Precision*, 2015 U.S. Dist. LEXIS 152688 at *33 (quoting *in re PaineWebber*, 171 F.R.D. at 132).

In determining the fairness, reasonableness and adequacy of a proposed plan of allocation, courts give great weight to the opinion of qualified counsel. *See In re Dell Inc., Sec. Litig.*, No. A-06-CA-726-SS, 2010 U.S. Dist. LEXIS 58281, at *35 (W.D. Tex. June 10, 2010);

see also In re Sturm, 2012 U.S. Dist. LEXIS 116930, at *22 (D. Conn. Aug. 20, 2012); *In re PaineWebber P'shps Litig.*, 171 F.R.D. at 126, 133; *White v. NFL*, 822 F. Supp. 1389, 1420 (D. Minn. 1993) (stating that "[t]he court . . . affords considerable weight to the opinion of experienced and competent counsel that is based on their informed understanding of the legal and factual issues involved" in approving distribution of settlement proceeds). As such, an allocation formula need only have a reasonable, rational basis, particularly if recommended by "experienced and competent" class counsel. *In re Dell Inc., Sec. Litig.*, No. A-06-CA-726-SS, 2010 U.S. Dist. LEXIS 58281, at *35.

Here, the Plan of Allocation provides for a pro rata distribution of the Net Settlement Fund among Settlement Class members whose Plan accounts included investments in the J. C. Penney Common Stock Fund relative to their net losses on those holdings. A "plan of allocation that reimburses class members based on the extent of their injuries is generally reasonable." *In re Oracle Sec. Litig.*, 1994 U.S. Dist. LEXIS 21593, at *3 (N.D. Cal. June 16, 1994); *In re AOL Time Warner, Inc. Secs. & ERISA Litig.*, 2006 U.S. Dist. LEXIS 17588, at *59 (S.D.N.Y. Apr. 6, 2006) (plan of allocation provided "recovery to damaged investors on a pro- rata basis according to their recognized claims of damages."); *Summers v. UAL Corp. ESOP Comm.*, 2005 U.S. Dist. LEXIS 29731, at *7 (N.D. Ill. Nov. 22, 2005) ("Given that the settlement funds in the instant action will be disbursed on a pro rata basis to all class members, we find that the allocation plan is reasonable and, thus, we grant Plaintiffs' motion for approval of the allocation plan.").

As further detailed by the Plan of Allocation, distributions to current Plan participants will be made by allocating recovery amounts into their Plan account, while distributions to former Plan participants will be made by a separate check or through re-opening their Plan accounts so distributions can be effectuated so as to defer tax consequences if Settlement Class

members so desire. Indeed, the Plan of Allocation is substantially similar to the plans of allocation approved and used in the vast majority of company stock fund ERISA cases.[12]

VIII. CONCLUSION

For the foregoing reasons, Named Plaintiffs respectfully request that the Court approve the Settlement, certify the Class, approve of the Plan of Allocation, and enter the [Proposed] Order and Final Judgment attached to Plaintiffs' Motion.

[12] *See, e.g., Griffin v. Flagstar Bancorp, Inc.*, 2:10-cv-10610, 2013 U.S. Dist. LEXIS 173702, at *21 (E.D. Mich. Dec. 12, 2013) (noting that the same Plan of Allocation "is similar to plans used and approved in many ERISA company stock fund cases."); *In re Delphi Corp.*, 248 F.R.D. 483, 491-93 (E.D. Mich. 2008) (approving a materially similar plan of allocation); *In re AOL Time Warner ERISA Litig.*, 2006 U.S. Dist. LEXIS 70474, at *31 (approving materially identical plan of allocation where "Class members will have their recovery calculated according to the decrease in value of their Plan holdings during the Class Period. All Settlement Class members are treated equally under the formula, and all members qualifying for recovery will have their share of the funds automatically distributed to their Plan accounts or, if they are no longer Plan members, an account created for them under the terms of the Settlement."); *In re Worldcom, Inc. ERISA Litig.*, No. 02-CV-4816, 2004 U.S. Dist. LEXIS 20671, at *29 (S.D.N.Y. Oct. 18, 2004) (approving plan of allocation based on the "proportional share of the loss of each participant"); *In re Worldcom, Inc. ERISA Litig.*, 2005 WL 2035496, at *1 (S.D.N.Y. Aug. 24, 2005) (ordering plan of allocation materially the same as that proposed here); *In re Sprint Corp. ERISA Litig.*, 443 F. Supp. 2d 1249, 1262 (D. Kan. 2006) (approving plan of allocation virtually identical to that here where the plan administrator would calculate "each participant's and former participant's net loss, then exclude those with a net gain, calculate each participant's and former participant's preliminary fractional share, use that to calculate the preliminary dollar recovery, exclude those with a de minimis preliminary dollar recovery of less than $[10], then recalculate as many times as necessary so as to arrive at a final fractional share and final dollar recovery for each participant and former participant who is entitled to receive more than a de minimis amount until the sum of the final dollar recoveries equals the cash settlement fund").

Dated: June 23, 2017

By: */s/ Samuel E. Bonderoff*
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Certificate of Service

I hereby certify that on June 23, 2017, a copy of the foregoing Memorandum of Law in Support of Plaintiffs' Unopposed Motion for Final Approval of Class Action Settlement, Certification of Settlement Class, and Approval of Plan of Allocation was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the court's CM/ECF System. I further certify that the foregoing will be provided to the Settlement Administrator today for posting on the dedicated settlement website, www.jcperisaclassaction.com.

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