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**IN THE UNITED STATES DISTRICT COURT FOR
THE CENTRAL DISTRICT OF ILLINOIS**

Steve Martin, *et al*.,	)	
	)	Case No. 07-1009 JBM/JAG
Plaintiffs,	)	
	)	
v.	)	Judge Joe Billy McDade
	)	
Caterpillar Inc., *et al*.,	)	Magistrate Judge John A. Gorman
	)	
Defendants.	)	

**MEMORANDUM IN SUPPORT OF MOTION FOR
PRELIMINARY APPROVAL OF CLASS SETTLEMENT**

I. INTRODUCTION

Plaintiffs Steve Martin, Carol Tegard and Allen Rose and the Class respectfully submit this memorandum in support of their motion for an order preliminarily approving the proposed settlement of this litigation. The fully executed settlement agreement dated November 5, 2009 ("Settlement") is attached to the Declaration of Plaintiffs' Counsel, Jerome J. Schlichter ("Schlichter Decl.") submitted herewith, as Exhibit A. The Settlement being proposed is an excellent result for the Class and an historic recovery in 401(k) excessive fee litigation. The Settlement will resolve claims or proposed claims against Caterpillar Inc., Benefit Funds Committee of Caterpillar Inc., Employee Benefit Funds of Caterpillar Inc., Investment Plan Committee of Caterpillar Inc., Caterpillar Investment Management Ltd. ("CIML"), and Vice President of Human Services Division of Caterpillar Inc. regarding alleged breaches of their fiduciary obligations under the Employee Retirement Income Security Act ("ERISA").

As more fully described below, the Settlement achieves, to a significant degree, the relief sought by this litigation. The lawsuit, which was commenced on September 11, 2006, sought to obtain compensatory and affirmative relief based on allegations that Defendants caused the

401(k) retirement plans within the Caterpillar Inc. Investment Trust ("Master Trust") to: (1) include imprudent investment options, including retail mutual funds when the plan's size allowed equivalent investment management through low-cost institutional investment options; (2) pay excessive fees, including recordkeeping fees and fees to a Caterpillar subsidiary, CIML; and (3) contain the Caterpillar Stock Fund ("CSF") which was mismanaged and allowed to hold excessive levels of cash. The fees and investment options at issue were placed in the Plans on July 1, 1992. The relief provided in the Settlement will include substantial affirmative relief including: (1) a Caterpillar commitment not to receive money from Plan investments; (2) compelling Caterpillar to submit a Requests for Proposal for recordkeeping services; (3) an obligation to continue limitations on the amount of cash Caterpillar can hold in the Company Stock Fund; (4) forbidding Caterpillar from including retail mutual funds as core investment options in the Plans during the settlement period; (5) oversight of fiduciary activities by an independent monitor for at least two years, and up to four years in the event Caterpillar is found out of compliance with the Settlement Agreement; (6) additional fee disclosures to participants detailing the specific fees charged to their accounts and the services provided for those fees; (7) Caterpillar's commitment not to allow investment consultants to also serve as investment managers during the settlement period; and (8) Caterpillar's commitment that recordkeeping costs will be calculated on a flat or per participant basis instead of through uncapped asset-based fees, during the settlement period. Relief also includes a $16,500,000 gross settlement fund.

The monetary payment and affirmative relief to Plan Participants and beneficiaries is substantial and will provide meaningful relief to each member of the Class. There are four categories of cash benefits based on the length of time Class members held assets in a 401(k) Plan within the Master Trust. Under the plan of allocation, 10% of the Net Settlement Amount will be divided equally among Class members who maintained balances in the Plans for between 1 and 12 quarters. 15% of the Net Settlement Amount will be divided equally among Class members who maintained balances for between 13 and 25 quarters. 25% of the Net Settlement Amount will be divided equally among Class members who maintained balances for between 26 and 47 quarters and 50% of the Net Settlement Amount will be divided equally among Class members who maintained balances for between 48 and 69 quarters. The actual recovery per Class members will depend on the number of similarly tenured Class members.

Before Plaintiffs filed this case on September 11, 2006, few cases had been filed by Plaintiffs against fiduciaries in large employer 401(k) plans alleging breaches of fiduciary duties resulting in excessive recordkeeping, administrative and investment management fees, as well as excessive cash in a company stock fund, reducing its return. Plaintiffs also believe this is one of the first cases achieving a settlement against fiduciaries of a large employer involving a claim of excessive 401(k) fees, and the first case achieving a settlement against fiduciaries from a large employer alleging excessive cash being held in a company stock fund and, thereby, reducing its return.

The Settlement was the product of months of arms-length negotiation and mediation following years of contentious litigation and discovery, including thousands of documents reviewed by Plaintiffs' Counsel and their consulting experts. Plaintiffs respectfully submit that in light of the litigation risks further prosecution of this action would inevitably entail, it would be proper for the Court to: (1) preliminarily approve the proposed settlement; (2) preliminarily certify a nationwide settlement class; (3) approve the proposed form and method of notice to the settlement class; and (4) hold a hearing at which the Court will consider final approval of the settlement.

II. THE CLAIMS IN THE CASE

Plaintiff Steve Martin is a participant in the Caterpillar 401(k) Plan and is a resident of Booneville, Missouri. Plaintiff Carol Tegard also is a participant in the Caterpillar 401(k) Plan and is a resident of Hanna City, Illinois. Plaintiff Allen Rose is a participant in the Caterpillar Inc. Tax Deferred Savings Plan and is a resident of Edwards, Illinois. Thus, all the Named Plaintiffs are participants in Plans within the Master Trust and are members of the Settlement Class.

Defendants are fiduciaries of the four 401(k) Plans within the Master Trust. In 1992, Defendants chose to change most of the Plans' investment options to mutual funds managed by its subsidiary, CIML. These mutual funds were a part of the "Preferred Group of Mutual Funds" and were marketed to investors both inside and outside of the Master Trust. Defendants subsequently decided to unitize the Caterpillar Stock Fund ("CSF"). "Unitizing" the CSF meant that investors in the CSF were no longer owners of shares of Caterpillar stock, but, rather, owned shares of a fund that invested primarily in Caterpillar stock, but also invested in cash and cash-equivalent investments. As Caterpillar stock appreciated in value, the cash component of the CSF caused the Fund to underperform Caterpillar stock. In 2006, the CIML-managed investment options were removed from the Plan, but the unitized CSF remained. At that time, Defendants decided to stop paying the administrative costs of the Plans, which led to the Plans themselves paying allegedly excessive and unreasonable recordkeeping fees.

Plaintiffs claim that the actions described above constituted breaches of Defendants' fiduciary obligations under ERISA § 404(a) [29 U.S.C. § 1104(a)] and that the payments of fees to CIML constituted prohibited transactions under ERISA § 406(b) [29 U.S.C. § 1106(b)].

Defendants dispute the allegations above, and contend that: (1) the level of recordkeeping fees (which where were not paid by the Plans until 2006) is not imprudent under ERISA § 404(a); (2) unitizing a company stock fund is not imprudent in that it allowed for greater liquidity and is common in large Plans; (3) the mutual fund fees paid by the Plans were not excessive or unreasonable; and (4) the payment of these fees did not constitute a prohibited transaction because Defendants met the requirements of Prohibited Transaction Exemption 77-3 ("PTE 77-3"). PTE 77-3 allows such relationships provided certain requirements are met. PTE 77-3 requires, among other things, that all other dealings between the plan and the investment company, investment advisor, principal underwriter or affiliated person are on a basis no less favorable to the plan than such dealings with other investors in the mutual funds. Therefore, Defendants must demonstrate that the Plans were treated no less favorably than other shareholders, and Defendants contend that they could have done so here. Plaintiffs contend that other Preferred Group investors, including other Caterpillar investors and outside investors, received more favorable terms, additional services, and/or revenue sharing from the Preferred Group. However, predicting how a Court would interpret these claims and defenses is far from clear.

The Action

On September 11, 2006, Plaintiffs filed their original complaint in the Western District of Missouri. (Doc. 1.) Defendants moved to transfer venue to the Central District of Illinois (Doc. 20), and that motion was granted on December 15, 2006. (Doc. 36.) Plaintiffs filed an Amended Complaint on May 25, 2007, and a Second Amended Complaint on July 13, 2007. (Docs. 58 and 70.) Defendants filed a Motion to Dismiss the Second Amended Complaint, which Plaintiffs' opposed, and that motion was denied on September 25, 2008. At that point, substantial documents were produced by Defendants. On February 19, 2009, Defendants filed a Motion for Judgment on the Pleadings (Doc. 116), and on March 16, 2009, Plaintiffs filed a Motion for Leave to File a Third Amended Complaint. (Doc. 123). Initial settlement discussions were not fruitful and additional review and analysis of documents and consultation with experts occurred. With the advancement of meaningful settlement discussions, Plaintiffs moved to stay proceedings, and a stay was first issued on August 4, 2009. (Doc. 139). At that time, the Court denied as moot, and without prejudice, the pending Motion for Judgment on the Pleadings and Motion for Leave to File a Third Amended Complaint. (Doc. 139). In a separate paper, Plaintiffs will renew their Motion for Leave to File Third Amended Complaint, and will substitute a Third Amended Complaint.

III. THE TERMS OF THE PROPOSED SETTLEMENT

In exchange for the dismissal of the Action and for entry of the Judgment as provided for in this Settlement Agreement, Defendants shall make available to Settlement Class Members the benefits described below (the "Settlement Benefits").

A. Monetary Relief

Within two business days of the entry of the Order granting this Motion, Defendants will deposit $16,500,000 in an interest-bearing escrow account. This account represents the "Gross Settlement Fund" from which the Plans' recoveries will be paid as well as Class Counsels' fees, costs, Settlement Administrative Expenses, and Class Representatives' Compensation as described in the Plan of Allocation.

B. Non-Monetary and Affirmative Relief

In addition to the gross settlement amount, the Settlement provides for oversight of Caterpillar's management of the Plans by an Independent Monitor for two years. This monitor will verify and review service provider contracts, as well as other data to ensure compliance with the terms of the Settlement Agreement. In the event Caterpillar is found to not be in compliance, this monitoring will continue for an additional two years.

During this period of oversight, as described in the Introduction to this Memorandum and in the Settlement Agreement, Caterpillar will not use any retail mutual funds as core investment options, cannot use conflicted investment consultants to recommend themselves as investment managers, and must continue to limit cash holdings in the Company Stock Fund to a maximum of 1.5% unless it receives approval of the Independent Monitor to increase that amount. Caterpillar has also agreed not to profit from providing services to the Plans during the settlement period.

Further, the fee disclosures to participants will be significantly strengthened. Participants will receive new information concerning the fees they are charged for investment management and administrative services.

These benefits represent a significant value to the Plans above and beyond the monetary settlement, and should help to control costs, increase net returns, and prevent the claimed conflicts of interest which led to the selection of retail mutual funds offered by the Preferred Group and the other alleged breaches of fiduciary duty.

C. Notice and Class Representatives' Compensation

The Notice costs and all costs of administration of the Settlement will come out of the $16,500,000 gross settlement amount. Incentive payments to the three Named Plaintiffs in the amount to be approved by the Court, but not more than $19,000 each, will also be paid out of the Gross Settlement, an amount well in line with precedent recognizing the value of individuals stepping forward to represent classes – particularly in a case, like the present, where the benefit to any individual does not outweigh the cost of prosecuting the claim and there is significant risk, including the risk of no recovery, the risk of uncompensated time and the commitment of time and energy to this uncertain and historic action.

D. Attorneys' Fees and Costs

Plaintiffs' Counsel will later request attorneys' fees to be paid out of the Gross Settlement in an amount not more than one-third of the Gross Settlement Amount, or $5,500,000, as well as reimbursement for costs incurred of no more than $325,000. Plaintiffs' Counsel will not seek fees on the interest earned on the Gross Settlement Amount. A full and formal application for attorneys' fees and costs will be made prior to the proposed final fairness hearing for approval of the Settlement.

E. Summary

The proposed Settlement balances the risks, costs, and uncertainties of continuing litigation with the certainty of benefits that provide substantial meaningful recovery for the class as well as significant affirmative non-monetary relief which will benefit the class in the future. The Settlement is the result of months of extensive, arm's-length negotiations, including two all day sessions and two partial day phone conferences with mediator Hunter Hughes, Esquire, a nationally recognized mediator who is extensively experienced in mediating major class action cases. Plaintiffs' Counsel believes the proposed settlement is fair, adequate, and reasonable and in the best interests of the Class, and that the named Plaintiffs are adequate class representatives. The relief that would be provided by the Settlement is adequate and reasonably within what might have been possible to obtain through extended litigation and trial, particularly when providing for the expenses and delays of continuing litigation.

III. ARGUMENT

A. General Governing Principles

In determining whether preliminary approval is warranted, the sole issue before the Court is whether the proposed settlement is within the range of what might be found fair, reasonable and adequate, so that notice of the proposed settlement should be given to class members, and a hearing scheduled to consider final approval. The Court reviews the proposal preliminarily to determine whether it is sufficient to warrant public notice and a hearing. If so, the final decision on approval is made after the hearing. Manual for Complex Litigation, Fourth, §13.14, at 172-73 (Fed. Jud. Ctr. 2004)("Manual Fourth"). The Court is not required at this point to make a final determination:

> The judge must make a preliminary determination on the fairness, reasonableness, and adequacy of the settlement terms and must direct the preparation of notice of the certification, proposed settlement, and date of the final fairness hearing.

Id. at § 21.632, at 321. Preliminary approval is the first step in a two-step process required before a class action may be finally settled. *Id*. at 320. Courts first make a preliminary evaluation of the fairness of the settlement, prior to notice. *Id*. at 320-21. In some cases this initial assessment can be made on the basis of information already known to the court and then supplemented by briefs, motions and an informal presentation from the settling parties. *Id*.

There is an initial strong presumption that a proposed class action settlement is fair and reasonable when it is the result of arm's length negotiations. *Great Neck Capital Appreciation Inc. Partnership, L.P. v. PricewaterhouseCoopers, LLP*, 212 F.R.D. 400, 410 (W.D.Wis. 2002); *see also, Newberg on Class Actions* §11.41 at 11-88 (3d ed. 1992). The proposed Settlement here is the result of lengthy, contentious and complex arm's-length negotiations between the parties. Counsel on both sides are experienced and thoroughly familiar with the factual and legal issues presented. Courts recognize that the opinion of experienced and informed counsel supporting settlement is entitled to considerable weight. *See In re Global Crossing. Sec. & ERISA Litig.*, 225 F.R.D. 436, 461 (S.D.N.Y. 2005). Proposed class counsel is very experienced in class action litigation generally and, in particular, class litigation arising from breaches of fiduciary duties to retirement plans under ERISA, and it is Class counsel's opinion that the proposed Settlement is fair and reasonable. (Exh. A, para. 2). As discussed more fully in Plaintiffs' Motion for Certification of a Settlement Class, multiple District Courts have certified Proposed Class Counsel as Class Counsel in other ERISA breach of fiduciary duty cases alleging excessive fees and other breaches.

"Once the judge is satisfied as to the certifiability of the class and the results of the initial inquiry into the fairness, reasonableness, and adequacy of the settlement, notice of a formal Rule 23(e) fairness hearing is given to the class members." Manual (Fourth) at § 21.633, at 321. Preliminary approval permits notice of the hearing on final settlement approval to be given to the class members, at which time class members and the settling parties may be heard with respect to final approval. *Id*. at 322. As explained below, the proposed Settlement now before this Court and on file herein falls squarely within the range of reasonableness warranting preliminary approval of the Class Notice apprising class members of the Settlement and setting a hearing on final approval.

"The temptation to convert a settlement hearing into a full trial on the merits must be resisted." *Mars Steel Corp. v. Continental Illinois Nat. Bank & Trust Co. of Chicago.*, 834 F.2d 677, 684 (7th Cir. 1987). "The very purpose of a compromise is to avoid the trial of sharply disputed issues and to dispense with wasteful litigation." *McDonald v. Chicago Milwaukee Corp.*, 565 F.2d 416, 426 (7th Cir. 1977). A settlement is fair to the plaintiffs in a substantive sense "if it gives them the expected value of their claim if it went to trial, net of the costs of trial." *Id*. at 682. In evaluating whether a class action settlement is fair, reasonable and adequate, "the factors which a district judge should consider are well established: the strength of the plaintiffs' case on the merits measured against the terms of the settlement; the complexity, length and expense of continued litigation; the degree of opposition to the settlement; the presence of collusion in gaining settlement; the opinion of competent counsel as to the reasonableness of the settlement; and the stage of the proceedings and the amount of discovery completed. *Donovan v. Estate of Fitzsimmons*, 778 F.2d 308 (7th Cir. 1985).

1. **The strength of the Plaintiffs' case on the merits.**

As discussed above, a significant theory for recovery by Plaintiffs is based on Defendants' inclusion of mutual funds, and particularly the Preferred Group of Mutual Funds, in the Plans instead of cheaper separately managed accounts. On July 1, 1992, the Plans began offering Preferred Group mutual funds, for which CIML was the investment manager. CIML was a Caterpillar wholly-owned subsidiary. CIML, in turn, contracted with various unaffiliated sub-advisors to manage the investments of the Preferred Group of Mutual Funds. Had the Defendants selected lower cost separately managed accounts directly from these sub-advisors, rather than these retail mutual funds, Plaintiffs contend fees would have been significantly lower. Accordingly, Plaintiffs contend the payment of the additional mutual fund fees was imprudent under ERISA § 404(a). Further, because CIML was a Caterpillar subsidiary, Plaintiffs contend that the payment of fees to CIML were prohibited transactions in violation of ERISA § 406.

ERISA Section 404(a)(1)(A) provides that "a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and for the exclusive purpose of: (i) providing benefits to participants and their beneficiaries; and (ii) defraying reasonable expenses of administering the plan." This means fiduciaries must act "with complete and undivided loyalty" and an "eye single toward the interests of the participants...". *Leigh v. Engle*, 727 F.2d 113, 123 (7th Cir. 1984). "A fiduciary breaches its duty of care under section 404(a)(1)(A) whenever it acts to benefit its own interests." *Chao v. Linder*, 2007 WL 1655254 (N.D. Ill. May 31, 2007)(citing *Hedrich v. Pegram*, 154 F.3d 362, 371 (7th Cir. 1998), *rev'd on other grounds*, 530 U.S. 211 (2000)).

Plaintiffs' counsel continue to believe in the merits of these claims. However, there are significant legal obstacles and defenses which render recovery in this case uncertain, and, if there is a recovery, which affect the amount. First, the Department of Labor has exempted prohibited transactions under circumstances which Defendants contend apply here. This DOL exemption provides that if the affiliated mutual fund (in this case the Preferred Group) was also available to outside investors and that the fees and terms of the mutual funds within the Plans were no less favorable than the fees and terms available to shareholders outside of the Plans the exemption applies. *See* PTE 77-3. Plaintiffs have determined through extensive document review and investigation that the Preferred Group mutual funds were widely owned by other investors and believe they can show that the exemption's requirements were not met. However, large numbers of outside investors appear to have paid the same fees for investing in the funds. Plaintiffs believe that the requirements of PTE 77-3 are not met because Caterpillar was itself an investor in the Preferred Group and, by profiting from the fees it charged itself, enjoyed more favorable terms. However, the law has not been developed interpreting PTE 77-3 in this context, so that the issue presents significant uncertainty.

Apart from the prohibited transaction issue, Plaintiffs claim that Defendants' investments in mutual funds are a violation of ERISA because less expensive separately managed accounts were available will also face uncertainties at trial, including the extent of any damages resulting from the use of such funds. While it is unmistakably true that separately managed accounts were available and would have been cheaper, Defendants contend that a recent Seventh Circuit case upholding the dismissal of a case alleging that the retail mutual funds therein were imprudently expensive under ERISA §404(a) applies to this case. *Hecker v. Deere*, 556 F.3d 575 (7th Cir. 2009)("*Hecker I*"), *rehearing denied*, 569 F.3d 708 (7th Cir. 2009) ("*Hecker II*"). In *Hecker I*, the Seventh Circuit upheld the dismissal of a claim involving retail mutual funds in a large 401(k) plan. In *Hecker II*, the Seventh Circuit dramatically narrowed *Hecker I*, but affirmed its decision, reasoning that the holding was "tethered" to the facts and pleadings of that particular case, and ruling that Plaintiffs failed to allege that cheaper separately managed accounts would provide comparable services to the retail mutual funds. Plaintiffs' counsel are also counsel for the plaintiffs in *Hecker*, and are intimately familiar with the holding. A petition for *writ of certiorari* is pending in *Hecker*.

Plaintiffs believe their Third Amended Complaint avoids any pleading deficiencies noted in *Hecker II*. Still, the *Hecker* decision, and other litigation from outside of the Seventh Circuit, raise questions creating some uncertainty regarding the likelihood of success on these claims and the extent of recovery at trial.

Further, Plaintiffs anticipate Defendants, at trial, would attempt to present evidence that CIML provided valuable services for the added fee it received. Plaintiffs dispute whether any services CIML provided were valuable to the Plans and, even if some services were of value, dispute that the fees for those services were reasonable. Plaintiffs have evidence that CIML was a profitable entity because of the claimed excessive fees charged on Preferred Group mutual funds, but there is uncertainty about which side's position would be adopted at trial.

Plaintiffs' counsel has spent extensive time and resources in developing the facts of this case. Not only have Plaintiffs extensively examined industry practices, but they have used knowledgeable experts to examine documents and develop opinions here.

The applicable statute of limitations is also an issue. Under ERISA, the statute of limitations is three years if participants had actual knowledge of the breach of fiduciary duties. In the absence of actual knowledge, the statute of limitations is six years; however, if Defendants engaged in fraud or concealment to hide their breaches, the six years does not begin to run until the date of discovery. 29 U.S.C. § 1113.

Defendants will assert that all of Plaintiffs' claims are based on well-advertised facts which were known to Plaintiffs before September 2003 and, thus, are barred by ERISA's three-year statute of limitations. In order for the three-year statute of limitations to apply, a plaintiff must have "knowledge of the facts or transaction that constituted the alleged violation." *Rush v. Martin Peterson Co.*, 83 F.3d 894, 896 (7th Cir. 1996); *Martin v. Consultants & Adm'rs.*, 966 F.2d 1078, 1086 (7th Cir. 1992). While Plaintiffs believe key facts, including the willingness of Preferred Group sub-advisors to manage separate accounts at fees below those of the Preferred Group mutual funds, were not disclosed to participants, Defendants would present evidence at trial that the fees related to each investment option, the relationship between the Preferred Group, CIML, and Caterpillar, and the unitized nature of the CSF were routinely disclosed to participants. If the Court found that a six-year statute of limitations applied, Plaintiffs experts calculated the total amount of investment management fees to have been $79 million of which $48 million was paid to CIML ($18 million of that for administrative services). If a three-year statute of limitations applied, estimates of what the Plans could recover at trial would be significantly lower. Plaintiffs believe disgorgement of all fees paid is a potential remedy but the availability of that remedy, and the amount and length of time are uncertain.

In the absence of actual knowledge, Plaintiffs' damages would be limited to six-years from the filing of the action unless Plaintiffs demonstrated that Defendants hid their breaches by "fraud or concealment." 29 U.S.C. § 1113, ERISA § 413. "The tolling provision applies to cases in which a plaintiff can prove that a defendant made knowingly false representations with the intent to defraud the plaintiffs, or took affirmative steps to conceal its own alleged breaches." *Kanawi v. Bechtel Corp*., 590 F.Supp.2d 1213, 1225-26 (N.D.Cal. 2008). More than merely a failure to disclose is required. *Id*. Plaintiffs alleged various ways in which Defendants, through fraud or concealment, prevented Plaintiffs from discovering their breaches of fiduciary duty, and alleged them in their Third Amended Complaint. The outcome of rulings to be made regarding the claim of fraud or concealment is also uncertain.

Plaintiffs also have claims relating to the prudence of the structure of Caterpillar's Company Stock Fund and for excessive recordkeeping fees, which began in 2005. As Plaintiffs and their experts determined, the Caterpillar Company Stock Fund included 3%-4% cash equivalent investments ("cash") from July 1, 1992 until June 2003, at which time the cash portion was reduced to under 2%. Plaintiffs' contention is that management of the cash in the CSF was an imprudent breach of fiduciary duty reducing the return in the CSF to a level below what an investor in Caterpillar Stock obtained. Between September 2003 and December 2008, the cash component of the CSF averaged approximately 1.25%.

While Plaintiffs believe the unitization was unnecessary and the cash component of the CSF was excessive, Plaintiffs believe Defendants would contend that a somewhat analogous argument, though with different facts, was recently rejected in another District, in *Taylor v.*

United Technologies, Corp., 2009 WL 535779, at *14 (D.Conn. 2009). This case, also a case handled by Plaintiffs' counsel, is currently on appeal to the Second Circuit Court of Appeals. If liability were found on this theory, damages would be vary significantly depending on the applicable statute of limitations.

Finally, beginning in 2005, according to Plaintiffs' experts, the Plans paid recordkeeping fees to Hewitt of $47 per participant. Plaintiffs contend that these fees are excessive and unreasonable in that recordkeeping services, properly bid through a competitive process, can be obtained for significantly less for the Plans. Accordingly, Plaintiffs at trial would present expert testimony that a recordkeeping fee under the facts of this case above $25 per participant is excessive and unreasonable. Plaintiffs expect that Defendants would argue that $47 is within a reasonable range and that some other large 401(k) Plans pay significantly more than $47 per participant to their recordkeepers. Thus, findings of liability and of damages on this claim are also uncertain.

2. **The complexity, length and expense of continued litigation.**

The instant lawsuit is, as an ERISA case, quite complex in multiple respects. First, it is one of the first cases in the country alleging breaches of fiduciary duty and prohibited transactions against a large employer and Plan fiduciaries based on the excessiveness of recordkeeping fees, investment management fees, and the inclusion of investment options managed by a subsidiary of a plan sponsor. Thus, the case presents novel legal issues. Second, the case would require no less than six highly experienced consulting and testifying expert witnesses with extensive reports, as well as tremendous attorney resources to bring the case to trial. Recovery of damages at all, apart from any amount, is not certain as discussed above. Moreover, in *Hecker v. Deere*, though limited to its specific facts and pleadings, not only was there no recovery allowed but the named plaintiffs therein were assessed over $200,000 in costs. *Hecker I*, 556 F.3d at 591.

3. **The absence of collusion.**

The Settlement with Defendants was the result of intense negotiations, including weeks of negotiations via telephone between the parties, two separate all-day in-person mediation sessions in Atlanta, Georgia, and two partial day mediation phone conferences with mediator Hunter Hughes. The parties have spoken many times on the phone, in attempts to resolve differences on settlement terms. Settlement discussions with all parties were fully informed as a result of the factual discovery as well as by briefing and memoranda prepared by the parties on all contested legal issues. The negotiations were vigorous and both sides argued their respective positions strenuously. The resulting Settlement was undeniably the product of arm's-length bargaining.

4. **The opinion of competent counsel as to the reasonableness of the settlement.**

As described more fully below, Plaintiffs' counsel are experienced and competent. Plaintiffs' counsel believe the settlement to be fair and reasonable in light of the procedural and substantive risks Plaintiffs would face if litigation were to continue. (Exh. A, para. 2). The parties will also submit the settlement terms to an independent fiduciary who will provide an opinion on its fairness before the final approval hearing.

5. **The stage of the proceedings and the amount of discovery completed.**

Plaintiffs conducted substantial discovery. Defendants provided counsel with approximately 14,500 pages of documents. Each document was electronically indexed and sorted, and thereafter individually examined, analyzed and cataloged by an attorney. Plaintiffs' counsel also reviewed and analyzed additional and voluminous documents provided by Named

Plaintiffs and other documents obtained from public filings with the Department of Labor. Counsel painstakingly reviewed these documents. They also had experts intimately familiar with financial services industry practices, retirement industry practices as well as industry fiduciary practices examine and analyze these and other documents and provide opinions based on the record and their experience. This discovery documented the practices described above, the participants' disclosures that were made, the history of the Preferred Group of Mutual Funds, the history of Caterpillar's formation of CIML, the management of Caterpillar's Company Stock Fund and the fees and levels of cash held therein, and the recordkeeping, administrative and investment management fees charged to the Plans. Thus, Plaintiffs' counsel extensively developed the facts supporting their claims.

V. THE PROPOSED NOTICE PLAN IS ADEQUATE

Due process and Rule 23(e) require that Class Members receive notice of the pending settlement which meets the test of "reasonableness." *Wal-Mart Stores Inc. v. Visa Usa Inc.*, 396 F.3d 96, 113 (2d Cir. 2005). The 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. Notice is adequate if it may be understood by the average class member." *Id.* at 114 (internal quotations and citations omitted).

"Notice must be reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Eisen v. Carlisle and Jacquelin*, 417 U.S. 156, 172 (1974). "Individual notice must be provided to those class members who are identifiable through reasonable effort." *Id.* at 175.

Here, the proposed form and method of notice of proposed settlement agreed to by the parties satisfy all due process considerations and meet the requirements of Fed. R. Civ. P.

23(e)(1). Plaintiffs' proposed form of Individual Notice is attached to the Class Action Settlement Agreements. The proposed Notice will fully apprise Settlement Class members of the existence of the lawsuit, the proposed Settlements, and the information they need to make informed decisions about their rights, including (i) the terms and operation of the Settlement; (ii) the nature and extent of the release, (iii) the maximum counsel fees that will be sought; (iv) the procedure and timing for objecting to the Settlement; and (v) the date and place of the fairness hearing.

The Notice Plan consists of multiple components designed to reach class members. First, the Individual Notice will be sent by first-class mail to the address of current Plan Participants and the last known address of former Plan Participants shortly after entry of the Preliminary Approval Order. Addresses of class members are maintained by the Plans' personnel, who use this information for, inter alia, mailing Plan notices, participant communications, and other Plan-related information. Participants include both current and former employees and agents of Caterpillar and its affiliates. In addition to the Individual Notice, Plaintiffs' counsel will develop a dedicated website, www.caterpillarERISAsettlement.com, solely for the settlement, and a link to that website will appear on Class Counsel's website, www.uselaws.com. The Notice Plan also includes a requirement for follow-up by the Claims Administrator for those class members whose notice letters are returned because they no longer reside at such address. Publication Notice will also run in two editions of the Peoria Journal-Star.

Thus, the form of notice and proposed procedures for notice satisfy the requirements of due process and the Court should approve the Notice Plan as adequate. *See* Newberg on Class Actions, § 8.34.

VI. CONCLUSION

For these reasons, the Plaintiffs' Unopposed Motion for Preliminary Approval of Class Settlement should be granted.

Respectfully submitted,
SCHLICHTER, BOGARD & DENTON

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CERTIFICATE OF SERVICE

I hereby certify that on November 5, 2009, I served the above with the Clerk of the Court using the CM/ECF system which will send notification of such filing(s) to the following:

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