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-MHS-KNM CLASS ACTION

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT

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TABLE OF CONTENTS

I. INTRODUCTION 1

II. FACTUAL AND PROCEDURAL BACKGROUND...3

A. Description of the Action and Procedural History...3

B. Discovery Efforts 3

C. Settlement Discussions 4

D. The Proposed Settlement 4

E. Proposed Timetable for Effectuation of the Settlement...4

III. THE SETTLEMENT MEETS THE CRITERIA NECESSARY FOR THIS COURT TO GRANT PRELIMINARY APPROVAL 6

A. The Proposed Settlement Is Fair and Reasonable Under the Fifth Circuit's Six-Pronged Test of Fairness 7

1. There Is No Fraud or Collusion Behind the Settlement..............................7

2. The Stage of the Proceedings and the Amount of Discovery Completed 8

3. The Probability of Success on the Merits 9

a. The Risks of Establishing Liability Support Preliminary Approval 9

b. The Risk of Establishing Damages Support Preliminary Approval 10

4. The Settlement Falls Within the Range of Reasonableness.......................11

5. The Complexity, Expense, and Likely Duration of Litigation 12

6. The Opinions of Class Counsel, the Class Representatives, and Absent Class Members 14

IV. CERTIFICATION OF A SETTLEMENT CLASS IS APPROPRIATE..........................15

A. The Proposed Settlement Class Satisfies Rule 23(a) 15

1. Numerosity 15

2. Commonality 16

3. Typicality 16

4. Adequacy 17

B. The Proposed Settlement Class Satisfies Rule 23(b)(1) 18

1. The Court Should Appoint Zamansky LLC As Settlement Class Counsel Under Rule 23(g) 19

V. THE PROPOSED NOTICE PLAN SHOULD BE APPROVED 19

VI. THE PLAN OF ALLOCATION SHOULD BE PRELIMINARILY APPROVED 22

VII. CONCLUSION 23

TABLE OF AUTHORITIES

Page(s)

CASES

Amchem Prods. Inc. v. Windsor, 521 U.S. 591 (1997) 15

Banyai v. Mazur, 205 F.R.D. 160 (S.D.N.Y. 2002) 16

Bourlas v. Davis Law Assocs., 237 F.R.D. 345 (E.D.N.Y. 2006) 15

Brieger v. Tellabs, Inc., 2009 WL 1565203 (N.D. Ill. June 1, 2009) 10

Clark v. Lomas & Nettleton Fin. Corp., 79 F.R.D. 641 (N.D. Tex. 1978) 13

Clark v. Lomas & Nettleton Fin. Corp., 625 F.2d 49 (5th Cir. 1980) 14

Cotton v. Hinton, 559 F.2d 1326 (5th Cir. 1977) 6

Detroit v. Grinnell Corp., 495 F.2d 448 (2d Cir. 1974) 11, 12

DiFelice v. U.S. Airways, Inc., 436 F. Supp. 2d 756 (E.D. Va. 2006) 9

Di Felice v. U.S. Airways, Inc., 497 F.3d 410 (4th Cir. 2007) 9

Eatmon v. Palisades Collection, LLC, 2010 WL 1189571 (E.D. Tex. Mar. 5, 2010) 16, 17

Faircloth v. Certified Fin. Inc., 2001 WL 527489 (E.D. La. May 16, 2001) 8

Fickinger v. C.I. Planning Corp., 646 F. Supp. 622 (E.D. Pa. 1986) 11

Fifth Third Bancorp v. Dudenhoeffer, 134 S. Ct. 2459 (2014) .... *passim*

Graden v. Conextant Sys. Inc., 496 F.3d 291 (3d Cir. 2007) 10

Griffin v. Flagstar Bancorp, Inc., 2013 U.S. Dist. LEXIS 173702 (E.D. Mich. Dec. 12, 2013) 22

Hamilton v. First Am. Title Ins. Co., 266 F.R.D. 153 (N.D. Tex. 2010) 17

In re American Bank Note Holographics, Inc., 127 F. Supp. 2d 418 (S.D.N.Y. 2001) 22

In re AOL Time Warner ERISA Litig., 2006 U.S. Dist. LEXIS 70474 23

In re AOL Time Warner, Inc. Secs. & ERISA Litig., 2006 U.S. Dist. LEXIS 17588 (S.D.N.Y. Apr. 6, 2006) 22

In re Chicken, Antitrust Litig. Am. Poultry, 669 F.2d 228 (5th Cir 1982) 12

In re Delphi Corp., 248 F.R.D. 483 (E.D. Mich. 2008) 23

In re Elec. Data Sys. Corp. "ERISA" Litig., 2005 U.S. Dist. LEXIS 17457 (E.D. Tex. June 20, 2005) 12

In re Honeywell Int'l ERISA Litig., 2004 WL 3245931 (D.N.J. Sept. 14, 2004) 17

In re Marsh ERISA Litig., 265 F.R.D. at 142 ..... 15, 16, 19

In re NASDAQ Market-Makers Antitrust Litig., 176 F.R.D. 99 (S.D.N.Y. 1997) 6

In re Nissan Motor Corp. Antitrust Litig., 552 F.2d 1088 (5th Cir. 1977) 21

In re Oracle Sec. Litig., 1994 U.S. Dist. LEXIS 21593 (N.D. Cal. June 16, 1994) 22

In re Orthopedic Bone Screw Prods. Liab. Litig., 246 F.3d 315 (3d Cir. 2001) 20

In re Painewebber Ltd. P'Ships Litig., 171 F.R.D. 104 (S.D.N.Y. 1997) 22

In re Painewebber Ltd. P'Ships Litig., 117 F.3d 721 (2d Cir. 1997) 22

In re Processed Egg Products Antitrust Litig., 284 F.R.D. 278 (E.D. Pa. 2012) 11

In re Schering Plough Corp. ERISA Litig., 589 F.3d 585 (3d Cir. 2009) 19

In re Schering-Plough Corp. Enhance ERISA Litig., 2012 WL 1964451 (D.N.J. May 31, 2012) 10, 12, 13

In re Schering-Plough/Merck Merger Litig., 2010 WL 1257722 (D.N.J. Mar. 26, 2010) 17

In re Seitel, Inc. Secs. Litig., 245 F.R.D. 263 (S.D. Tex. June 26, 2007) 13

In re Sprint Corp. ERISA Litig., 443 F. Supp. 2d 1249 (D. Kan. 2006) 23

In re Wachovia Corp. ERISA Litig., 2011 WL 7787962 (W.D.N.C. Oct. 24, 2011) 13

In re Worldcom, Inc. ERISA Litig., 2004 U.S. Dist. LEXIS 20671 (S.D.N.Y. Oct. 18, 2004) 23

In re Worldcom, Inc. ERISA Litig., 2005 WL 2035496 (S.D.N.Y. Aug. 24, 2005) 23

James v. City of Dallas, 254 F.3d 551 (5th Cir. 2001) 16

Katrina, *Canal Breaches Litig. v. Bd. of Comm'rs*, 628 F. 3d 185 (5th Cir. 2010) 20, 21

Langbecker v. Elec. Data Sys. Corp., 476 F.3d 299 (5th Cir. 2007) 20

Langraff v. Columbia Healthcare Corp., 2000 U.S. Dist LEXIS 21831
(M.D. Tenn. May 24, 2000) 10

Lightbourn v. County of El Paso, 118 F.3d 421 (5th Cir.1997) 16

Maher v. Zapata Corp., 714 F.2d 436 (5th Cir. 1983) 6

Manchaca v. Chater, 927 F. Supp. 962 (E.D. Tex. 1996) 9, 12

McNamara v. Bre-X Minerals Ltd., 214 F.R.D. 424 (E.D. Tex. 2002) 6, 15

McNary v. Am. Sav. & Loan Ass'n, 76 F.R.D. 644 (N.D. Tex. 1977) 7, 12

Mehling v. New York Life Ins. Co., 246 F.R.D. 467 (E.D. Pa. 2007) 20

Mullen v. Treasure Chest Casino, LLC, 186 F.3d 620 (5th Cir. 1999) 15

Nelson v. IPALCO Enters., Inc., 480 F. Supp. 2d 1061 (S.D. Ind. 2007) 9

Newman v. Stein, 464 F.2d 689 (2d Cir. 1972) 11

Parker v. Anderson, 667 F.2d 1204 (5th Cir. 1982) 12

Peabody v. Davis, 2010 WL 1416933 (N.D. Ill. Apr. 5, 2010) 10

Peabody v. Davis, 636 F.3d 368 (7th Cir. 2011) 10

Precision Assocs. v. Panalpina World Transp. (Holding) Ltd., 2015 U.S. Dist. LEXIS
152688 (E.D.N.Y. Nov. 10, 2015) 22

Reed v. General Motors Corp., 703 F.2d 170 (5th Cir. 1983) 6, 7

Schwartz v. TXU Corp., 2005 WL 3148350 (N.D. Tex. Nov. 8, 2005) 14

Strougo ex rel. Brazilian Equity Fund v. Bassini, 258 F. Supp. 2d 254
(S.D.N.Y. 2003) 14

Summers v. UAL Corp. ESOP Comm., U.S. Dist. LEXIS 29731 (N.D. Ill. Nov. 22,
2005) 22

Turner v. Murphy Oil USA, Inc., 472 F. Supp. 2d 830 (E.D. La. 2007) 14

Unger v. Amedisys, Inc., 401 F.3d 16 (5th Cir. 2005) 17

STATUTES

ERISA § 502(a)(2) 15, 19

RULES

Fed. R. Civ. P. 23 .... 15, 19

Fed. R. Civ. P. 23(a) 15, 18

Fed. R. Civ. P. 23(a)(2) 16

Fed R. Civ. P. 23(b) 15, 18

Fed. R. Civ. P. 23(b)(1) 15, 18, 19

Fed. R. Civ. P. 23(b)(1)(B) 18

Fed. R. Civ. P. 23(b)(2) 19

Fed. R. Civ. P. 23(b)(3) 19

Fed. R. Civ. P. 23(c)(2)(A) 19

Fed. R. Civ. P. 23(e) 6

Fed. R. Civ. P. 23(e)(1) 20

Fed. R. Civ. P. 23(g) 19

Fed. R. Civ. P. 23(g)(1)(A) 19

Fed. R. Civ. P. 23(g)(1)(B) 19

TREATISES

Manual for Complex Litigation, Fourth (“Manual 4th”) § 13.14 (2010) 6

Manual 4th § 21.632 15

Manual 4th § 21.633 20

Named Plaintiffs Roberto Ramirez and Thomas Ihle ("Named Plaintiffs") respectfully submit this memorandum in support of their unopposed[1] motion for preliminary approval of the proposed settlement and related relief (the "Motion"),[2] which moves this Court for an Order, *inter alia*:

1) Preliminarily approving the proposed Class Action Settlement Agreement and Release, dated May 31, 2016 (the "Settlement Stipulation");[3]
2) Preliminarily certifying the Settlement Class, defined in the Settlement Stipulation and below, solely for Settlement purposes;
3) Approving the Parties' proposed Notice Plan, and
4) Scheduling a Fairness Hearing no sooner than 120 days from the filing of the motion, or not before September 29, 2016.

I. INTRODUCTION

The Parties have agreed to a proposed Settlement of this ERISA case for $4,500,000 which will provide a substantial recovery to the Settlement Class members.[4] The proposed Settlement,

[1] The Parties conferred on May 31, 2016, 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. The proposed Settlement is a compromise of those differences.

[3] Capitalized terms used herein are defined in the Settlement Stipulation, which is attached as Exhibit A to the Motion.

[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."

if finally approved by the 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.

As set forth below, all prerequisites for preliminary approval of the Settlement are satisfied. Plaintiffs' Unopposed Motion for Preliminary Approval therefore should be granted and Notice should be provided to the Participants in accordance with the Notice Plan. The proposed Notice Plan—which consists of (1) an individual notice to be mailed to Settlement Class members at their last known addresses, (2) the creation of a dedicated website to share information with Settlement Class members, and (3) publication in *USA Today*—satisfies the requirements of Rule 23 and due process and is consistent with that approved by courts and implemented in similar settled ERISA actions.

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 in an amended complaint filed on August 25, 2014. The 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 one hundred thousand pages of damages-related trade data (the "Plan Data"). *See* Declaration of Samuel E. Bonderoff in Support of Plaintiffs' Motion for Preliminary Approval of Settlement and for Related Relief (the "Bonderoff Decl.") ¶¶ 6-7.

C. Settlement Discussions

On January 8, 2016, the Court ordered the Parties 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. In calls convened and presided over by Mediator Robert Meyer, the Parties spoke several times via telephone 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 for the Class with the Parties executing a Term Sheet setting forth the material terms of the Settlement.

D. The Proposed Settlement

The Settlement provides that Defendants will make a Settlement Payment in an aggregate amount of $4,500,000.00 in a Gross Settlement Fund to be allocated to Participants pursuant to a Plan of Allocation. In exchange, Plaintiffs and the Plan will dismiss their ERISA claims, as set forth more fully in the Settlement Stipulation. The Settlement Stipulation also sets forth a proposed Notice Plan to Participants, and provides for the payment of attorney's fees, expenses and for Plaintiffs' Case Contribution Awards, all of which are subject to Court approval.

E. Proposed Timetable for Effectuation of the Settlement

The Parties request that the Court schedule a Fairness Hearing. To effectuate the Settlement, Plaintiffs request the Court schedule a Fairness Hearing no sooner than September 29, 2016. Plaintiffs respectfully suggest the following:

(see table on next page)

Actions to Be Taken	**Settlement Stipulation ("§__") and/or Preliminary Approval Order ("¶ __") Reference**	**Proposed Date**
Defendants serve Class Action Fairness Act Notice	§§ 3.4; 15.8	CAFA provides for mailing 10 days after filing the Motion for Preliminary Approval
Defendants' Counsel to provide names and last known addresses of Settlement Class members	§ 5	As soon as reasonably possible upon entry of the Preliminary Approval Order
Deadline to mail Class Notice	¶ 7	45 days after entry of Preliminary Approval Order
Deadline for Publication of Summary Notice and Establishment of Settlement Website	¶ 7	45 days after entry of Preliminary Approval Order
Deadline to file motion papers in support of Final Settlement approval and Attorneys' fees and expenses	¶¶ 8-9	To be set by the Court; the Parties propose thirty-one (31) calendar days before the Fairness Hearing
Deadline for Settlement Class Member Objections	¶ 10	To be set by the Court; the Parties propose 14 calendar days before the Fairness Hearing
Deadline for Settlement Class members to serve notice of intention to appear at Fairness Hearing	¶ 10	To be set by the Court; the Parties propose 14 calendar days before the Fairness Hearing
Deadline for Parties to respond to Objections or file additional briefs	¶ 10-11	To be set by the Court; the Parties propose 7 calendar days before the Fairness Hearing
Fairness Hearing	("At least one hundred twenty (120) calendar days from the date the Preliminary Approval Motion is filed, and at least ninety (90) calendar days following the mailing of the Class Notice")	To be set by the Court on or after June 28, 2016 (which is 120 days after the filing of the motion). Note that Class Counsel are advised by a potential Settlement Administrator that it may take up to 3 weeks to print and mail notices without bearing additional costs, so Plaintiffs ask the final fairness hearing be set no sooner than 111 days after Preliminary Approval is granted.

III. THE SETTLEMENT MEETS THE CRITERIA NECESSARY FOR THIS COURT TO GRANT PRELIMINARY APPROVAL

Rule 23(e) of the Federal Rules of Civil Procedure requires judicial approval for any compromise of claims brought on a class basis. The issue of whether a proposed settlement should be granted preliminary approval is a matter within the sound discretion of the district court, which should be exercised in the context of public policy strongly favoring the pretrial settlement of class action lawsuits. *See, e.g.*, *Cotton v. Hinton*, 559 F.2d 1326, 1331 (5th Cir. 1977) ("Particularly in class action suits, there is an overriding public interest in favor of settlement.") *See Reed v. General Motors Corp.*, 703 F.2d 170, 172 (5th Cir. 1983). There is a strong initial presumption that the compromise is fair and reasonable. *Maher v. Zapata Corp.*, 714 F.2d 436, 455 n.31 (5th Cir. 1983) ("[N]either the district court nor the appellate court on review, should reach ultimate conclusions on the issues of fact and law underlying the dispute.")

"Approval of a class action settlement involves a two-step process. First, the Court makes a preliminary fairness evaluation of the proposed terms of settlement submitted by counsel." *McNamara v. Bre-X Minerals Ltd.*, 214 F.R.D. 424, 426 (E.D. Tex. 2002). "Second, if the Court determines that the settlement is fair, the Court directs that notice pursuant to Rule 23(e) be given to the class members of a formal fairness hearing, at which arguments and evidence may be presented in support of and in opposition to the settlement." *Id.*; *see also Manual for Complex Litigation, Fourth ("Manual 4th")* § 13.14 (2010). "Where the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class and falls within the range of possible approval, preliminary approval is granted." *In re NASDAQ Market-Makers Antitrust Litig.*, 176 F.R.D. 99, 102 (S.D.N.Y. 1997); *see also McNamara*, 214 F.R.D. at 430.

Named Plaintiffs are now requesting the Court to take the first step in this process and grant preliminary approval of the proposed settlement. Interim Class Counsel believes the settlement is an excellent result and clearly in the best interest of the Class. Given the complexities of this Litigation and the substantial risks of continued litigation, Interim Class Counsel believes the settlement represents an outstanding resolution of this Litigation and eliminates the risk that the Class might not otherwise recover if action were to continue. While Named Plaintiffs are only seeking preliminary approval, reference to the six factors established by the Fifth Circuit Court of Appeals in granting final approval of class action settlements lends support to the proposition that the settlement is well within the range of possible approval.

A. The Proposed Settlement Is Fair and Reasonable Under the Fifth Circuit's Six-Pronged Test of Fairness

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. General 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. ¶ 4. This proposed

settlement is the product of extensive, arm's-length negotiations by adverse, represented parties. *Id.* at ¶ 5. Class Counsel's experience is set forth its firm biography. *Id.* at Ex. A.

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 of Named Plaintiffs and their counsel gained by reviewing 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 preliminary 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 July 8, 2014 through the negotiation of the Settlement Stipulation. Interim Class Counsel conducted a thorough investigation into the claims asserted in the highly detailed 31-page 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, Interim Class Counsel reviewed and analyzed approximately Plan and Trade Data obtained from Defendants and consulted with experts on the issues of loss causation and damages. Interim 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, Interim 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 Preliminary 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; Interim Class Counsel knows of only four ERISA company stock fund cases that have been tried, with defense verdicts in each.[5] As another court recently observed:

[5] *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 option.); *Nelson v. IPALCO Enters., Inc.*, 480 F. Supp. 2d 1061 (S.D. Ind. 2007) (holding

> 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 Preliminary 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). Defendants argue that there were no damages because there was no breach. Defendants also assert that the Plan's

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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).

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 a gross amount of $4,5000,000 – 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 Interim 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 Interim 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 preliminary 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, Interim 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 preliminary 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 preliminary approval.

IV. CERTIFICATION OF A SETTLEMENT CLASS IS APPROPRIATE

Prior to granting preliminary approval of a settlement, the Court should determine that the proposed Settlement Class is a proper class for settlement purposes. *See Manual 4th* § 21.632; *McNamara*, 214 F.R.D. at 426-27. The Court has great discretion in determining whether to certify a class. *See Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 624 (1997). At the preliminary approval stage, when a court has not previously certified a class, it may conditionally certify a class for purposes of providing notice, leaving the final certification decision for the subsequent fairness hearing. *Bourlas v. Davis Law Assocs.*, 237 F.R.D. 345, 354 (E.D.N.Y. 2006). In determining whether an action may be maintained as a class action under Federal Rule of Civil Procedure 23, a court should preliminarily determine if the proposed class satisfies the criteria set forth in Rule 23(a) (i.e., (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy of representation) and at least one of the subsections of Rule 23(b). *Id.* In this matter, the proposed Settlement Class satisfies Rule 23(a)'s prerequisites and Rule 23(b)(1).

It is clear that ERISA Section 502(a) breach of fiduciary duty claims are well-suited for class status as they are brought, by definition and in practice, on behalf of retirement plans and affected participants. *See, e.g., In re Marsh ERISA Litig.*, 265 F.R.D. 128, 142 (S.D.N.Y. 2010) (finding analogous claims "particularly appropriate for class certification" because of, *inter alia*, the nature of plaintiffs' claims).

A. The Proposed Settlement Class Satisfies Rule 23(a)

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 27,000 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 plan-wide 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 previously appointed the law firm of Zamansky LLC serve as Interim Liaison Class Counsel (Dkt. No. 17). As shown in the firm resume presented to the Court in connection with the motion for appointment, 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 A** 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).

V. THE PROPOSED NOTICE PLAN SHOULD BE APPROVED

In general, "[n]either a Rule 23(b)(1) or (2) class action requires notice to class members

or the option to opt-out." *Langbecker v. Elec. Data Sys. Corp.*, 476 F.3d 299, 306 (5th Cir. 2007). Rule 23(c)(2)(A) provides, however, that the court "may direct appropriate notice" to a Rule 23(b)(1) or (b)(2) class. And the Fifth Circuit has suggested "that the level of notice required for mandatory settlement is the same as is required in a Rule 23(b)(3) [opt-out] action: the best notice practicable." *Katrina Canal Breaches Litig. v. Bd. of Comm'rs*, 628 F.3d 185, 197 n.5 (5th Cir. 2010) (quoting *In re Orthopedic Bone Screw Prods. Liab. Litig.*, 246 F.3d 315, 327 n.11 (3d Cir. 2001)).

Rule 23(e)(1) requires the Court "to direct notice in a reasonable manner to all class members who would be bound by the [settlement] proposal." Fed. R. Civ. P. 23(e)(1). The Notice Plan includes multiple components designed to reach the largest number of Settlement Class members possible. First, the Notice, attached as Exhibit A.1 to the Settlement Stipulation, will be sent by first-class mail to the last known address of each Settlement Class member at least two months prior to the Fairness Hearing. Notably, all Settlement Class members had Plan accounts, so the Plan has addresses for them, at least as of the Settlement Class Period, and has their Social Security numbers which can be used to do an address update if Notices are returned as undeliverable. *See Mehling v. New York Life Ins. Co.*, 246 F.R.D. 467, 477-78 (E.D. Pa. 2007). Additionally, the Notice will be posted on a website established by Class Counsel, along with other documents related to the litigation such as a list of frequently asked questions and the Stipulation with all of its exhibits. The Notice will also provide contact information for Class Counsel. In addition, Class Counsel will cause the Summary Notice to be published in *USA Today*.

"The fairness hearing notice should alert the class that the hearing will provide class members with an opportunity to present their views on the proposed settlement and to hear arguments and evidence for and against the terms." *Manual 4th* § 21.633. The notice "should tell

objectors to file written statements of their objections with the clerk of court by a specified date in advance of the hearing and to give notice if they intend to appear." *Id.* The notice must "contain an adequate description of the proceedings written in objective, neutral terms that, insofar as possible, may be understood by the average absentee class member." *In re Nissan Motor Corp. Antitrust Litig.*, 552 F.2d 1088, 1104 (5th Cir. 1977). The notice must also "contain information that a reasonable person would consider to be material in making an informed, intelligent decision of whether to opt out or remain a members of the class and be bound by the final judgment." *Id.* at 1105; *see also Katrina*, 628 F.3d at 197 ("Notice of a mandatory class settlement, which will deprive class members of their claims, therefore requires that class members be given information reasonably necessary for them to make a decision whether to object to the settlement.").

The proposed form of mailed notice satisfies these requirements because it describes the nature, history and status of the litigation; sets forth the definition of the Settlement Class; describes the Settlement Class as mandatory; states the class claims and issues; says that Settlement Class Members may enter an appearance through their own counsel; and advises of the binding effect of the settlement approval proceedings on Settlement Class Members. The notice describes the Settlement and the proposed distribution of the Net Settlement Fund to Settlement Class Members; sets out the amount of attorneys' fees and expenses that Plaintiffs' Class Counsel intend to seek in connection with final settlement approval; provides contact information for Settlement Class Counsel; and summarizes the reasons the parties are proposing the Settlement. The notice also states the date, time, and place of the Fairness Hearing, and the procedures for commenting on the Settlement and appearing at the hearing. Because the notice satisfies all applicable requirements, the Court should approve the proposed form and method of notice to the Settlement Class.

VI. THE PLAN OF ALLOCATION SHOULD BE PRELIMINARILY 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).

Here, the Plan of Allocation provides for a pro rata distribution among Settlement Class members who 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 separate checks or through re-opening these Settlement Class member Plan accounts. 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.[6]

VII. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court preliminarily approve the Settlement, set a date for the Fairness Hearing, and enter the accompanying proposed Preliminary Approval Order.

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[6] *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 1, 2016

By: */s/ Samuel E. Bonderoff*
Samuel E. Bonderoff

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that in accordance with this Court's Individual Practices plaintiffs' counsel served all counsel of record with a copy of this document and all attachments hereto via the Court's CM/ECF system per Local Rule CV-5(a)(3).

I declare under penalty of perjury that the foregoing is true and correct. Executed on June 1, 2016 at New York, New York.

By: /s/ Samuel E. Bonderoff
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