IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

In re J.P. Morgan Stable Value Fund ERISA Litigation	)))	Master File No. 12-cv-2548-VSB

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY APPROVAL OF CLASS SETTLEMENT, APPROVAL OF NOTICES OF SETTLEMENT, APPROVAL OF THE PLAN OF ALLOCATION, AND SETTING OF FAIRNESS HEARING

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Settling Plaintiffs Richard Whitley, Caroleta M. Duran, Terry J. Koch, Mark D. Grandy, John M. Gates, Scott Newell, Michael Knee, and Eric M. Murphy ("Settling Plaintiffs"),[1] by Co-Lead Class Counsel, respectfully submit this memorandum in support of their motion for preliminary approval of the settlement reached in the above-captioned litigation (the "Settlement"). The proposed Settlement provides a recovery of $75,000,000 in cash to resolve the ERISA[2] class action against all Defendants. The Settlement is set forth in a settlement agreement entered into by the Settling Plaintiffs dated November 2, 2017 (the "Settlement Agreement").[3] The Settlement provides for the Class Members to receive their distributions in the form of a check made out to them individually or, in most cases, as a roll-over into a tax-deferred account. As a result, most Class Members will receive their distributions tax-deferred, further enhancing the $75,000,000 monetary recovery. The Settlement further provides that the $75,000,000 will be deposited in an interest bearing account shortly after Preliminary Approval by the Court. Ex. A, Art. 5.1.

I. INTRODUCTION

A. Factual and Procedural Background

Plaintiffs brought this action alleging violations of ERISA in conjunction with the management of an investment in their employer sponsored 401(k) plans by Defendants.[4] Plaintiffs and the Class are plan participants who had allocated a portion of their retirement

[1] Settling Plaintiffs anticipate that Plaintiffs Nancy Dye, John Stolwyk, Clay Hedges, and Rosemary Dotson, represented by Phillip G. Greenfield, will object to the settlement and therefore are not identified as Settling Plaintiffs.
[2] Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. 1001, et. seq.
[3] Unless otherwise defined, all capitalized terms have the meanings ascribed to them in the Settlement Agreement attached as Exhibit A.
[4] The named Defendants include J.P. Morgan Chase & Co., J.P. Morgan Chase Bank N.A., J.P. Morgan Investment Management Inc. a/k/a J.P. Morgan Asset Management, and J.P. Morgan Retirement Plan Services (hereafter "J.P. Morgan," "JPM" or "Defendants").

savings to JPMorgan Stable Value Funds. On March 31, 2017, the Court issued a Memorandum Opinion and Order Certifying the Class and Subclasses of similarly situated 401(k) participants under Rule 23(b)(3). *In re J.P. Morgan Stable Value Fund ERISA Litig.,* No. 12-cv-2548 (VSB), 2017 WL 1273963, at *16 (S.D.N.Y. Mar. 31, 2017). The Class Members all invested in a JPMorgan Stable Value Fund that was invested in one of two JPM commingled pension funds, the Intermediate Bond Fund ("IBF") and the Intermediate Public Bond Fund ("IPBF"), for some period from January 1, 2009 to December 31, 2010.

Plaintiffs principally allege that Defendants violated ERISA in two fundamental ways. First, Plaintiffs allege that JPM managed Plaintiffs' investments imprudently in violation of JPM's fiduciary duties by causing its stable value funds to invest heavily in the IBF and the IPBF, which, in turn, allegedly invested in excessively risky, highly leveraged assets, including, among other things, mortgage-related assets. Second, Plaintiffs allege that certain Defendants, as fiduciaries to the relevant plans and their participants and beneficiaries, breached their obligations under ERISA §§ 404(a)(1)(B), 404(a)(1)(C), and 404(a)(1)(A) to comply with the duties of prudence and diversification and to discharge their duties solely in the interests of plan participants and beneficiaries, and for the exclusive purpose of providing benefits to the plan participants and beneficiaries.[5]

Defendants dispute all of these allegations, as set forth in their motion for summary judgment, memorandum and reply memorandum. *See* Doc. 330, 331 and 361.

[5] Plaintiffs also claim that certain Defendants engaged in transactions prohibited by ERISA §§ 406(a)(1)(A), 406(a)(1)(D), and 406(b)(1)-(3), and the ACSAF/JPM Stable Value Fund Subclass Plaintiffs make additional claims against all Defendants for engaging in transactions prohibited by those provisions. Finally, Plaintiffs plead in the alternative that Defendants other than J.P. Morgan Chase & Co. are liable under ERISA § 405(a) for knowing participation in a breach of fiduciary duty.

The proposed Settlement is the culmination of more than five years of vigorous litigation, which included Co-Lead Class Counsel's extensive investigation into the Class' claims; the filing of complaints in two separate actions, followed by three amended complaints including a consolidated complaint; thoroughly briefing class certification, which was granted; successfully opposing Defendants' Rule 23(f) motion for leave to appeal the class certification order to the Second Circuit; filing a motion for partial summary judgment and defending against Defendants' motion for summary judgment; defending the depositions of the Plaintiffs and taking the depositions of current and former JPM employees and third parties, and taking and defending seven expert depositions; and reviewing over approximately 108,500 documents, including both custodial and non-custodial material from Defendants and third-party witnesses and experts.[6] (Decl. Co-Lead Counsel, attached as Exhibit C, ¶ 5).

B. Settlement Negotiations

The settlement negotiations in this Action were hard-fought, lengthy and certainly arm's length. Informal negotiations started as early as January 2014 when the parties met in person to discuss a possible settlement. From time to time thereafter, the Parties participated in additional settlement discussions that did not bear fruit. Then, on June 9, 2017, the Parties participated in a formal mediation session in Atlanta, Georgia, before mediator Hunter Hughes. Mr. Hughes is an experienced, neutral third-party mediator. Mr. Hughes has mediated many ERISA class actions in the recent past, including cases alleging breaches of fiduciary duty.[7] Although the mediation session was unsuccessful, the Parties and Mr. Hughes remained in contact and participated in numerous telephonic sessions thereafter. (Decl. Co-Lead Class Counsel, ¶ 2).

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[6] *See* Doc. 309 and 322.

[7] *See* Exhibit B, Mr. Hughes's biography listing seven recently mediated ERISA class actions with settlements ranging in size from $8 million to $62 million. (Decl. Co-Lead Class Counsel, ¶ 2).

The Parties continued to litigate this Action vigorously and to prepare the case for trial. On August 31, 2017, following multiple communications with Mr. Hughes, the Settling Parties reached an agreement in principle to settle all claims in the Action. On September 6, 2017, the Court, in light of the anticipated motion for preliminary approval of the settlement, denied as moot the pending motions for summary judgment without prejudice to refile. Doc. 391. The Settling Parties fully executed the Settlement Agreement, attached hereto as Exhibit A, on November 2, 2017. (Decl. Co-Lead Class Counsel, ¶ 3). The extensive course and arm's length nature of the negotiations, along with the substance of this Settlement overwhelmingly support that the Settlement is fair, reasonable and adequate. (Decl. Co-Lead Class Counsel, ¶ 4).

C. <u>The Proposed Settlement</u>

Under the Settlement, Defendants have agreed to make a payment of $75,000,000 to the Class in cash to be deposited at interest in a Qualified Settlement Account within ten business days after preliminary approval. The Settlement Agreement provides that Co-Lead Class Counsel will file a petition for an attorneys' fees award under the "common fund" method in an amount not to exceed $25,000,000. In addition, the petition will seek reimbursement of Plaintiffs' litigation costs not to exceed $1,750,000, costs paid to the Settlement Administrator, and Class Representative Service Awards for each named Plaintiff not to exceed $20,000.[8] Any awards or reimbursement, if granted by the Court, would be paid from the Gross Settlement Amount. Ex. A, Art. 7. The remaining Net Settlement Amount will be used to make settlement payments to the Class Members according to the Plan of Allocation.

In exchange, Plaintiffs and the Class will dismiss their Complaint and all related claims. The Settlement sets forth the proposed Notice of Settlement to the Class Members and provides

[8] Class Counsel will provide the Court an estimate of the Settlement Administration costs at the preliminary approval hearing.

for the ability of Co-Lead Class Counsel to seek payment of attorneys' fees, reimbursement of expenses and Class Representative Service Awards for the named Plaintiffs, subject to the Court's approval.

D. <u>The Timeline</u>

Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, a hearing on the final approval of the Settlement should take place after Class Members have received notice and have had the opportunity to evaluate the Settlement. The Settling Parties propose the following schedule:

Event	Deadline
Pursuant to the Class Action Fairness Act, 28 U.S.C. § 1715, JPM will send notice of the proposed Settlement no later than 10 days after Settling Plaintiffs file the motion for preliminary approval of the Settlement	November 13
Hearing on Motion for Preliminary Approval	December 4
Court Grants Motion for Preliminary Approval and Notice	December 4
The Settlement Amount is to be deposited into an interest-bearing escrow account with a JPM bank within 10 business days after preliminary approval of the Settlement by the Court (or as soon as is reasonably possible thereafter once any information required for the deposit has been provided)	December 18
Notice shall be provided to the Class as soon as reasonably possible after Class Counsel finishes the discovery it has undertaken from the record keepers for the Plans invested in JPMorgan Stable Value Funds to obtain JPM stable value participants' contact information (approximately 60 days from date of preliminary approval)	February 2
Plaintiffs apply to Court for attorneys' fees and costs (no later than 20 days after Notice is mailed)	February 22
Deadline for requests for exclusion to be submitted (40 days after Notice is mailed)	March 14
Objections by Class Members to Settlement due, postmarked no later than 40 calendar days after Notice is mailed	March 14
Deadline for appearance of counsel regarding objections	March 14
Deadline for any party to file with the Court a response to an objection by a Class Member (on or before 70 calendar days after the Notice is mailed)	April 13
Plaintiffs shall timely file a memorandum in support of final approval	April 13
Fairness Hearing *at least* 100 calendar days following the mailing of	

the class notice (assuming Court approves Settlement and enters Order and Partial Judgment)	May 14

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

A. The Law Encourages Fair and Reasonable Settlements.

Settling Plaintiffs present this Settlement for review under Federal Rule of Civil Procedure 23(e), which requires court approval of class action settlements, the issuance of notice in a reasonable manner to Class Members that would be bound by the Settlement, and a finding by the Court following a hearing that the Settlement is fair, reasonable and adequate. For the reasons discussed below, preliminary approval under Rule 23(e) in this matter is appropriate.

Settlements of disputed claims, especially in complex class action litigation are strongly favored by the courts. *See, e.g., Wal-Mart Stores, Inc. v. VISA U.S.A. Inc.*, 396 F.3d 96, 116 (2d Cir. 2005) ("We are mindful of the strong judicial policy in factor of settlements, particularly in the class action context.") (citation omitted). The decision to grant or deny approval of a settlement lies within the broad discretion of the trial court, which should exercise that discretion in light of the general judicial policy favoring settlement. *See e.g., Weinberger v Kendrick*, 698 F.2d 61, 73 (2d Cir. 1982).

Courts have also examined the "negotiating process by which the settlement was reached." *Weinberger*, 698 F.2d at 74. They have focused on whether the settlement was achieved through "arm's length negotiations" by counsel who have "the experience and ability …necessary for effective representation of the class' interest." *See also In re PaineWebber Ltd. P'ships Litig.*, 171 F.R.D. 104, 125 (S.D.N.Y. 1997) ("A strong initial presumption of fairness attaches to the proposed settlement if the settlement is reached by experienced counsel after arm's length negotiations."). This initial presumption of fairness and adequacy applies with

special force here because the Settlement was reached by experienced, informed counsel after protracted arm's length negotiations, with the assistance of a third party neutral experienced in mediating ERISA class actions, after summary judgment briefing was completed and trial preparation was underway. (Decl. Co-Lead Class Counsel, ¶¶ 2-5).

B. The Settlement Satisfies this Circuit's Criteria for Class Action Settlements.

The standard for reviewing a proposed settlement of a class action is whether the proposed settlement is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2); *see also Wal-Mart Stores, Inc.*, 396 F.3d at 116 (citation omitted). To aid in this analysis, the Second Circuit has set forth nine factors a court should consider in deciding whether a proposed class action settlement is substantively fair, reasonable, and adequate. The following nine factors have been applied in ERISA cases:

(1) the complexity, expense and likely duration of the litigation;

(2) the reaction of the Class to the Settlement;

(3) the stage of the proceedings and the amount of discovery completed;

(4) the risks of establishing liability;

(5) the risks of establishing damages;

(6) the risks of maintaining the class action through the trial;

(7) the ability of the defendants to withstand a greater judgement;

(8) the range of reasonableness of the settlement fund in light of the best possible recovery; and

(9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

City of Detroit v. Grinnell Corp., 495 F.2d 448, 463 (2d Cir. 1974) *abrogated on separate grounds by Goldberger v. Integrated Res., Inc.,* 209 F.3d 43 (2d Cir. 2000) (citations omitted); *McReynolds v. Richards-Cantave*, 588 F.3d 790, 804 (2d Cir. 2009); *Wal-Mart Stores, Inc.,* 396 F.3d at 117.

Although complete analysis of these factors is required prior to final approval of a settlement, at the preliminary approval stage, "the Court need only find that the proposed settlement fits 'within a range of possible approval'" to proceed. *In re Prudential Sec. Inc. Ltd. P'Ships Litig.,* 163 F.R.D. 200, 210 (S.D.N.Y. 1995) (citation omitted); *In re Warner Chilcott Ltd. Sec. Litig.,* No. 06-cv-11515, 2008 WL 5110904, at *2 (S.D.N.Y. Nov. 20, 2008) (same). That test is easily satisfied here.

1. The Complexity, Expense, and Likely Duration of the Litigation

"The expense and possible duration of the litigation are major factors to be considered in evaluating the reasonableness of [a] settlement." *Milstein v. Huck*, 600 F. Supp. 254, 267 (E.D.N.Y. 1984). *See also In re Alloy, Inc. Sec. Litig.*, No. 03-cv-1597, 2004 WL 2750089, at *2 (S.D.N.Y. Dec. 2, 2004). Many courts have noted the complexity of ERISA breach of fiduciary duty claims such as those asserted in this Action. Indeed, in *In re WorldCom, Inc. ERISA Litigation*, an ERISA company stock case, the Court expressly recognized the "general risk inherent in litigating complex claims such as these to their conclusion." No. 02-cv-4816, 2004 WL 2338151, at *6 (S.D.N.Y. Oct. 18, 2004) (approving settlement). Similarly, in *In re Global Crossing Securities & ERISA Litig.*, the Court explained that ERISA "[f]iduciary status, the scope of fiduciary responsibility . . . and numerous legal issues concerning fiduciary liability . . . substantially increase the ERISA cases' complexity, duration, and expense – and thus militate in favor of settlement approval." 225 F. R.D. 436, 456 (S.D.N.Y. 2004); *see also In re Enron Corp.*

Secs., Derivative & "ERISA" Litig., 228 F.R.D. 541, 565 (S.D. Tex. 2005) (finding that "complexity, expense and likely duration of the litigation . . . are self-evident and exceptional"); *In re Ikon Office Solutions, Inc. Sec. Litig.*, 209 F.R.D. 94, 104-07 (E.D. Pa. 2002) (finding that the complexity and duration of litigating ERISA breach of fiduciary duty claims, as well as the expense of litigation and risks of establishing liability and damages, weighed heavily in favor of settlement).

This case is no exception. Plaintiffs' claims raise numerous complex legal and factual issues under ERISA that would require comprehensive evidentiary support and testimony at trial. The complexity and expense of the case has also been borne out by the time and effort that the Parties and their counsel have put into litigating this matter over the past five-and-a-half years. As set forth in greater detail above, the Parties to this Action exchanged numerous discovery requests; produced and reviewed more than 800,000 pages of documents; took the depositions of 40 fact witnesses; engaged in extensive expert discovery from five experts; and conducted seven expert depositions. (Decl. Co-Lead Counsel, ¶ 9)

The docket for this case contains over 391 entries. Indeed, the Parties litigated this Action for more than five years and were preparing for trial when they agreed to the Settlement after extensive arm's length negotiations before an experienced mediator. This Settlement eliminates the additional time and expense of litigating this Action at trial and any subsequent appeals. It therefore conserves judicial resources.

There would be considerable additional work left to complete before this Action could be ready for trial. While trial preparation was underway, there was months of work ahead to draft the pretrial order, identify trial exhibits, designate deposition testimony of witnesses, prepare for direct and cross-examination of witnesses, and draft findings of fact and conclusions of law.

Instead of the additional time it would take to resolve this Action and the considerable risk that the result could be adverse, under the Settlement, $75,000,000 will be deposited in an interest-bearing account, which will benefit the Class if the Settlement is finally approved. In sum, a settlement at this stage avoids further motion practice raising various issues around causation and proof of damages. (Decl. Co-Lead Class Counsel, ¶ 10).

Moreover, even if the Class were to receive a favorable judgment at trial, the additional delay through trial, post-trial motions, and the appellate process could deny the Class any actual recovery for years, further reducing the value of the judgment. (Decl. Co-Lead Class Counsel, ¶ 11). *See Strougo ex rel. Brazilian Equity Fund, Inc. v. Bassini*, 258 F. Supp. 2d 254, 261 (S.D.N.Y. 2003) ("[E]ven if a shareholder or Class Member was willing to assume all the risks of pursuing the actions through further litigation . . . the passage of time would introduce yet more risks and would in light of the time value of money, make future recoveries less valuable than in this current recovery."). Furthermore, a winning verdict does not provide absolute assurance of recovery, where post-trial motions and appeals are likely. *See, e.g., Robbins v. Koger Props., Inc.*, 116 F.3d 1441, 1449 (11th Cir. 1997) (reversing on appeal $81 million jury verdict and dismissing case with prejudice in securities action.)

For example, whichever party did not prevail at trial would likely appeal, which may take up to one year to reach final disposition.[9] A delay of this magnitude would impose a particular hardship to the Class here, where many of the Class Members have likely retired or are approaching retirement age, given that the retirement investments at issue here are tied to a class period that began almost nine years ago, in January 2009, and that stable value investors tend to

[9] On average in the Second Circuit, an appeal takes 10 to 12 months from the notice of appeal to final disposition. *See* U.S. Court of Appeals – Judicial Caseload Profile, p. 8, *available at* http://www.uscourts.gov/sites/default/files/data_tables/fcms_na_appprofile0331.2017.pdf.

be older participants between the ages of 50 and 65. (Decl. Co-Lead Class Counsel, ¶ 11). *See Millsap v. McDonnell Douglas Corp.*, No. 94-cv-633-H(M), 2003 WL 21277124, at *13 (N.D. Okla. May 28, 2003) ("Avoiding delay is particularly important in this case due to the length of the litigation to date and the presence of an aging class."); *Wilkerson v. Martin Marietta Corp.*, 171 F.R.D. 273, 288 (D. Colo. 1997) (stating that the "ages of many class members also weigh heavily in favor of immediate recovery" and that "monetary provisions of the Consent Decree are more valuable if implemented now than if victims must wait an additional number of years").

Together, these factors of complexity, expense and duration weigh heavily in favor of preliminary approval of the Settlement.

2. The Reaction of the Class to the Settlement

Because the Court is only being asked to preliminarily approve the Settlement at this stage, some of the *Grinnell* factors, such as reaction of the Class to the Settlement, do not yet fully come into play. *See Bourlas v. Davis Law Assocs.*, 237 F.R.D. 345, 355 n. 7 (E.D.N.Y. 2006). As mentioned above, four of the named Plaintiffs have indicated to the Court through their attorney, Phillip G. Greenfield, that they intend to file objections to the Settlement. *See* Doc. 391. Those objections should be addressed under the same schedule that has been agreed upon with Defendants in the Settlement Agreement for filing, responding and hearing objections to the Settlement from Class Members. Ex. A, Art. 3.1.

3. The Stage of the Proceedings and Discovery Completed

For a class action settlement to be found reasonable and appropriate based on the status of discovery, the court does not need to decide the merits of the litigation, but it does need something above "mere conjecture." 4 ALBA CONTE & HERBERT B. NEWBERG, NEWBERG ON CLASS ACTIONS § 11:45 (4TH ED. 2002). Although there is no litmus test for determining how

much work on the case is sufficient to make this determination, whatever the measure, it is easily satisfied here. *See In re Global Crossing sec. & ERISA Litig*., 225 F.R.D. 436, 458 (S.D.N.Y. 2004) ("The question is whether the parties had adequate information about their claims.").

Plaintiffs have developed a comprehensive understanding of the key legal issues in this Action based on the late stage of litigation and are therefore in a good position to evaluate the fairness of the Settlement. The Parties have been litigating this Action vigorously for more than five years. Throughout that lengthy period, Plaintiffs conducted an extensive legal and factual investigation and evaluation of their claims and have engaged in extensive fact and expert discovery practice with Defendants. The Parties exchanged numerous discovery requests; produced and reviewed more than 800,000 pages of documents; took the depositions of 40 fact witnesses; and engaged in extensive expert discovery from five experts, including seven expert depositions. (Decl. Co-Lead Class Counsel, ¶ 9).

Plaintiffs also sought certification of the Class, fully briefed the issue, and their motion was granted by the Court on March 31, 2017. Doc. 374. The Parties have also thoroughly litigated this Action through cross-motions for summary judgment, and Plaintiffs have a strong basis to assess the strengths and weaknesses of their claims for purposes of engaging in meaningful settlement negotiations. The advanced stage of the litigation and extensive amount of legal research, as well as fact and expert discovery completed by the parties, weigh heavily in favor of approval of the Settlement. Under these circumstances a presumption of fairness attaches to the proposed Settlement. *See Wal-Mart Stores, Inc.,* 396 F.3d at 116 (A "'presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery.'") (quoting MANUAL FOR COMPLEX LITIGATION, at § 30.42).

Co-Lead Class Counsel, based on their combined, unique experience in complex ERISA actions, (Decl. Co-Lead Counsel, ¶ 6), are confident that they have "a clear view of the strengths and weaknesses of their case []," *Teachers' Ret. Sys. Of La. v. A.C.L.N., Ltd.,* No. 01-cv-11814, 2004 WL 1087261, at *3 (S.D.N.Y. May 14, 2004) (quotation omitted), and are well aware of the range of possible outcomes at trial. In assessing the merits of the proposed Settlement, Co-Lead Counsel considered the risks and uncertainties of proceeding with the litigation and ultimately prevailing at trial in light of various factors, some of which were made clearer as the Action approached trial. (Decl. Co-Lead Counsel, ¶ 7). Therefore, this Court should find that this factor also supports preliminary approval of the Settlement.

4. The Risks of Establishing Liability

In assessing the Settlement, the Court should balance the benefits afforded the Class, including the immediacy and certainty of a recovery, against the continuing risks of litigation. *See Grinnell*, 495 F.2d at 436. Certain types of ERISA claims similar to those asserted by Plaintiffs here have been described as implicating "a rapidly developing, and somewhat esoteric, area of law." *In re Global Crossing*, 225 F.R.D. at 459 n.13 (finding plaintiffs' significant legal and factual obstacles to proving their case, when viewed against the substantial and certain benefits of settlement, supported settlement approval). In Co-Lead Class Counsel's view, Plaintiffs would be successful, and the allegations of the complaint would ultimately be borne out by the evidence, but there are, nonetheless, significant hurdles in establishing liability and damages at trial.

Because the Court was reviewing Defendants' motion for summary judgment at the time the Settlement was reached, it is familiar with the arguments Defendants made there. But even if summary judgment had been denied, Defendants would have likely re-argued at trial that liability

was unwarranted because, among other reasons: a) no one in the Class lost any principal on their stable value fund investment; b) the JPMorgan Stable Value Funds met their purported objective of providing a yield or return that exceeded money market rates of return during the class period; c) the losses in the portfolio were a result of a black swan event in the financial markets and were not attributable to any imprudent investment decisions; and d) Plaintiffs' claims of imprudence are based on evaluating JPM's stable value investment decisions from the vantage point of hindsight, arguably contrary to the objective standard for measuring the duty of prudence required by the Second Circuit in *Pension Ben. Guar. Corp. ex rel. St. Vincent Catholic Med. Centers Ret. Plan v. Morgan Stanley Inv. Mgmt. Inc*., 712 F.3d 705 (2d Cir. 2013). In order to obtain a liability verdict in this case, each of these defenses to Plaintiffs' claims would have to be overcome at trial.

As evidence of the uncertainty of the outcome here, a number of other ERISA breach of fiduciary cases involving stable value investments have been adversely decided against the plaintiffs. *See, e.g., Bidwell v. Univ. Med. Ctr., Inc.,* 685 F.3d 613, 620 (6th Cir. 2012) (affirming judgment on record for defendant); *Renfro v. Unisys Corp.,* 671 F.3d 314 (3d Cir. 2011) (affirming dismissal in district court where allegations of failure to maintain range of investment options which included stable value fund); *Wood v. Prudential Ret. Ins. & Annuity Co.,* No. 15-cv-1785, 2017 WL 3381007, at *6 (D. Conn. Aug. 4, 2017) (denying class certification); *Dezelan v. Voya Ret. Ins. & Annuity Co.,* No. 16-cv-1251, 2017 WL 2909714, at *13 (D. Conn. July 6, 2017) (granting motion to dismiss without prejudice to renewal); *Ellis v. Fid. Mgmt. Tr. Co.,* No. 15-cv-14128, 2017 WL 2636042, at *10 (D. Mass. June 19, 2017) (granting defendant's motion for summary judgment); *Barchock v. CVS Health Corp.,* No. 16-cv-061, 2017 WL 1382517, at *5 (D.R.I. Apr. 18, 2017) (granting motion to dismiss complaint);

Terraza v. Safeway Inc., No. 16-cv-03994, 2017 WL 952896, at *19 (N.D. Cal. Mar. 13, 2017) (dismissing claim of failure to diversify where stable value was one of the offerings in investment lineup); *Ortiz v. Am. Airlines, Inc.,* No. 16-cv-151, 2016 WL 8678361, at *14 (N.D. Tex. Nov. 18, 2016) (order on class certification withheld); *Austin v. Union Bond & Tr. Co.,* No. 14-cv-00706, 2016 WL 1257897, at *1 (D. Or. Mar. 30, 2016) (dismissing excessive-fees theory of liability); *Leber v. Citigroup 401(K) Plan Inv. Comm.*, 129 F. Supp. 3d 4, 23 (S.D.N.Y. 2015) (denying motion to amend complaint to add stable value claim). Some of these cases have been appealed and it is hard to predict how they will ultimately be decided. Because the law around these stable value ERISA cases is just developing, it compounds the risk the Class faces here the longer it continues to litigate this action. *See also*, *In re AOL Time Warner ERISA Litig.,* No. 02-cv-8853, 2006 WL 2789862, at *8 (S.D.N.Y. Sept. 27, 2006). ("The substantive risks faced in this litigation are compounded by the fact that ERISA claims are rarely decided on their merits at trial, thus ERISA litigation boasts few successful precedents.").

In light of these obstacles and precedents, it is significant that the $75 million Settlement of this Action appears to represent a substantial settlement for an ERISA case alleging a fiduciary breach from imprudent investment decisions for stable value funds.[10]

Although Co-Lead Class Counsel is confident in its ability to ultimately prove liability of Defendants on the claims asserted, the risks of a verdict in favor of Defendant at trial, when weighed against the immediate benefits of Settlement, confirm that the Settlement is in the best interest of the Class and therefore should be approved.

[10] In *Abbott v Lockheed Martin Corp*., 725 F.3d 803, 814 (7th Cir. 2013), the Seventh Circuit reversed the denial of class certification of an ERISA stable value class and remanded the case for further proceedings. On remand the case settled in 2015 for $62 million dollars, to cover all three subclasses' claims with 62% of the net settlement allocated to the stable value subclass. Agreement, *Abbott v Lockheed Martin Corp*., No. 06-cv-00701 (Doc. 491-1 at p.19) (S.D. Ill. Feb. 20, 2015).

5. The Risks of Establishing Damages

The relevant law on ERISA damages is found in the Second Circuit's influential opinion, *Donovan v. Bierwirth*, 754 F.2d 1049, 1056 (2d Cir. 1985). The Second Circuit stated "[w]here several alternative investment strategies were equally plausible, the court should presume that the funds would have been used in the most profitable of these." *Id. See also LaRue v. DeWolff, Boberg & Assocs., Inc.*, 552 U.S. 248, 253 n.4 (2008) ("[Section] 502(a)(2) encompasses appropriate claims for 'lost profits.'"). Any ambiguity or uncertainty in damages is resolved against the fiduciaries. *Donovan*, 754 F.2d at 1056. Plaintiffs maintain that the risk in proving damages resides primarily in the complexity of the calculation. Damages calculations in ERISA cases like this are expert-intensive. In calculating damages, Plaintiffs' expert first determined what would have occurred and the economic impact but-for the alleged improper investment strategy.

While Plaintiffs are confident in their ability to establish substantial damages, they are also aware that the presentation of such complex testimony involves risks that Settlement avoids. *In re Milken & Assocs. Sec. Litig*., 150 F.R.D. 46 (S.D.N.Y. 1993) (approving settlement of small percentage of the total damages sought because the magnitude of damages often becomes a "battle of experts . . . with no guarantee of the outcome"); *Bonime v. Doyle*, 416 F. Supp. 1372 (S.D.N.Y. 1976), *aff'd*, 556 F.2d 554 (2d Cir. 1977), and *aff'd*, 556 F.2d 555 (2d Cir. 1977) (difficulty in determining damages is a factor supporting settlement).

In addition, Defendants have raised challenges to Plaintiffs' view concerning the applicable standard of damages under ERISA and loss causation, creating even further uncertainty concerning how the issue might be resolved at trial. At trial Defendants would have argued, as they did in their summary judgment briefing, that under the law of the Second Circuit

it is Plaintiffs' burden to prove damages. That burden would include proving not only that Plaintiffs suffered a loss, but that the fiduciary breach proximately caused their losses. *Silverman v. Mutual Benefit Life Ins., Co.,* 138 F.3d 98, 104 (2d Cir. 1998). Defendants would argue that there was no loss, because no participant Class member lost any principal but instead received a return which met their expectations as every one of the funds at-issue outperformed money market funds, the benchmark for stable value funds. Doc. 361 at p. 20.

Then too, there would be arguments between the parties about what the appropriate benchmark in the stable value industry was for measuring what was earned on Defendants' allegedly imprudent investment of the funds, compared with what those funds would have earned had they been invested in a prudently managed stable value fund. Defendants would continue to argue that the money market benchmark which it outperformed was not only the industry standard, but it was the benchmark that had been communicated to participants: "to protect the principal balance of the accounts" while "generat[ing] stable, positive book value returns that exceed those of alternative principal protection vehicles, such as money market funds during normal conditions." *Id*. p. 21-22. Therefore, Defendants would contend that there were no damages at all because the performance of their stable value products met not only the benchmark of the stable value industry but met the funds' investment goals as communicated to the participants. *Id*.

Defendants would further argue that, unlike the money market benchmark, the benchmark Plaintiffs used to measure Defendants' underperformance, Lehman's Intermediate Aggregate Bond Index, is inappropriate because Plaintiffs are "measuring performance against a hypothetical stable value fund that would have invested in the Lehman Index – a standard that

was never communicated to plan participants and is not an industrywide standard for evaluating stable value fund performance." Doc. 361 at p. 22.

According to Defendants then, the Lehman Index is an impermissible standard under the law, employed in hindsight to judge JPM's performance against the highest possible benchmark return. In Defendants' Memorandum in Support of Summary Judgment, JPM argued that, under Plaintiffs' expert's methodology, several of the funds that the named Plaintiffs invested in would have outperformed every stable value fund in the Hueler Index. *Id.* p. 22. Moreover, if the Lehman Index were used to measure performance of other stable value fund investment managers included in the Hueler Index, all would have suffered damages. *Id.*

Regardless of what objective index was used to measure underperformance, there would be arguments by Defendants "with respect to causation because there are 'numerous' other factors—cash inflows and outflows, changes in wrap contracts, varying levels of investment in cash and cash equivalents—that affected the performance of the Stable Value Funds yet had no role in Defendants' alleged breaches." *In re J.P. Morgan Stable Value Fund ERISA Litig.,* 2017 WL 1273963, at *14. The Court noted in its class certification order that Plaintiffs had conceded that factors other than Defendants' breaches influenced the underperformance of the Stable Value Funds as measured against the Hueler Index, a widely-used industry source that reports on performance of several stable value funds. *Id.* Therefore, if the case proceeded to trial, there would be arguments about whether the "other factors" had been properly accounted for by the Plaintiffs' damages expert.

Finally, there would be arguments between the parties about what the appropriate length of the damage period should be. According to Defendants' experts, losses, if any, would be greatly diminished, if not zeroed out, by credits or offsets for periods of time during which

JPM's stable value fund performance exceeded the market. *See e.g*., Doc. 240, Ex. A - Stangle Report, Ex. 12. If JPM's summary judgment motion were denied, Defendants would have presented expert witnesses to support their defenses to damages at trial and the battle of experts reflected in the summary judgment briefing would continue in pretrial proceedings, with *Daubert* and other kinds of motions in limine yet to be filed and spill over at trial.

Thus, the complexities in establishing ERISA damages here are similar to those the court explained in *In re Global Crossing Securities and ERISA Litigation*:

> aside from difficulties involved in calculating the ERISA damages, the parties disagree on the law bearing on ERISA damages, including whether loss causation . . . apply to the ERISA 401(k) Actions. These legal disagreements would no doubt lead to motions that would introduce additional time, expenses, uncertainty. In short, the legal and factual complexities and uncertainties of the ERISA damages case also militate in favor of settlement.

225 F.R.D. 436, 460 (S.D.N.Y. 2004). This factor, like the others, therefore weighs in favor of the sum-certain Settlement proposed here.

6. The Risks of Maintaining the Class Action through Trial

The Court granted class certification on March 31, 2017, and the Action has proceeded as a class action since that decision. From a practical standpoint, certification provides procedural advantages that have enabled the efficient litigation of the claims asserted by Plaintiffs in this Action and Plaintiffs do not anticipate that the Class would be decertified at any point prior to trial, particularly at this stage in the litigation. However, class certification can be reviewed and modified by the Court at any time before trial, or on appeal, so there is always a risk that this Action or particular claims in this Action, may not be maintained for the Class through trial. Thus, the risk of failing to maintain the Class through trial – albeit small – also weighs in favor of the Court approving the proposed Settlement.

7. The Ability of Defendant to Withstand a Greater Judgment

Plaintiffs do not believe that this factor is an issue due to the financial stability of Defendants and their resultant ability to satisfy a judgment in this case, but that factor standing alone is insufficient to defeat approval of the Settlement. *See D'Amato v. Deutsche Bank*, 236 F.3d 78, 86 (2d Cir. 2001) (the ability to withstand higher judgment "standing alone, does not suggest that the settlement is unfair."); *In re Veeco Instruments Inc. Sec. Litig*., No. 05-md-0165, 2007 WL 4115809, at *11 (S.D.N.Y. Nov. 7, 2007) (defendant's substantial net worth "alone does not prevent the Court from approving the Settlement where the other *Grinell* factors are satisfied").

8. The Reasonableness of the Settlement in Light of the Best Possible Recovery and the Attendant Risks of Litigation

In evaluating a proposed settlement, a court is not required to engage in a trial on the merits to determine the prospects of success. *In re Milken & Assocs. Sec. Litig*., 150 F.R.D. at 54. The adequacy of the amount offered in settlement must be judged "not in comparison with the possible recovery in the best of all possible worlds, but rather in light of the strengths and weaknesses of plaintiffs' case." *In re Union Carbide Corp. Consumer Prods. Bus. Sec. Litig*., 718 F. Supp. 1099, 1103 (S.D.N.Y. 1989) (citation omitted). The Court thus need only determine whether the Settlement falls within a "range of reasonableness." *PainWebber*, 171 F.R.D. at 130 (citations omitted). The Second Circuit has said that "a range of reasonableness" is a range which "recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion." *Newman v. Stein*, 464 F.2d 689, 693 (2d Cir. 1972).

The Court, in approving an ERISA class action settlement brought by participants of AOL Time Warner's 401(k) plans for breach of fiduciary duty concerning the plans' imprudent

investment in the company's stock, considered the total amount of the settlement in finding it in a reasonable range: "As one of the largest ERISA settlements to date, the $100 million settlement is well within the range of reasonableness, even apart from its immediacy." *In re AOL Time Warner ERISA Litig.*, 2006 WL 2789862, at *9. Similarly here, the $75 million cash Settlement represents a significant ERISA settlement that is also "well within the range of reasonableness" compared with other recent ERISA class action settlements. In 2016, a $75 million settlement would have been tied for the fifth largest ERISA class action settlement that year, and in 2015 it would have been the fourth largest. *See* Seyfarth Shaw's Annual Workplace Class Action Reports for 2016 and 2015, *available at* http://www.workplaceclassaction.com/wp-content/uploads/sites/214/2017/05/2017-Seyfarth-Shaw.pdf.

Here the $75 million Settlement—which is large and substantial in its own right—represents a meaningful percentage of the potentially provable losses that Plaintiffs believe they could show if liability were established, and depending on how many of the numerous issues concerning their damage calculation were resolved in favor of the Class by the Court. Plaintiffs' damages calculations have varied and evolved with this case. Based on comparing the performance of the JPMorgan Stable Value Funds to the Lehman Intermediate Aggregate index as well as accounting for excess cash holdings, Plaintiffs' expert estimated damages between $410 million and $555 million depending on the period used to calculate damages.[11] Previously, in connection with class certification, Plaintiffs' expert proposed to calculate damages by comparison to the Hueler Index, which would have yielded substantially lower damages figures as explained above.

[11] *See* Ex. F to Declaration of Jason H. Kim in Opposition to Defendants' Motion for Summary Judgment, dated June 20, 2016, citing Table 78 from January 19, 2016, Expert Report of Steven Pomerantz, PhD.

Therefore, the Settlement Amount represents a range of recovery, approximately 13.5 to 18.29 percent, that is appropriate, given the wide range of potential damage outcomes at trial—as well as the possibility of a verdict in favor of Defendant that would result in zero recovery for the Class. This range is similar to the range in other approved ERISA class action settlements. *See In Re Am. Int'l Group, INC. ERISA Litig. II*, No. 08-cv- 05722 (Doc. 254 at p. 20) (S.D.N.Y. June 1, 2015) (approving $40 million settlement or 13.25% of $302.4 million maximum exposure); *In Re Textron, Inc. ERISA Litig.*, No. 09-cv-00383 (Doc. 109-1 at p. 22) (D.R.I. Nov. 6, 2013) (approving $4.4 million settlement or approximately 5.5% to 11% of maximum damages ranging between $40 million to $80 million); *Otte v. Life Ins. Co. of N. Am.*, No 09-cv-11537 (Doc. 107 at p.17-18) (D.M.A. March 5, 2013) (approving $8.1 million settlement or approximately 15% of $55 million exposure); *See also* ERISA Class Action Settlements and Attorney Fees, Fiduciary Counselors Inc., available at http://www.erisasettlements.com/press/ERISA-Chart.pdf, including *In re BristolMyers Squibb Co. ERISA Litig.*, No. 02-cv-10129 (S.D.N.Y) (approving $41.22 million cash settlement or 13.74% of $300 million exposure); *In re CIGNA Corp. ERISA Litig.,* No. 03-cv-00714 (E.D. Pa.) (approving $954,000 in cash and plan changes valued at $24 to $30 million or approximately 4% of approximately $720 million exposure);
Overby v. Tyco Int'l Ltd., No. 2-cv-1357-B (D.N.H.) (approving $71 million, or .59% of $12 billion exposure).

It is also noteworthy that in the case where the Second Circuit set forth the standards for approving class action settlements, *City of Detroit v. Grinnell Corp.*, 356 F. Supp. 1380, 1385-1386 (S.D.N.Y. 1972), the court approved a settlement totaling approximately 3% of provable damages, then on appeal the Second Circuit stated "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." *Grinnell*, 495 F.2d at 455, fn 2.

The $75 million cash Settlement, representing a meaningful percentage of the estimated damages as discussed above, is also well in excess of the approximate 2 to 3 percent threshold typically approved in class action settlements involving complex litigation by courts in the Second Circuit. For example, a survey of approved class action securities settlements in the Second Circuit for the past ten years reported a 2.1% median settlement as a percentage of estimated damages. *See* Securities Class Action Settlements 2016 Review and Analysis, Cornerstone Research, http://securities.stanford.edu/research-reports/1996-2016/Settlements, p. 23. (Decl. Co-Lead Class Counsel ¶¶ 12-13). *See, e.g., In re Initial Pub. Offering Sec. Litig.,* 671 F. Supp. 2d 467, 483-485 (S.D.N.Y. 2009) (approving settlement that represented 2% of defendants' maximum liability and noting, "the Second Circuit has held that a settlement amount of even a fraction of the potential recovery does not render a proposed settlement inadequate"); *In re Prudential Sec. Inc. Ltd. P'Ships Litig.*, MDL Docket No. 1005, M-21-67, 1995 WL 798907 (S.D.N.Y. Nov. 20, 1995) (approving settlement of between 1.6 and 5% of claimed damages).

Considering the present and time-value of money, the probability of a lengthy and involved trial in the absence of a settlement, the risk that the Class would not succeed in proving liability against Defendant and the range of possible recovery at trial, the Settlement is well within the range of reasonableness. As Judge Harmon aptly put it when approving of the settlements in *In re Enron ERISA Litigation*, "The settlement at this point would save great expense and would give the Plaintiffs hard cash, a bird in the hand." 228 F.R.D. at 566; *see also In re Global Crossing*, 225 F.R.D. at 461 ("The prompt, guaranteed payment of the settlement

money increases the settlement's value in comparison to some speculative payment of a hypothetically larger amount years down the road.") (citation omitted).

In sum, the *Grinnell* factors support a finding that the proposed settlement fits "within the range of possible approval" and should proceed to the second step of the process with notice to class members of a hearing, at which time the settling parties may be heard with respect to final court approval. Granting preliminary approval, ". . . deprives no party or non-party of any procedural or substantive rights, and provides a mechanism through which class members who object to the . . . settlement can voice those objections." *Allen v. Dairy Farmers of Am., Inc.,* No. 09-cv-230, 2011 WL 1706778, at *2 (D. Vt. May 4, 2011).

Based upon extensive legal research, all fact and expert discovery, analysis of the risks inherent in continued litigation, the risks of establishing liability and damages at trial, and the likelihood of appeals regardless of which side prevailed at trial, Co-Lead Class Counsel unequivocally support the Settlement and the immediate and definite benefit it provides to Class Members. (Decl. Co-Lead Class Counsel, ¶ 8).

III. PLAN OF ALLOCATION IS FAIR, REASONABLE AND ADEQUATE

The Court should also preliminarily approve the Plan of Allocation for distributing the Net Settlement Amount to the Class Members, as set forth in the Settlement Agreement, and as explained in the Notices that will be distributed to the Class. Ex. A, Art. 6, and Exs. 2 and 3.

Review of a plan of allocation falls within this Court's broad supervisory power over the settlement, its proceeds, and their ultimate disposition. *In re PaineWebber Ltd. P'ships Litig.,* 171 F.R.D. 104, 132, (S.D.N.Y) ("The review of the plan of allocation is squarely within the discretion of the district court"), aff'd, 117 F.3d 721 (2d Cir. 1997). The standard for reviewing a proposed plan of allocation is the same as the standards of fairness and reasonableness that apply

to review of proposed settlements. "[T]he adequacy of an allocation plan turns on whether counsel has properly apprised itself of the merits of all claims, and whether the proposed apportionment is fair and reasonable in light of that information." *PaineWebber*, 171 F.R.D. at 133.

As with the Settlement, the opinion of experienced and informed counsel carries considerable weight. *In re Indep. Energy Holdings PLC*, No. 00-cv-6689, 2003 WL 22244676, at *4-*5 (S.D.N.Y. Sept. 29, 2003). An allocation formula need only have a reasonable basis, particularly if recommended by experienced class counsel. *In re Am. Bank Note Holographics*, 127 F. Supp. 2d 418, 429-30 (S.D.N.Y. 2001); *In re AOL Time Warner, Inc. Sec. & ERISA Litig.*, No. 02-cv-4475, 2006 WL 903236, at *17 (S.D.N.Y. Apr. 6, 2006) (noting class counsel's "experience and competency" in approving a plan of allocation that provided "recovery to damaged investors on a pro rata basis according to their recognized claims of damages.")

The goal of a distribution plan is fairness to the class as a whole, taking into consideration the strength of claims based on available evidence. *In re Am. Bank Note Holographics*, 127 F. Supp. 2d at 430. Here, experienced and informed counsel formulated the Plan of Allocation with their damages expert. While there is no requirement that a settlement must benefit all class members equally, here the Class and the three Sub-Classes are all treated alike.[12]

In its class certification order, the Court found (at least for class certification purposes) the participants' damages could be measured by assessing the underperformance of the Stable Value Funds relative to "the Hueler Index or similar objective benchmark." Doc. 377, Sec. II.E,

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[12] One of the subclasses, the ACSAF/JP Morgan Stable Value Fund Subclass, has a longer class period than the Class and the other two subclasses, but because there was no underperformance relative to the Benchmark until January 2009 (when the other class periods begin), there is no difference in the damage periods.

pp.7-9. In discussions with Plaintiffs' damages expert, Plaintiffs have decided to use, subject to the Court's approval, the Lehman Brothers Intermediate Aggregate Index (later renamed the Barclays Intermediate Aggregate Index). The Lehman Brothers Intermediate Aggregate Index was selected in part because it was one measure by which JPM evaluated the performance of the IBF and IPBF in which its Stable Value Funds invested.

This is a large class, but the precise number of Class Members is unknown at this time as Class Counsel continues to seek information on the identity and number of 401(k) plan participants invested in JPMorgan Stable Value Funds during the Class Period 2009 through 2010. The Class will be a subset of those 401(k) participants because, consistent with the Court's class certification order, if a participant or the participant's Plan did not experience any underperformance damages as calculated by the Settlement Administrator, then the participant is not a Class Member. Doc. 377, Sec. II.E, pp. 7-9; Doc. 285. The data for making that determination is being collected now, but the Settlement Administrator's work in calculating which participants suffered underperformance damages will not be performed until after final approval of the Settlement by the Court. (Decl. Co-Lead Class Counsel ¶ 14).

The pro rata amount each Class Member will receive from the Settlement will turn not only on the number of participants that have underperformance damages, but also on the number of Former Participants who return a completed Claim Form and the number of participants who opt-out of the Settlement. By the time of the Fairness Hearing, Co-Lead Class Counsel will be able to share with the Court the number of timely Former Participant Claim Forms that have been received by the Settlement Administrator and the number of participants who have opted-out of the Settlement. (Decl. Co-Lead Class Counsel ¶ 15).

After payment of costs, taxes, attorneys' fees and expenses, the Net Settlement Amount will be proportionally allocated by the Settlement Administrator to qualifying Class Members based on the Plan of Allocation set forth in the Settlement Agreement and in the mailed Notice of Class Action Settlement and the examples therein. As a result, the Plan of Allocation clearly has a "'reasonable, rational basis'" and should be approved by the Court. *Global Crossing*, 225 F.R.D. at 462 (citation omitted).[13]

IV. THE COURT HAS ALREADY CERTIFIED THE CLASS

On March 31, 2017, the Court entered an Opinion and Order granting class certification for the Class, along with three Subclasses, under Federal Rule of Civil Procedure 23(a) and 23(b)(3). *See In re J.P. Morgan Stable Value Fund ERISA Litig.,* No. 12-cv-2548 (VSB), 2017 WL 1273963, at *16 (S.D.N.Y. Mar. 31, 2017). Accordingly, the Settlement Notice allows Class Members an opportunity to exclude themselves from the Class and the Settlement by submitting a written Request for Exclusion twenty-one (21) calendar days prior to the Fairness Hearing**.**

While the Notice explains the right of Class Members to exclude themselves from the Class, the Settling Parties also request that the Court, in conjunction with issuing its Order Preliminarily Approving the Settlement and Notice, make a finding that ERISA's six-year statute of repose has expired and, in turn, approve the proposed language of the Notice advising Class Members that, if they exclude themselves from the Class, they will not have rights to bring their own lawsuits. The U.S. Supreme Court recently held that a statute of repose is not subject to equitable tolling as provided for class actions under its prior decision in *American Pipe Construction Co. v. Utah*, 414 U.S. 538 (1974). *Cal. Pub. Employees' Ret. Sys. v. ANZ Sec., Inc.,*

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[13] There will be some Class Members who do not recover awards. If a Class Member's damages as calculated by the Settlement Administrator are $5 or below, the Class Member is excluded from receiving an award because the costs of administering the claim will be more than the Class Member's recovery.

582 U.S.__, 137 S. Ct. 2042, 2055 (2017) ("CalPERS"). As Justice Ginsburg's dissent points out, *id.* at 2058, "today's decision impels courts and class counsel to take a more active role in protecting class members' opt out rights . . . a district court will need to assess whether the notice [should] alert class members that opting out . . . would end [their] chance for recovery." Here, in accordance with *CalPERS*, the Settling Parties have reflected in the Settlement Agreement that they believe that ERISA's six-year statute of repose has run in this action and therefore the Class Members should be provided notice that if they opt out there will be no chance to bring their own law suits. Ex. A, Art. 3.1.1.

Section 1113 of ERISA, which governs the time for filing a breach of fiduciary duty claim arising under ERISA section 1104 (a)(1), sets out a general six-year limitation, which courts have found to be a statute of repose.[14] *See Fulghum v. Embarq Corp*., 785 F.3d 395, 413 (10th Cir. 2015); and *Hugler v. First Banker Serv. Trust Inc.*, No. 12-cv-8649, 2017 WL 1194692 (S.D.N.Y. March 29, 2017).

Given that the class period in this action ends on December 31, 2010, ERISA's six-year statute of repose for claims by Class Members expired on December 31, 2016. Because the statute of repose is not subject to equitable tolling for class actions, *CalPERS,* 137 S. Ct. at 2055, the Court should make a finding that ERISA's statute of repose has run for claims asserted on behalf of Class Members in this Action. Alternatively, if the Court decides not to make such a finding, the Notice will advise the Class that their claims may potentially be time-barred for those reasons. Accordingly, the Court should approve the proposed Notice and proposed

[14] Section 1113, *inter alia*, sets out the following six-year limitations period: "No action may be commenced under this subchapter with respect to a fiduciary's breach of any responsibility, duty, or obligation under this part, or with respect to a violation of this part, after the earlier of — six years after (A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission the latest date on which the fiduciary could have cured the breach or violation. . . ."

Preliminary Approval Order which provides notice to Class Members of this consequence if they choose to exclude themselves from the Class.

V. THE PROPOSED NOTICE SHOULD BE APPROVED

A. The Proposed Notice Meets the Requirements of Due Process

To satisfy due process, notice to Class Members must be "reasonably calculated under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *In re Prudential Sec. Inc. Ltd. P'ships Litig.*, 164 F.R.D. 362, 368 (S.D.N.Y. 1996); *see also Weinberger v. Kendrick*, 698 F.2d 61 70-72 (2d Cir. 1983) (citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)). "It is widely recognized that for the due process standard to be met it is not necessary that every Class Member receive actual notice, so long as Class Counsel acted reasonably in selecting means likely to inform persons affected." *Prudential*, 164 F.R.D. at 368; *see also Weigner v. City of New York,* 852 F.2d 646, 649 (2d Cir. 1988). Settlement notices need only describe the terms of the settlement generally. *Handschu v. Special Servs. Div*., 787 F.2d 828, 833 (2d Cir. 1986).

The Second Circuit has recognized that the mail is an "efficient and inexpensive means of communication" that generally may be relied upon to deliver notice where it is sent. *Weigner v. City of New York*, 852 F.2d 646, 650 (2d Cir. 1988) (citing *Mullane,* 399 U.S. at 319); *In re Initial Public Offering Sec. Litig*., 260 F.R.D. 81, 119-20 (S.D.N.Y. 2009) (approving notice by means of mailing notice first-class to each potential Class Member, posting notice on a website and publishing a copy in the national editions of several major newspapers).

Article 3 of the Settlement Agreement provides for actual notice to all Class Members through a combination of direct mailings, published notice, and Internet website posting. As set

forth below, Plaintiffs' proposed means of Notice of Settlement more than satisfy the mandate of due process.

B. Description of the Notice

The proposed Notice of Settlement will fully inform Class Members about the Action, the proposed Settlement and the facts they need to make informed decisions about their rights. The Notice includes multiple components designed to reach the largest number of Class Members possible. The Notice, attached as Exhibit 2 and 3 to the Settlement Agreement (for Current and Former Participants, respectively),[15] will be sent by first-class mail to the last known address of each Class Member as soon as practicable after entry of the Preliminary Approval Order, once discovery to identify the Class Members now underway is completed.[16] Ex. A, Art. 3.2.

As soon as reasonably possible after Class Counsel finishes the discovery it has undertaken in order to obtain Class Members' contact information, the Settlement Administrator shall also, by the date and in the manner set by the Court in the Preliminary Order, cause the Settlement Notice to be posted on a Settlement Website. In addition, the Settlement

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[15] Different notices are required for Current and Former Participants because Current Participants will automatically receive their settlement payments as contributions to their Plan accounts, as of the date of the settlement payments, and so will not be required to file a Claim Form. Contrastingly, Former Participants, only upon filing a Claim Form, will receive their settlement payments in the form of checks, or by rollover if available and elected in their Claim Form. Therefore, a Claim Form will only be included in the notice to Former Participants. *See* Ex. A, Art. 6.

[16] The Plaintiffs' request to have Defendants identify the names of the 76 separate plans and the names of the plans in the two comingled plans investing in JPM's stable value products was denied by the Court, with leave to reinstate the request depending on the outcome of the Court's ruling on class certification. Doc. 285. Following the Court's March 31, 2017 class certification order, the parties began working together to identify the plans and 401(k) participants in conjunction with the record keeper that was formerly a JPM entity, but that was sold during the pendency of the action. In addition, Co-Lead Class Counsel has served subpoenas for the identity of 401(k) participants and their investment data on record keepers for those plans that did not employ JPM's record keeper. The parties will update the Court further on their progress with the collection of this information at the preliminary approval hearing.

Administrator will cause the Summary Notice to be published in two national newspapers, running for three consecutive days in each. *Id.* The various forms of Notice will provide Class Members with a toll-free number for Co-Lead Class Counsel, an email address for Settlement-related inquiries, and the Settlement Website address where Class Members may receive further information. *Id.* at Art. 3.

The form and method of notice agreed to by the Parties satisfies all due process considerations and meets the requirements of Federal Rule of Civil Procedure 23(e)(1). The proposed Notice describes generally, in plain English (i) the terms and operations of the Settlement; (ii) the nature and extent of the release of claims; (iii) the right to opt-out of the Settlement; (iv) Plaintiffs' Counsel's intent to request attorneys' fees, reimbursement of expenses and service awards to the named Plaintiffs; (v) the procedure and timing for objecting to the Settlement; (vi) the date and place for the Fairness Hearing; and (vii) the procedure to receive additional information. Accordingly, the proposed Notice of Settlement and method of dissemination satisfies the requirements of due process. *See* William B. Rubenstein, NEWBERG ON CLASS ACTIONS, §8.17 (5th ed. 2017).

VI. CONCLUSION

For the reasons discussed herein, the Settlement is a fair, reasonable and adequate resolution of the claims against Defendants in this complex class action brought under ERISA. Thus, the Settling Plaintiffs and Co-Lead Class Counsel respectfully request that the Court grant their motion and enter the Preliminary Approval Order, which: (a) preliminarily approves the Settlement; (b) approves the form and manner of the Notice of Settlement; (c) preliminarily approves the proposed Plan of Allocation; and (d) sets a date and time for the Fairness Hearing and related deadlines as set forth in the proposed draft Preliminary Approval Order.

Respectfully submitted,

Dated: November 3, 2017

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CERTIFICATE OF SERVICE

I certify that on November 3, 2017, I electronically filed the foregoing with the Clerk of the Court using the ECF system, which will send notification of such filing to the parties participating in the Court's electronic filing system.

/s/ Michael M. Mulder

Michael M. Mulder