

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS**

**KRISTAL M. KHAN, MICHELLE R.
BALLINGER, and GEORGE A. CRAAN,
individually and on behalf of all others
similarly situated,**

Plaintiffs,

v.

**PTC INC., THE BOARD OF DIRECTORS
OF PTC INC., THE INVESTMENT
COMMITTEE OF PTC INC., and JOHN
DOES 1-30,**

Defendants.

Civil Action No. 1:20-cv-11710-WGY

**PLAINTIFFS' SUPPLEMENTAL MEMORANDUM OF LAW IN SUPPORT OF
PLAINTIFFS' MOTIONS FOR FINAL APPROVAL OF CLASS ACTION
SETTLEMENT, CERTIFICATION OF SETTLEMENT CLASS, AND APPROVAL OF
PLAN OF ALLOCATION AND FOR AN AWARD OF ATTORNEYS' FEES AND
REIMBURSEMENT OF EXPENSES AND
CASE CONTRIBUTION AWARDS TO THE NAMED PLAINTIFFS**

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I. INTRODUCTION

Named Plaintiffs Kristal M. Khan, Michelle R. Ballinger, and George A. Craan (together, “Plaintiffs”), participants in the PTC 401(k) Savings Plan (the “Plan”), by and through their undersigned counsel, hereby respectfully submit this Memorandum of Law in further support of their motions (1) for an Order Granting Final Approval of Class Action Settlement, Certification of Settlement Class, and Final Approval of Plan of Allocation (“Motion for Final Approval”) and (2) for an Award of Attorneys’ Fees, Reimbursement of Expenses, and Case Contribution Awards to the Named Plaintiffs (“Motion for Fees and Expenses”) (ECF Nos. 61 through 64-11), both filed with the Court on August 1, 2022. Plaintiffs submit this Supplemental Memorandum to (a) reflect on the successful dissemination of the Class Notice; (b) inform the Court that there has been only one objection to the Settlement; and (c) inform the Court that the Independent Fiduciary appointed to review the Settlement has approved it.

II. ARGUMENT

A. The Dissemination of the Class Notice was Extremely Effective

As explained in the Memorandum of Law In Support of Plaintiffs’ Motion for Award of Attorneys’ Fees and Reimbursement of Expenses, and Case Contribution Awards to the Named Plaintiffs (the “Final Approval Memo”) (ECF No. 61), the Parties retained JND Legal Administration (“JND”), an experienced class action claims administrator, as the Settlement Administrator. *See* Supplemental Declaration of Ryan Bahry Regarding Settlement Administration (“JND Decl.”) at ¶ 2 (attached hereto as Exhibit 1).

On June 13, 2022, JND mailed the Court-approved Class Notice to 6,423 unique Settlement Class Members with a mailing address (one (1) Settlement Class Member was excluded from the mailed notice as they did not have a mailing address). *Id.* at ¶ 4. As of September 6, 2022, JND

tracked 373 Class Notices that were returned to JND as undeliverable. *Id.* at ¶ 5. JND conducted additional advanced address research through TransUnion on these 373 undeliverable Class Notices and received updated address information for 23 Class Members. *Id.* JND promptly re-mailed Class Notices to these 23 Class Members (of which two (2) were returned as undeliverable). *Id.* As of September 6, 2022, 6,325 Class Members were emailed or mailed a Notice that was not returned as undeliverable, representing 98.5% of total Settlement Class Members. *Id.* at ¶ 6.

On June 13, 2022, JND established a Settlement Website (www.PTCERISASettlement.com), which hosts copies of important case documents, including the Class Action Settlement Agreement, Class Notice, Plan of Allocation, answers to frequently asked questions, and contact information for the Settlement Administrator. *Id.* at ¶ 7. As of September 6, 2022, the Settlement Website has tracked 1,190 unique users with 2,087 page views. *Id.* at ¶ 8.

On June 13, 2022, JND established a case-specific toll-free number, 1-844-202-9489, for Settlement Class Members to call to obtain information regarding the Settlement. *Id.* at ¶ 9. Callers have the option to listen to the Interactive Voice Response (“IVR”) system, or to speak with a live agent. The toll-free number is accessible 24 hours a day, seven days a week. *Id.* As of the date of this Supplemental Declaration, the toll-free number has received 19 incoming calls. *Id.* at ¶ 10.

The E-mail Notice and Class Notice informed recipients that any Class Member who wished to object to the proposed Settlement could do so by filing a written objection with the Court, postmarked on or before August 31, 2022. *Id.* at ¶ 11. As of September 6, 2022, JND has received one (1) objection from Class Member Matthew Ender (Newton, MA). *Id.* at ¶ 10.

B. The Minimal Objections Further Supports the Adequacy of the Settlement as well as Class Counsel’s Requested Attorneys’ Fees and Case Contribution Awards to the Named Plaintiffs

A “favorable reaction of class to settlement... constitutes strong evidence of fairness of proposed settlement and supports judicial approval.” *Hill*, 2015 WL 127728, at *8 (citing *Bussie v. Allmerica Fin. Corp.*, 50 F. Supp. 2d 59, 77 (D. Mass. 1999); *In re Puerto Rican Cabotage Antitrust Litig.*, 815 F. Supp. 2d 448, 473 (D.P.R. 2011)). The Class Notice, which was mailed to over 6,000 potential Settlement Class Members, specified that Class Counsel would request attorneys’ fees of up to 33 1/3% of the Class Settlement Amount. There has been only one objection challenging the attorneys’ fees filed on March 2, 2021. ECF No. 23. The objection was filed by Mathew Ender, a potential class member, who takes issue with the settlement and requested attorneys’ fees from a generalized viewpoint, not specific to the facts of this case. He states, among other things:

I understand that the number of parallel lawsuits on the basic question, of whether higher-than-average fees for some offerings in a retirement plan constitute a failure to fulfill the fiduciary obligation to the members of the plan, to be in the three figures. I would note that the existence of higher-than-average fees is a necessary fact of any system in which fees exist and are not universally fixed, so in my opinion fees need to have some further attributes to be actionable in this way.

Mr. Ender also seeks for the Court to “severely limit the Class Counsel’s award.” Ultimately, Mr. Ender bases his opinion on his own experience with the Plan. He does not consider the investigations Class Counsel has undertaken nor the documents that have been reviewed in this case, and the experts that have been consulted. As Mr. Ender himself states, “[t]hough I have not spent so much time on this matter as any of the principals, it is my considered opinion that this case is without merit, and I and the other Class Members were not harmed as stated.” Respectfully,

Class Counsel have delved fully into the merits of the case and are in a better position than Mr. Ender to assess the fairness and adequacy of the Settlement.

Accordingly, the objection should be overruled as none of the other over 6,000 participants in the Plan have objected to the Settlement or attorneys' fees. *See, e.g., Hochstadt v. Boston Scientific Corp.*, 708 F.Supp.2d 95, 110 (granting certification of the settlement class when only one class member objected); *Bezdek v. Vibram USA, Inc.*, 79 F.Supp.3d 324, 347 (D. Mass. 2015) (finding reaction of the class to the settlement was "overwhelmingly positive" when only three class members objected); *Boyd v. Coventry Health Care, Inc.*, 299 F.R.D. 451, 464 (D. Md. 2014) ("The lack of objections tends to show that at least from the class members' perspective, the requested fee is reasonable for services provided and the benefits achieved by class counsel."); *Smith v. Krispy Kreme Doughnut Corp.*, 2007 WL 119157, at *3 (M.D.N.C. Jan. 10, 2007) (finding it "noteworthy that no one has objected to the requested fee"). Further, the Independent Fiduciary, whose report is discussed below opines it does "not believe this objection provides substantial grounds to the Court to find against final approval of the Settlement or of the attorneys' fees, expenses, or Case Contribution Awards for the three Class Representatives." Report, Exhibit 2 at 4. Essentially, "Mr. Ender is asking the Court to deny approval of the Settlement and to reduce attorneys' fees because the Settlement is too favorable to Class Members." *Id.*

C. Fiduciary Counselors Authorizes the Settlement and Approves of the Request for Attorney's Fees and Expenses, and Case Contribution Awards

PTC engaged Fiduciary Counselors to serve as the Plan's independent fiduciary. *See* Updated Report of the Independent Fiduciary for the Settlement in *Kristal M. Khan, et al. v. PTC, Inc., et al.* dated August 26, 2022, attached hereto as Exhibit 2 at p. 1. Fiduciary Counselors has extensive experience in serving as an independent fiduciary in connection with settlements in similar actions, having "reviewed over 100 previous settlements involving ERISA plans." *Id.*

With respect to the Settlement, Fiduciary Counselors found as follows:

The size of the Settlement is \$1,725,000, a fair and reasonable recovery given the results in numerous similar cases in the last several years, the defenses the Defendants would have asserted, the risks involved in proceeding to trial, and the possibility of reversal on appeal of any favorable judgment. Plaintiffs determined maximum potential damages to the Plan to be \$2.9 million before calculation of prejudgment interest. This damages amount reflects damages related to Plaintiffs' remaining claims. This assumes a reasonable per participant annual recordkeeping rate of \$35. The Settlement Amount represents approximately 59% of the estimated damages put forth by Plaintiffs.

Given the substantial expense and risk involved in further litigation, the difficulty in prevailing on the merits and establishing damages, and the delay that would have resulted in providing any relief to the Class if the matter had been prolonged through trial and appeal, the amount of the Settlement is reasonable.

Id. at p. 9. Further, Fiduciary Counselors reviewed the request for attorneys' fees, reimbursement of expenses, and case contribution awards. It stated as follows:

Class Counsel seek an award of attorneys' fees in the amount of \$575,000, which represents one-third of the Settlement Amount of \$1,725,000. Class Counsel's lodestar to date was \$280,369.50, which would produce a lodestar multiplier of 2.1 if the requested \$575,000 were awarded.

In our experience, the percentage requested and the lodestar multiplier are within the range of attorney fee awards for similar ERISA cases. In particular, an award of one third of the common fund is very common in ERISA cases. In light of the work performed, the result achieved, the litigation risk assumed by Class Counsel, and the combination of the percentage and the lodestar multiplier, Fiduciary Counselors finds the requested attorneys' fees to be reasonable.

Id. at 7. It further noted the amounts requested for case contribution awards were justified. *Id.* at 8.

III. CONCLUSION

For the reasons set forth herein, and in Plaintiffs' prior submissions in connection with the Settlement, Plaintiffs respectfully request that the Court grant their unopposed Motions for Final Approval and for Fees and Expenses.

Dated: September 7, 2022

Respectfully submitted,

CAPOZZI ADLER, P.C.

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CERTIFICATE OF SERVICE

I hereby certify that on September 7, 2022, a true and correct copy of the foregoing document was filed with the Court utilizing its ECF system, which will send notice of such filing to all counsel of record.

By: Mark K. Gyandoh
Mark K. Gyandoh, Esq.

EXHIBIT 1

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS**

KRISTAL M. KHAN, MICHELLE R.
BALLINGER, and GEORGE A. CRAAN,
individually and on behalf of all others
similarly situated,

Plaintiffs,

v.

PTC INC., THE BOARD OF DIRECTORS
OF PTC INC., THE INVESTMENT
COMMITTEE OF PTC INC., and JOHN
DOES 1-30,

Defendants.

Civil Action No. 1:20-cv-11710-WGY

**SUPPLEMENTAL DECLARATION OF RYAN BAHRY REGARDING SETTLEMENT
ADMINISTRATION**

I, RYAN BAHRY, declare and state as follows:

1. I am an Assistant Director at JND Legal Administration (“JND”). JND is a legal administration services provider with its headquarters located in Seattle, Washington. JND has extensive experience with all aspects of legal administration and has administered settlements in hundreds of class actions.

2. JND is serving as the Settlement Administrator¹ in the above-captioned litigation (“Action”), as ordered by the Court in its Order Granting Preliminary Approval of Class Action Settlement, Preliminarily Certifying a Class for Settlement Purposes, Approving Form and

¹ Capitalized terms used and not otherwise defined herein shall have the meanings given such terms in the Class Action Settlement Agreement.

Manner of Settlement Notice, Preliminarily Approving Plan of Allocation, and Scheduling a Date for a Fairness Hearing, dated May 20, 2022 (the “Order”).

3. This Supplemental Declaration is meant to supplement my previous declaration dated August 1, 2022.

MAILED NOTICE

4. On June 13, 2022, JND mailed the Court-approved Class Notice to 6,423 unique Settlement Class Members with a mailing address (one (1) Settlement Class Member was excluded from the mailed notice as they did not have a mailing address).

5. As of the date of this Supplemental Declaration, JND tracked 373 Class Notices that were returned to JND as undeliverable. JND conducted additional advanced address research through TransUnion on these 373 undeliverable Class Notices and received updated address information for 23 Class Members. JND promptly re-mailed Class Notices to these 23 Class Members (of which two (2) were returned as undeliverable).

6. As of the date of this Supplemental Declaration, 6,325 Class Members were e-mailed or mailed a Notice that was not returned as undeliverable, representing 98.5% of total Settlement Class Members.

SETTLEMENT WEBSITE

7. On June 13, 2022, JND established a Settlement Website (www.PTCERISASettlement.com), which hosts copies of important case documents, including the Class Action Settlement Agreement, Class Notice, Plan of Allocation, answers to frequently asked questions, and contact information for the Settlement Administrator.

8. As of the date of this Supplemental Declaration, the Settlement Website has tracked 1,190 unique users with 2,087 page views.

TOLL-FREE INFORMATION LINE

9. On June 13, 2022, JND established a case-specific toll-free number, 1-844-202-9489, for Settlement Class Members to call to obtain information regarding the Settlement. Callers have the option to listen to the Interactive Voice Response (“IVR”) system, or to speak with a live agent. The toll-free number is accessible 24 hours a day, seven days a week.

10. As of the date of this Supplemental Declaration, the toll-free number has received 19 incoming calls.

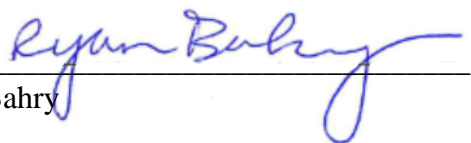
OBJECTIONS

11. The E-mail Notice and Class Notice informed recipients that any Class Member who wished to object to the proposed Settlement could do so by filing a written objection with the Court, postmarked on or before August 31, 2022.

12. As of the date of this Supplemental Declaration, JND has received one (1) objection from Class Member Matthew Ender (Newton, MA).

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed September 6, 2022 in Seattle, Washington.



Ryan Bahry

EXHIBIT 2



Updated Report of the Independent Fiduciary
for the Settlement in
Kristal M. Khan, et al. v. PTC Inc., et al.

August 26, 2022

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I. Introduction

Fiduciary Counselors has been appointed as an independent fiduciary for the PTC 401(k) Savings Plan (the “Plan”), in connection with the settlement (the “Settlement”) reached in *Kristal M. Khan, et al. v. PTC Inc., et al.*, Case 1:20-cv-11710-WGY, (the “Litigation” or “Action”), which was brought in the United States District Court for the District of Massachusetts (the “Court”). Fiduciary Counselors has reviewed over 100 previous settlements involving ERISA plans.

II. Executive Summary of Conclusions

After a review of key pleadings, decisions and orders, selected other materials and interviews with counsel for the parties, Fiduciary Counselors has determined that:

- The Court has preliminarily certified the Litigation as a class action for settlement purposes, and in any event, there is a genuine controversy involving the Plan.
- The Settlement terms, including the scope of the release of claims, the amount of cash received by the Plan and the amount of any attorneys’ fee award or any other sums to be paid from the recovery, are reasonable in light of the Plan’s likelihood of full recovery, the risks and costs of litigation, and the value of claims forgone.
- The terms and conditions of the transaction are no less favorable to the Plan than comparable arm’s-length terms and conditions that would have been agreed to by unrelated parties under similar circumstances.
- The transaction is not part of an agreement, arrangement or understanding designed to benefit a party in interest.
- The transaction is not described in Prohibited Transaction Exemption (“PTE”) 76-1.
- All terms of the Settlement are specifically described in the written settlement agreement and the plan of allocation.
- To the extent there is non-cash consideration, it is in the interest of Plan participants and beneficiaries, and the Plan is receiving no assets other than cash in the Settlement.

Based on these determinations about the Settlement, Fiduciary Counselors hereby approves and authorizes the Settlement on behalf of the Plan in accordance with PTE 2003-39.

III. Procedure

Fiduciary Counselors reviewed key documents, including the Complaint, the Motions to Dismiss, the Court’s Orders denying Defendants’ Motion to Dismiss for Lack of Subject Matter Jurisdiction and granting in part and denying in part Defendant’s Motion to Dismiss for Failure to State a Claim, the Motion for Class Certification, the Settlement Agreement, the Plan of

Allocation, the parties' Mediation Statements, the Motion for Preliminary Approval and related papers, the Court's Order Preliminarily Approving Settlement, the Notice, the Motion for an Award of Attorneys' Fees and Reimbursement of Expenses and Case Contribution Awards for the Named Plaintiffs and related papers, the Motion for Final Approval of Class Settlement and related papers, and a joint motion to substitute a revised proposed final approval order, with related papers. In order to help assess the strengths and weaknesses of the claims and defenses in the Litigation, as well as the process leading to the Settlement, the members of the Fiduciary Counselors Litigation Committee conducted separate telephone interviews with counsel for both Defendants and the Plaintiffs.

IV. Background

A. Procedural History of Case

Litigation.

Plaintiffs Kristal M. Khan, Michelle R. Ballinger, and George A. Craan (collectively, "Plaintiffs"), filed the Complaint against Defendants PTC Inc. ("PTC"), The Board of Directors of PTC Inc. (the "Board"), and The Investment Committee of PTC Inc. and its members (collectively, "Defendants") on September 17, 2020. The Complaint alleged Defendants breached their fiduciary duties under the Employee Retirement Income Security Act of 1974 ("ERISA") by failing to prudently manage the Plan. Plaintiffs' claims fell under five theories of liability. The first two theories were that Defendants failed to investigate and select lower cost alternative funds and utilize lower cost passively managed and actively managed funds. The third theory was that during the Class Period, several of the funds in the Plan had identical lower share counterparts that were never selected by the Plan's fiduciaries. The fourth theory was that Defendants caused Plan participants to over-pay for recordkeeping and administrative services. The fifth theory was that PTC and the Board failed to monitor the Plan's other fiduciaries. Defendants strongly dispute Plaintiffs' allegations, maintain that the Plan has been prudently managed throughout the relevant period, and deny liability for the alleged ERISA violations.

On January 15, 2021, Defendants filed their Motion to Dismiss Plaintiffs' Complaint For Failure to State A Claim Upon Which Relief Can Be Granted. On January 15, 2021, Defendants also filed their Motion to Dismiss Plaintiffs' Complaint For Lack of Subject-Matter Jurisdiction Under FED. R. CIV. P. 12(b)(1). On February 12, 2021, Plaintiffs filed their Memorandum of Law In Opposition to Defendants' Motion to Dismiss Pursuant to FED. R. CIV. P. 12(b)(1). On February 12, 2021, Plaintiffs also filed their Memorandum of Law In Opposition to Defendants' Motion to Dismiss For Failure to State A Claim Upon Which Relief Can Be Granted. Defendants filed a Reply Brief In Support of Defendants' Motion to Dismiss Pursuant to FED. R. CIV. P. 12(b)(6) on March 12, 2021. Defendants also filed a Reply Brief In Support of Defendants' Motion to Dismiss Pursuant to FED. R. CIV. P. 12(b)(1) on March 12, 2021. The parties presented before the Court for oral argument on Defendants' motions on March 31, 2021. On April 6, 2021, the Court entered an Order granting in part and denying in part Defendants'

Motion to Dismiss for Failure to State A Claim. The Court dismissed Plaintiffs' breaches of fiduciary duties of loyalty and prudence claims with respect to Plaintiffs' first two theories -- Defendants' failure to investigate and select lower cost alternative funds and utilize lower cost passively managed and actively managed funds. On April 20, 2021, the Court entered a Memorandum & Order denying Defendants' motion to dismiss for lack of subject matter jurisdiction. On May 4, 2021, Defendants filed their Answer and Defenses to Plaintiffs' Complaint. Plaintiffs filed their Motion for Class Certification on August 16, 2021.

On August 25, 2021, the parties agreed to participate in settlement discussions and filed a Joint Motion for Stay Pending Settlement Discussions. The Court entered an order administratively closing the action on September 8, 2021.

While the parties agreed to participate in private mediation prior to engaging in the exchange of formal discovery, prior to filing suit, Plaintiffs requested numerous documents and information from Defendants pursuant to Section 104(b)(4) of ERISA. In response to Plaintiffs' request, Defendants produced numerous responsive documents. Prior to the Mediation, the parties drafted detailed mediation statements.

Settlement and Preliminary Approval.

On September 21, 2021, the parties participated in a mediation before Hunter R. Hughes, III, a neutral, third-party private mediator with experience mediating ERISA class actions. Following a full day of mediation, the parties arrived at a settlement in principle. Several weeks of negotiations followed to finalize the terms of the Settlement Agreement, which was executed on December 17, 2021.

Plaintiffs filed a motion seeking preliminary approval of the Settlement on December 21, 2021. The Court granted Plaintiffs' motion on May 20, 2022. The Court's Order: (1) preliminarily certified the class for settlement purposes; (2) approved the form and method of class notice; (3) set September 14, 2022 as the date for a Fairness Hearing; and (4) set August 31, 2022 as the deadline for objections.

On August 23, 2022, the parties filed a joint motion to substitute a revised proposed Final Order with revisions (1) addressing a concern the Department of Labor had raised regarding the definition of Released Claims; and (2) explicitly conforming the definition of Class and Class Period to the one in the preliminary approval order. The Court granted the motion on August 24, 2022.

Objections.

August 31, 2022 is the deadline for Class Members to file objections to the Settlement. As of the date of this report, one Class Member filed an objection challenging the attorneys' fees filed on March 2, 2021. The objection was filed by Mathew Ender, a potential class member, who states, among other things: "Though I have not spent so much time on this matter as any of the principals, it is my considered opinion that this

case is without merit, and I and the other Class Members were not harmed as stated.” He objects to the Settlement and requests that it be reduced or denied. He also seeks for the Court to “severely limit the Class Counsel’s award.”

In essence, Mr. Ender is asking the Court to deny approval of the Settlement and to reduce attorneys’ fees because the Settlement is too favorable to Class Members. We do not believe this objection provides substantial grounds to the Court to find against final approval of the Settlement or of the attorneys’ fees, expenses or Case Contribution Awards for the three Class Representatives.

V. Settlement

A. Settlement Consideration

The Settlement provides for a Settlement Amount of \$1,725,000. After deducting (a) all attorneys’ fees and costs paid to Class Counsel as authorized by the Court; (b) all case contribution awards as authorized by the Court; (c) all administrative expenses; and (d) a contingency reserve not to exceed an amount to be mutually agreed upon by the settling parties that is set aside by the Settlement Administrator for (1) administrative expenses incurred before the Settlement Effective Date but not yet paid, (2) administrative expenses estimated to be incurred after the Settlement Effective Date, and (3) an amount estimated for adjustments of data or calculation errors, the remainder (known as the “Net Settlement Fund”) will be distributed to the Class Members in accordance with the Plan of Allocation.

The Settlement also provides for prospective relief. PTC agreed, within a reasonable period after the Settlement Effective Date (i.e., up to 18 months from the Settlement Effective Date), to conduct or cause to be conducted a request for proposal relating to the Plan’s recordkeeping and administrative services, if the Plan’s fiduciaries have not already done so.

Class and Class Period

As provided in the amended proposed Final Order, the Settlement will define the Settlement Class and Class Period in the same manner as in the Order granting preliminary approval, as follows:

All persons who participated in the Plan at any time during the Class Period (September 17, 2014, through May 20, 2022), including any Beneficiary of a deceased Person who participated in the Plan at any time during the Class Period, and any Alternate Payee of a Person subject to a QDRO who participated in the Plan at any time during the Class Period. Excluded from the Settlement Class are Defendants and their Beneficiaries.

The Court has preliminarily certified the Settlement Class, for settlement purposes only.

B. The Release

The Settlement defines Released Claims as follows:

any and all¹ actual or potential claims (including claims for any and all losses, damages, unjust enrichment, attorneys' fees, disgorgement, litigation costs, injunction, declaration, contribution, indemnification or any other type or nature of legal or equitable relief), actions, demands, rights, obligations, liabilities, expenses, costs, and causes of action, accrued or not, whether arising under federal, state, or local law, whether by statute, contract, or equity, whether brought in an individual or representative capacity, whether accrued or not, whether known or unknown, suspected or unsuspected, foreseen or unforeseen based in whole or in part on acts or failures to act through the end of the Class Period:

1. That were asserted in the Class Action, or that arise out of, relate to, or are based on any of the allegations, acts, omissions, facts, matters, transactions, or occurrences that were alleged, or could have been alleged, in the operative Complaint filed in the Class Action; and/or
2. That arise out of, relate in any way to, are based on, or have any connection with (a) the selection, oversight, retention, monitoring, compensation, fees, or performance of the Plan's investment options or service providers; (b) disclosures or failures to disclose information regarding the Plan's investment options, fees, or service providers; (c) the management, oversight or administration of the Plan or its fiduciaries; (d) the use of Plan-related information by any of the Plan's service providers, including in marketing and selling investment and wealth management products to the Plan's participants; or (e) alleged breach of the duty of loyalty, care, prudence, diversification, or any other fiduciary duties or prohibited transactions under ERISA; or
3. That would be barred by *res judicata* based on entry of the Final Order; or
4. That relate to the direction to calculate, the calculation of, and/or the method or manner of allocation of the Qualified Settlement Fund to the Plan or any Class Member in accordance with the Plan of Allocation; or

¹The original Settlement Agreement included the phrase "past, present, and future" after "any and all." Following preliminary approval of the Settlement Agreement, the Parties were contacted by the Department of Labor ("DOL"), which asked the parties to consider deleting the phrase "past, present, and future" from the definition of Released Claims in order to clarify that "Released Claims" does not include "future" claims. It was not the intention of the parties to include "future" claims as part of the Released Claims and do not read the Settlement Agreement as releasing "future" claims given that all released claims are tied to occurrences during the defined Class Period. Nonetheless, for the sake of clarity, and to eliminate all doubt as to the scope of released claims, the parties agreed to eliminate the phrase "all past, present, and future" from the definition of "Released Claims." The parties proposed no other changes to the definition of "Released Claims." Given the nature of changes to the Released Claims, the parties believe incorporating the changes in the Final Order and Judgment would be sufficient. In filing their motion for final approval of the settlement, Plaintiffs inadvertently failed to submit the proposed revised Final Order or address the reasons for the change. Accordingly, the parties filed a joint motion to substitute a revised proposed Final Order making the change. The Court granted the motion.

5. That relate to the approval by the Independent Fiduciary of the Settlement, unless brought against the Independent Fiduciary alone.

The Class Representatives, Class Members, and the Plan expressly waive and relinquish, to the fullest extent permitted by law, any and all provisions, rights, and benefits conferred by Section 1542 of the California Civil Code, which provides that a “general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor,” and any similar state, federal or other law, rule or regulation or principle of common law of any domestic governmental entity.

“Released Claims” does not include any claims unrelated to this Settlement that the Class Representatives or the Settlement Class may have to the value of their respective vested account balances under the terms of the Plan and according to the Plan’s records as of the date the Settlement becomes final.

The terms of the release, including the provision for the Independent Fiduciary to provide a release of claims by the Plan, are reasonable.

C. The Plan of Allocation

The Net Settlement Amount will be allocated as follows:

1. Calculate the sum of each Class Member’s account balances for each year of the Class Period based on the data as of December 31, 2014 and on December 31 of each subsequent year of the Class Period up to and including 2020. For 2021, September 30, 2021 will be used. This amount shall be that Class Member’s “Balance.”
2. Sum the Balance for all Class Members.
3. Allocate each Class Member a share of the Net Settlement Amount in proportion to the sum of that Class Member’s Balance as compared to the sum of the Balance for all Class Members, i.e. where the numerator is the Class Member’s Balance and the denominator is the sum of all Class Members’ Balances.

The amounts resulting from this initial calculation will be known as the Preliminary Entitlement Amount. Class Members who are entitled to a distribution of less than \$10.00 will receive a distribution of \$10.00 (the “De Minimis Amount”) from the Net Settlement Amount. The Settlement Administrator will progressively increase Class Members’ awards falling below the De Minimis Amount until the lowest participating Class Member award is the De Minimis Amount, i.e. \$10.00. The resulting calculation will be the “Final Entitlement Amount” for each Settlement Class Member. The sum of the Final Entitlement Amount for each remaining Settlement Class Member must equal the dollar amount of the Net Settlement Amount. For Class Members with an Active Account (an account with a positive balance) as of September 30, 2021, each Class

Member's Final Entitlement Amount will be allocated into their Plan account (unless that Plan account has been closed in the intervening period, in which case that Class Member will receive their allocation via check). The deposited amount will be invested by the recordkeeper pursuant to the Settlement Class Member's investment elections on file for new contributions. If the Class Member has no election on file, it will be invested in any default investment option(s) designated by the Plan, and if the Plan has not designated any default investment option(s), in a target date fund commensurate with the Class Member's retirement age or similar fund under the Plan.

Former Participants (members of the Settlement Class who do not have an Active Account as of September 30, 2021) will be paid directly by the Settlement Administrator by check. Checks issued to Former Participants will be valid for 180 days from the date of issue. No sooner than fourteen (14) calendar days following the expiration of all undeposited checks issued pursuant to this Plan of Allocation, any amount remaining in the Qualified Settlement Fund will be paid to the Plan for the purpose of defraying administrative fees and expenses of the Plan that would otherwise be charged to the Plan's participants. Unless otherwise expressly provided for in the Settlement Agreement, no part of the Settlement Fund may be used to reimburse any Defendant or otherwise offset costs, including Settlement-related costs, incurred by any Defendant.

We find the Plan of Allocation to be reasonable, including:

- (1) the pro rata distribution of funds based on average year-end account balances during the Class Period;
- (2) the \$10 De Minimis Amount; and
- (3) the provisions for payments into Plan accounts for Class Members with Active Accounts when possible and by check for Former Participants without Active Accounts.

The provisions are cost-effective and fair to Class Members in terms of both calculation and distribution.

D. Attorneys' Fees, Litigation Expenses and Service Awards

Class Counsel seek an award of attorneys' fees in the amount of \$575,000, which represents one-third of the Settlement Amount of \$1,725,000. Class Counsel's lodestar to date was \$280,369.50, which would produce a lodestar multiplier of 2.1 if the requested \$575,000 were awarded.

In our experience, the percentage requested and the lodestar multiplier are within the range of attorney fee awards for similar ERISA cases. In particular, an award of one third of the common fund is very common in ERISA cases. In light of the work performed, the result achieved, the litigation risk assumed by Class Counsel, and the combination of the percentage and the lodestar multiplier, Fiduciary Counselors finds the requested attorneys' fees to be reasonable.

Class Counsel also request reimbursement of \$15,204.37 in litigation costs, including mediator (\$10,000), e-discovery (\$1,438.44), travel expenses (\$1,200) and Westlaw research (\$1,003.33). Fiduciary Counselors finds the request for expenses to be reasonable.

Furthermore, Class Counsel seek Case Contribution Awards of \$10,000 to each of the three Named Plaintiffs for a total of \$30,000. They provided documents, reviewed the Complaint, and monitored Class Counsel and the progress of the litigation, including discussions about the terms of the Settlement. The total award sought for the three Named Plaintiffs is less than 2 percent of the total Settlement Amount. We believe the Case Contribution Awards are reasonable.

In sum, although the Court ultimately will decide what fees and case contribution awards to approve, we find that the requested amounts are reasonable under ERISA.

VI. PTE 2003-39 Determination

As required by PTE 2003-39, Fiduciary Counselors has determined that:

- **The Court has preliminarily certified the Litigation as a class action for settlement purposes only.** Thus, the requirement of a determination by counsel regarding the existence of a genuine controversy does not apply. Nevertheless, we have determined that there is a genuine controversy involving the Plan. Based on the documents we reviewed and our calls with counsel, we find that there is a genuine controversy involving the Plan within the meaning of the Department of Labor Class Exemption, which the Settlement will resolve.
- **The Settlement terms, including the scope of the release of claims, the amount of cash received by the Plan, and the amount of any attorneys' fee award or any other sums to be paid from the recovery, are reasonable in light of the Plan's likelihood of full recovery, the risks and costs of litigation, and the value of claims foregone.** At the time the parties agreed to the Settlement, the Court had dismissed claims based on Plaintiffs' first two theories – Defendants' failure to investigate and select lower cost alternative funds and to utilize lower cost passively managed and actively managed funds. That decision left two theories of primary violations and the related failure to monitor claim. The first remaining primary violation theory was that throughout the putative Class Period, Defendants selected a slate of investment options for the Plan that were imprudent due to their high fees where identical or nearly identical alternative funds – differing only in price – were available in the marketplace. Plaintiffs alleged had there been a prudent process in place, the majority of these funds would have been replaced with less expensive alternatives as early as the beginning of the Class Period. The second remaining primary violation theory was that the Plan suffered millions of dollars in damages due to unreasonably high recordkeeping fees that ranged from \$292.27 to \$380.22 per participant annually when a reasonable amount should have been much less. These claims overlap because Defendants used revenue sharing from the higher-cost share classes of Plan funds to pay for the Plan's recordkeeping. Defendants strongly

dispute Plaintiffs' allegations, maintain that the Plan has been prudently managed throughout the relevant period, and deny all liability for the alleged ERISA violations.

Plaintiffs faced challenges in continuing the Action. In their papers in support of Final Approval, Class Counsel noted that to prevail on the breach of prudence claims, Plaintiff must prove that Defendants' process for monitoring Plan options was "tainted by failure of effort, competence or loyalty." *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 596 (8th Cir. 2009). Plaintiffs would proffer their liability and damages experts, which would undoubtedly be countered by Defendants' proffered experts on both liability and damages. Even if Plaintiffs can establish a fiduciary breach, which defendants dispute, calculation of ERISA damages is "complex, time-consuming and expensive." *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 460 (S.D.N.Y. 2004). The process can have unexpected results, and the parties' assessments of the damages would no doubt vary greatly. Indeed, a battle of experts would likely ensue, which each side presenting differing damages calculations, and the factfinder "would therefore be faced with competing expert opinions representing very different damage estimates[,] . . . adding further uncertainty." *In re: Rent-Way Sec. Litig.*, 305 F. Supp. 2d 491, 506 (W.D. Pa. 2003). Class Counsel concluded that if Plaintiffs were unsuccessful in proving any of their claims at trial, the recovery could be diminished or lost.

Although the Court denied in part Defendants' motion to dismiss, its ruling underscores the risks Plaintiffs face:

I want to say to the Plaintiffs here . . . I think this is very thin. Yes, you've just passed the motion to dismiss . . . This may well be vulnerable, and I express no opinion, to a well-crafted motion for summary judgment, because almost every point [Defendants' counsel] makes . . . resonates with this Court, and more than that I think it makes sense.

Continued litigation would have likely resulted in appeals, causing more expense and further delaying resolution. Instead of a drawn-out period of costly litigation, with a risk of no recovery, class members will receive a certain benefit now.

The size of the Settlement is \$1,725,000, a fair and reasonable recovery given the results in numerous similar cases in the last several years, the defenses the Defendants would have asserted, the risks involved in proceeding to trial, and the possibility of reversal on appeal of any favorable judgment. Plaintiffs determined maximum potential damages to the Plan to be \$2.9 million before calculation of prejudgment interest. This damages amount reflects damages related to Plaintiffs' remaining claims. This assumes a reasonable per participant annual recordkeeping rate of \$35. The Settlement Amount represents approximately 59% of the estimated damages put forth by Plaintiffs.

Given the substantial expense and risk involved in further litigation, the difficulty in prevailing on the merits and establishing damages, and the delay that would have resulted in providing any relief to the Class if the matter had been prolonged through trial and appeal, the amount of the Settlement is reasonable.

Fiduciary Counselors also finds the other terms of the Settlement to be reasonable, including the scope of the release, attorneys' fees, the requested Case Contribution Awards to the Class Representatives, and the Plan of Allocation.

- **The terms and conditions of the transaction are no less favorable to the Plan than comparable arm's-length terms and conditions that would have been agreed to by unrelated parties under similar circumstances.** As indicated in the finding above, Fiduciary Counselors determined that Class Counsel obtained a favorable agreement from Defendants in light of the challenges in proving the underlying claims. The agreement also was reached after arm's-length negotiations supervised by mediator Hunter R. Hughes, III.
- **The transaction is not part of an agreement, arrangement or understanding designed to benefit a party in interest.** Fiduciary Counselors found no indication the Settlement is part of any broader agreement between Defendants and the Plan.
- **The transaction is not described in PTE 76-1.** The Settlement did not relate to delinquent employer contributions to multiple employer plans and multiple employer collectively bargained plans, the subject of PTE 76-1.
- **All terms of the Settlement are specifically described in the written settlement agreement and the plan of allocation.**
- **To the extent there is non-cash consideration, it is in the interest of Plan participants and beneficiaries, and the Plan is receiving no assets other than cash in the Settlement.** In addition to paying the \$1,725,000 Settlement Amount, Defendants have agreed to additional prospective relief as described in Section V.A. above and as specifically described in the Settlement. Including prospective relief that addresses the concerns underlying the Litigation is reasonable and in the interest of Plan participants and beneficiaries. The non-cash consideration does not include non-cash assets, so the requirements related to non-cash assets do not apply.
- **Acknowledgement of fiduciary status.** Fiduciary Counselors has acknowledged in its engagement that it is a fiduciary with respect to the settlement of the Litigation on behalf of the Plan.
- **Recordkeeping.** Fiduciary Counselors will keep records related to this decision and make them available for inspection by the Plan's participants and beneficiaries as required by PTE 2003-39.
- **Fiduciary Counselors' independence.** Fiduciary Counselors has no relationship to, or interest in, any of the parties involved in the litigation, other than the Plan, that might affect the exercise of our best judgment as a fiduciary.

Based on these determinations about the Settlement, Fiduciary Counselors (i) authorizes the Settlement in accordance with PTE 2003-39; and (ii) gives a release in its capacity as a fiduciary of the Plan, for and on behalf of the Plan. Fiduciary Counselors also has determined not to object to any aspect of the Settlement.

Sincerely,

A handwritten signature in dark ink that reads "Stephen Caflisch". The signature is written in a cursive style with a large, prominent "S" and "C".

Stephen Caflisch

Senior Vice President & General Counsel

