UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

VALESKA SCHULTZ, *et al*.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Cause No. 4:16-cv-1346-JAR
	)	
EDWARD D. JONES & CO., L.P., *et al*.,	)	
	)	
Defendants.	)	

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT, PRELIMINARY CERTIFICATION OF SETTLEMENT CLASS, APPOINTMENT OF CLASS COUNSEL,
APPROVAL OF CLASS NOTICE AND SCHEDULING OF FAIRNESS HEARING

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Plaintiffs Valeska Schultz, Melanie Waugh and Rosalind Staley (collectively, "Plaintiffs") submit this Memorandum of Law in support of their Motion for Preliminary Approval of a Settlement that the parties have reached in this class action. Plaintiffs seek an Order: (1) preliminarily approving to the Settlement under FED. R. CIV. P. 23(e); (2) preliminarily certifying the below-defined Class; (3) appointing Plaintiffs' Counsel as Class Counsel under FED. R. CIV. P. 23(g); (4) approving the manner of notifying the Class of the Settlement; and (5) setting a date for a Fairness Hearing.

I. INTRODUCTION

Plaintiffs brought this case under ERISA to challenge the decisions that Defendants made concerning Edward Jones' 401(k) plan (the "Plan"). Plaintiffs alleged that Defendants chose investment funds that the Plan offered based on whether Edward Jones had a corporate relationship with the fund's provider, not whether the fund was a prudent investment option. Plaintiffs also alleged that Defendants also caused Plan participants to pay excessive recordkeeping fees.

After more than two years of litigation, multiple motions and the review of more than 100,000 pages of documents exchanged in discovery, Plaintiffs and Defendants have agreed to settle the claims in the First Amended Complaint on a class-wide basis in exchange for $3.175 million and the releases contained in the settlement agreement.

The Settlement is a fair, reasonable and adequate resolution of the proposed Class's claims and should be preliminarily approved under Rule 23(e). In particular, the Settlement represents more than 50% of the Class's potential damages and eliminates the numerous, substantial risks, expenses and potential delays that would lay ahead if they continued prosecuting this case. The Settlement, negotiated at arms-length by experienced counsel on both sides, is an excellent result and in Class members' best interests.

The Court should also preliminarily certify the proposed Settlement Class, which consists of Plan participants from 2010 to the present. Plaintiffs meet all of Rule 23's requirements for class certification and their claims, brought on behalf of the Plan under ERISA §§ 409 and 502, affect all Plan participants and challenge Defendants' Plan-wide conduct, are well-suited for certification. Plaintiffs' Counsel, well experienced litigators in ERISA class litigation, should be appointed as Class Counsel. Lastly, Plaintiffs ask the Court to approve the proposed Notice to the members of the Class and schedule a Fairness Hearing.

II. SUMMARY OF CLAIMS

Plaintiffs, individually and as representatives of a putative class, brought the Action in their capacities as participants in the Plan against Defendants. Plaintiffs allege that Defendants violated ERISA §§ 404 and 406, 29 U.S.C. §§ 1104, 1106, as further described below.

Plaintiffs were participants in the Plan during the proposed Class Period. The Plan's investment options consisted predominantly of mutual funds managed by "partners" and "preferred partners" of Edward Jones — investment management companies that worked closely with Edward Jones brokers and agents and paid revenue sharing to Edward Jones based on Edward Jones marketing their funds to Edward Jones clients. Plaintiffs claim the Defendants selected and retained certain Plan investment options because of Edward Jones' business relationships, not because the funds were prudent investment options. Plaintiffs allege there were superior, less expensive investment options available that Defendants should have chosen for the Plan. Doc. 58 at ¶¶ 35–97.

Plaintiffs contend that Edward Jones and its officers, employees, and subsidiaries did not operate the Plan for the exclusive benefit of Plan participants as ERISA requires, but instead as a way to further Edward Jones' business interests. Plaintiffs also allege that Defendants caused the Plan to pay excessive recordkeeping fees that harmed Plan participants. *Id.* at ¶¶ 98–114.

Defendants deny any such liability or wrongdoing

III. LITIGATION HISTORY AND SETTLEMENT NEGOTIATIONS.

A. The Action.

The Complaint in this case was filed on August 19, 2016, by Charlene McDonald. Doc. 1. The original defendants Edward Jones & Co., L.P., The Jones Financial Companies, L.L.L.P. and the Edward Jones Investment and Education Committee. *Id*. On October 12, 2016, Defendants moved to dismiss under FED. R. CIV. P. 12(b)(1) and (6), claiming that McDonald did not have standing to pursue claims regarding funds in which she did not invest and that she failed to state a claim for breach of fiduciary duty under ERISA as to the funds in which she did investment. Doc. 26, 27. On November 14, 2016, McDonald filed her Opposition to the motion to dismiss (Doc. 37) and Defendants filed a Reply on December 7, 2016 (Doc. 38). On January 26, 2017, the Court denied the motion to dismiss as to Edward Jones and the Committee but granted it as to The Jones Financial Companies, L.L.L.P. Doc. 43.

On February 1, 2017, a Consolidated Complaint was filed, including the claims of Valeska Schultz and Melanie Waugh, who had previously brought a similar case. Doc. 44. The Consolidated Complaint added the individual members of the Investment Committee as additional Defendants. *Id.* On March 31, 2017, Defendants moved to dismiss the Consolidated Complaint (Doc. 51), asserting that the Investment Committee was not responsible for selecting the Plan's recordkeeper. Doc. 52 at 11-12. Thereafter, with Defendants' consent (Doc. 56) and the Court's approval (Doc. 57), Plaintiffs filed an Amended Consolidated Complaint to add the Administrative Committee as a party, alleging that the Administrative Committee had "discretion and control over…the Plan's recordkeeping and administrative contracts." Doc. 58 at ¶ 20. On March 27, 2018, this Court denied Defendants' motion to dismiss, finding that the Plaintiffs pled plausible claims against the Administrative Committee. Doc. 71 at 6-8. Defendants answered on

April 10, 2018, denying all claims and asserting numerous defenses. Doc. 72.

The Court bifurcated class and merits discovery in its original Case Management Order. Doc. 44. In furtherance of their claims, Plaintiffs served two sets of document requests, two sets of interrogatories and a set of requests for admissions. Porter Decl. at ¶ 4. In response, Defendants produced over 22,000 documents that comprised more than 100,000 pages of material, including the minutes from Investment Committee and Administrative Committee meetings showing how Defendants selected and retained the Plan's investment options and chose the Plan's recordkeeper. *Id*. Plaintiffs also served a subpoena on Transamerica, the Plan's recordkeeper, to obtain the trading records showing how Plan participants bought and sold the funds that Plaintiffs allege were imprudent in order to calculate the Plan's damages. *Id*. at ¶ 5. Transamerica produced over 300 documents comprising more than 2,500 pages of material in response. *Id*.

B. Settlement Negotiations.

In June 2018, the Parties began discussing a potential settlement. Counsel for Plaintiffs and Defendants had extensive telephonic and e-mail discussions concerning settlement, and met for face to face negotiations on June 6 and August 21. On September 13, 2018, the Court entered an order that stayed this case for 90 days while the Parties continued to negotiate a settlement. Doc. 92. On December 11, 2018, the Parties agreed to the Settlement.

IV. THE SETTLEMENT AGREEMENT.

A. The Settlement Fund.

The Settlement resolves all claims of current and former participants in the Plan since January 1, 2010. Settlement at §§ 2.2, 5.1 and 5.2. To effectuate the Settlement, Defendants have agreed not to oppose the certification of the "Settlement Class," defined as:

All current and former participants in the Plan who maintained a balance of any

amount in the Plan at any point during the period from January 1, 2010 to the date of the entry of the Preliminary Approval Order.

Settlement at § 2.2. The individual defendants in this case are excluded from the Class. *Id*.

Under the Settlement, Defendants will contribute $3.175 million to the Settlement Fund. Settlement at § 3.1. The Settlement Fund will be used to pay the costs to administer the Settlement, to provide notice to Settlement Class members and to pay any attorneys' fees, expenses or Case Contribution Awards that the Court may order. Settlement at § 3.5, 7.1 and 7.2. The Settlement Fund will also be used to pay the costs of an independent fiduciary[1] to review the Settlement. Settlement at § 2.9.

After the payment of costs, expenses and fees described above, the Settlement Fund will be distributed to Class members. Settlement at § 3.2. Settlement Class members will not have to make a claim to receive their share of the Settlement Fund. The amount distributed to each Settlement Class member will be *pro rata*, based on account balances, a proxy for the alleged losses, as fully described in the Plan of Allocation attached to the Settlement Agreement. Settlement at Exhibit C. No payment to any Settlement Class member shall be smaller than ten dollars ($10.00). Any Settlement Class Member whose payment pursuant to Section 3.2(b) is less than ten dollars ($10.00) shall receive a payment of ten dollars ($10.00). Settlement at § 3.2(d).

As soon as practical after the Settlement's effective date, *i.e.*, 30 days after the Final Approval Order, the Settlement Administrator shall determine the eligibility for and disbursement amounts for each Class member and then make payments to Class members within ten (10) days. Settlement at §§ 1.13, 3.2(c).

Current participants will receive their share of the Settlement Fund through an electronic

[1] The expected cost of the Independent Fiduciary is $30,000.

distribution to their Plan account. Settlement at § 3.2(e). Former participants will receive a check mailed to their last known address that expires in ninety (90) days. Settlement at § 3.2(e). If any checks to former Plan participants are uncashed, the money will first be used to pay the costs associated with hiring the independent fiduciary if they exceed $50,000. Settlement at § 3.2(e). The remainder of the Settlement Fund, if any, will be distributed to the Plan to pay Plan expenses not currently paid by Edward Jones or Defendants. Settlement at § 3.2(e). None of the Settlement Fund will revert back to Edward Jones or the Defendants. Settlement at § 3.2(e).

B. Released Claims.

Plaintiffs and Settlement Class members will provide a release and covenant-to-not-to-sue to Defendants and the other Released Parties covering the claims that were or could have been asserted in the Action based on the facts alleged in any of the complaints filed in this case, including the First Amended Complaint (Doc. 58) and the proposed Second Amended Complaint (Doc. 78-2) or Defendants' defenses to the Plaintiffs' claims. Settlement at §§ 1.30, 5.1, 5.2. The release and covenant-not-to-sue in the Settlement does not encompass individual claims for vested benefits that are otherwise due under the terms of the Plan. Settlement at § 1.30.

C. Case Contribution Awards, Attorneys' Fees and Costs.

The Settlement provides that each Plaintiff may seek a Case Contribution Award not to exceed the amount of ten thousand dollars ($10,000.00) (the "Case Contribution Awards"). Settlement at § 7.1(a). The Settlement is not contingent upon the Court granting Plaintiffs' request for Case Contribution Awards. Settlement at § 7.1(b). Any Case Contribution Award approved by the Court will be paid from the Settlement Fund within thirty (30) days of the Settlement's effective date, *i.e.*, 60 days after the Final Approval Order. Settlement at § 7.1(a), 1.14.

The Settlement also provides that Class Counsel may seek an award of attorneys' fees not

to exceed one-third of the Settlement Fund, plus reimbursement of expenses not to exceed $50,000. Settlement at § 7.2(a).

D. Notice to Class Members.

All Settlement Class members are current or former participants of the Plan and many are current employees of Edward Jones. Settlement at § 2.2. Under the Settlement, Edward Jones (through the Plan's Recordkeeper, Transamerica) will provide the Settlement Administrator with the names and last known addresses of Class members to provide them with notice of the Settlement. Settlement at § 2.10. Class Members who currently have a balance in their Plan accounts and who have opted to receive Plan communications, such as their quarterly statements, from Transamerica by email will receive this notice by email to the same email address. *See* Rule 23(c)(2)(B) (class notice may be by electronic means). All others will receive mailed notice. Settlement at § 10(b). For undelivered or returned mail to Settlement Class Members, the Settlement Administrator will engage in standardized processes to identify and locate Settlement Class Members. Settlement at § 2.10(b).

The proposed Class Notice, Exhibit B to the Settlement, informs Class members about the Action, the class definition, the class claims, issues and defenses, that a class member may enter an appearance through an attorney if the member so desires, the terms of the Settlement, including the release and the binding effect of the settlement, and the procedures for objecting to the Settlement. Settlement at Exhibit B. In addition, the Settlement Administrator will establish a website containing the First Amended Consolidated Complaint, the Notice, the Settlement and other key documents in the case. Settlement at § 2.12.

V. THE COURT SHOULD PRELIMINARILY APPROVE THE SETTLEMENT.

A. Legal Standard.

A court's review of a proposed class action settlement is a two-step process. "At the first

stage, the parties submit the proposed settlement to the Court, which must make a 'preliminary fairness evaluation.'" *Adams v. Cradduck*, No. 5:13-cv-05075, 2016 WL 7664135, * 3 (W.D. Ark. Nov. 17, 2016) (internal citations omitted). Until recently, the standard for preliminary approval was whether a proposed settlement was "within the range of possible approval due to an absence of any glaring substantive or procedural deficiencies." *Martin v. Cargill, Inc.*, 295 F.R.D. 380, 383 (D. Minn. 2013).

The recent amendments to FED. R. CIV. P. 23(e) impose a slightly different standard. Effective December 1, 2018, for a court to preliminarily approve a settlement, the settling parties "must provide the court with information to enable it to determine whether to give notice of the proposal to the class." FED. R. CIV. P. 23(e). To order that notice should be given, the court must determine that it will likely be able to approve the settlement at the final approval stage. FED. R. CIV. P. 23(e)(1)(B).

To grant final approval, a court must determine that a settlement is "fair, reasonable and adequate." *In re Uponor, Inc.*, 716 F.3d 1057, 1063 (8th Cir. 2013). The Eighth Circuit directs courts to consider the following factors in evaluating if it should approve a class action settlement:

> (1) the merits of the plaintiff's case weighed against the terms of the settlement; (2) the defendant's financial condition; (3) the complexity and expense of further litigation; and (4) the amount of opposition to the settlement.

In re Wireless Tel. Fed. Cost Recovery Fees Litig., 396 F.3d 922, 932 (8th Cir. 2005). A district has broad discretion in assessing the weight and applicability of these factors. *Prof. Firefighters Ass'n of Omaha Local 385 v. Zalewski*, 678 F.3d 640, 645 (8th Cir. 2012). As set forth below, the Settlement is fair, reasonable and adequate and should be preliminarily approved.

B. The Court Will Be Able To Approve the Settlement Because It Is Fair, Reasonable and Adequate.

1. The Merits of the Case Weighed Against the Terms of the Settlement.

The merits of the Plaintiffs' case are the most important consideration in deciding whether a settlement is fair, reasonable, and adequate. *Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1150 (8th Cir. 1999). The first step is determining if a settlement is fair analyzing the strength of the plaintiff's case to establish the value of class members' claims. "This is not a simple mathematical exercise with definite outcomes; a 'high degree of precision cannot be expected in valuing a litigation.'" *Hashaw v. Department Stores Nat. Bank*, 182 F. Supp. 3d 935, 943 (D. Minn. 2016) (quoting *Synfuel Techs., Inc. v. DHL Express (USA), Inc.*, 463 F.3d 646, 653 (7th Cir. 2006)). Courts perform a "ballpark valuation." *Synfuel Techs.,* 463 F.3d at 463.

Here, the Settlement's value is $3.175 million, approximately 7.05% of the Class's maximum potential damages of $45 million. Porter Decl. at ¶ 10. This percentage, in and of itself, is reasonable and warrants preliminary approval. *See*, *e.g.*, *Newbridge Networks Sec. Litig*., No. 94-1678, 1998 WL 765724, at *2 (D.D.C. Oct. 23, 1998) ("an agreement that secures roughly six to twelve percent of a potential recovery … seems to be within the targeted range of reasonableness").

However, the Settlement likely represents a much higher percentage of the Plaintiffs' expected damages. The $45 million figure is based on comparing the funds Plaintiffs allege were imprudent to Vanguard Index Funds within the same Morningstar Categories as the challenged funds. Porter Decl. at ¶ 10. Plaintiffs performed this comparison because the underlying funds were classified as domestic equity stock funds. However, several of the challenged funds also invested in asset categories outside of their Morningstar Categories. *Id.* After adjusting benchmarks to account for this factor, the Class's expected damages would be reduced to $6

million. *Id*. Therefore, the Settlement represents over ***50%*** of the Class's expected damages if Plaintiffs prevailed at trial, a percentage that is very favorable to settlements in comparable cases. *See*, *e.g.*, *Meiners v. Wells Fargo & Co*., 898 F.3d 820, 823 (8th Cir. 2018) (affirming dismissal where plaintiff compared allegedly imprudent fund to a fund with a different asset allocation); *Urakchin v. Allianz Asset Mgmt. of Amer., L.P.*, No. 15-cv-1614, 2018 WL 3000490, * 4 (C.D. Cal. Feb. 6, 2018) (granting preliminary approval to settlement that represented between 25.5% of plaintiffs' losses) and Docket Entries 185 and 186 (final approval order and judgment of that settlement).

In considering the Settlement's fairness, a court must consider the challenges that plaintiffs would face in prevailing on their claims. *See*, *e.g.*, *Ramsey v. Sprint Comm. Co., L.P.*, No. 11-cv-3211, 2012 WL 6018154, at * 3 (D. Neb. Dec. 3, 2012). In doing so, court "does not try the case," but instead identifies the disputed factual and legal issues that make it less likely for the plaintiffs to receive a full recovery. *Id*. (citing *Grunin v. Int'l House of Pancakes*, 513 F.2d 114, 123 (8th Cir. 1975)). "If the plaintiff class faced a strong unlikelihood of success, or an initial defeat followed by another round at the appellate level, virtually any benefit inuring to the class would be better than the prospect of an ultimately unsuccessful litigation." *Ramsey*, 2012 WL 6108154, at * 3 (citing *DeBoer v. Mellon Mortg. Co.*, 64 F.3d 1171, 1177 (8th Cir. 1995)).

Here, Plaintiffs face significant hurdles to recovering their maximum damages, no matter what the figure. As an initial matter, their maximum damages figure is contingent on the Court certifying a class. While courts have certified classes in similar ERISA cases (*see*, *e.g.*, *Wildman v. American Century Services, LLC*, No. 4:16-cv-cv-737, 2017 WL 6045487 (W.D. Mo. Dec. 6, 2017)), class certification is not guaranteed. *See*, *e.g.*, *Powers v. Credit Mgmt. Servs.*, 776 F.3d 567, 570 (8th Cir. 2015) ("'Rigorous analysis is necessary" for a class to be certified).

Defendants would be expected to oppose class certification on a number of grounds, including a unique challenge to Rule 23(a)'s commonality and typicality requirements based on Edward Jones' unique partnership structure, a defense not raised in other ERISA cases.

Plaintiffs would also face challenges in proving their claims. Breach of fiduciary duty claims under ERISA depend on the process by which decisions were made rather than the results of those decisions. *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 595 (8th Cir. 2009). The Plan's investment decisions were made by the Committee. ECF 58 at ¶ 29. The meeting minutes from the Committee's meetings indicate that the Committee evaluated the Plan's options regularly and, at certain times, removed Partner or Preferred Partner products from the Plan's lineup. Porter Decl. at ¶ 6. The Committee, however, did not remove ***all*** allegedly imprudent funds and often replaced the ones it removed with other Partner or Preferred Partner products. And, Plaintiffs maintain, the Committee's selection and removal process was tainted by disloyalty and its members' desire to benefit Edward Jones' corporate relationships. These disputed issues support the Settlement's approval. *See*, *e.g.*, *Cooper v. Integrity Home Care, Inc.*, No. 16-v-1293, 2018 WL 3468372, at * 2 (W.D. Mo. July 18, 2018) ("A settlement is bona fide if it reflects a reasonable compromise over issues actually in dispute.").

If Plaintiffs established that Defendants breached their fiduciary duty, proving damages would not be a given. Some funds in the Plan performed well during the proposed Class Period, outperforming their benchmarks and peer group, and even some of the funds Plaintiffs alleged were imprudent had particular years where they performed well. As set forth above, the $6 million damages amount was a "best case" scenario, a number that Defendants would try to minimize if not eliminate at the summary judgment stage or at trial. Albeit a decision on the pleading standard on a Rule 12(b)(6) motion, the Eighth Circuit's recent decision in *Meiners v.*

Wells Fargo & Co., 898 F.3d 820 (8th Cir. 2018) may also impact the benchmarks that Plaintiffs could use for their damages calculation. *Meiners*, 898 F.3d at 823-24.

The proposed Settlement here is the result of lengthy, contentious and complex arms-length negotiations between the parties. Counsel on both sides are experienced and thoroughly familiar with the factual and legal issues presented. Class Counsel is very experienced in class action litigation generally and, in particular, class litigation under ERISA.

2. Defendant's Financial Condition.

Edward Jones is a multi-billion company with enough assets to pay the Settlement. And, Plaintiffs did not discount the amount of the Settlement based on Edward Jones' ability to pay. Porter Decl. at ¶ 8. This supports the Court's preliminary approval of the Settlement. *See*, *e.g.*, *Cooper*, 2018 WL 3468372, at * 4; *In re Wireless Tel. Fed. Cost Recovery Fees Litig*., 396 F.3d at 933 (affirming approval of settlement because "there is no indication that (defendant's) financial condition would prevent it from raising the settlement amount.").

3. Complexity and Expense of Further Litigation.

"The possible length and complexity of further litigation is a relevant consideration to the trial court in determining whether a class action settlement should be approved." *In re Charter Communc'ns*, No. 02-cv-1186, 2005 WL 4045741, at * 8 (E.D. Mo. June 30, 2005). This factor supports the Settlement's approval.

As detailed above, this case would involve additional motions relating to class certification and then proceed into merits discovery, and summary judgment, as well as a trial and a possible appeal. Each stage will take time and, importantly, present additional risks that the Plaintiffs and Class members will receive less than the $3.175 million that they are now being offered.

The Settlement provides money to the Class ***now***, instead of years in the future ***if*** the Plaintiffs prevail on their claims. Courts have repeatedly recognized that ERISA 401(k) cases "often lead [] to lengthy litigation." *Krueger v. Ameriprise*, No. 11-cv-2781, 2015 WL 4246879, at * 1 (D. Minn. July 13, 2015). It is not unusual for ERISA fee cases to last for a decade or longer. *See*, *e.g.*, *Tussey v. ABB, Inc.*, No. 06-cv-4305, 2017 WL 6343803, at * 3 (W.D. Mo. Dec. 12, 2017) (requesting proposed findings on amount of damages more than 10 years after the suit was filed); *Tibble v. Edison Int'l*, No. 07-cv-5359, 2017 WL 3523727, at * 15 (C.D. Cal. Aug. 16, 2017) (outlining issues for trial in a case filed in 2007). The potential for protracted litigation supports the Settlement's approval. *See also Cullan and Cullan LLC v. M-Qube, Inc.,* No. 8:13-cv-172, 2016 WL 5394684, * 7 (D. Neb. Sept. 27, 2016) (approving settlement because it provided "a real and substantial remedy without the risk and delay inherent in prosecuting this matter through trial and appeal…").

Plaintiffs would also incur considerable expenses if this case continued. To prove their claims, Plaintiffs would need to depose several Committee members and Edward Jones employees. These depositions, including the costs of transcripts and travel, would be expensive and reduce the net amount of Class's recovery. *Kruger v. Novant Health, Inc.*, No. 14-cv-208, 2016 WL 6769066, at * 5 (M.D.N.C. Sept. 29, 2016) (granting final approval, noting that "early settlement of a 401(k) excessive fee case benefits the employees and retirees in multiple ways.").

In addition, Plaintiffs would incur expenses related to expert testimony, as they would need experts on: (a) what is a prudent process for an ERISA fiduciary; (b) what are comparable funds to the ones Plaintiffs allege are imprudent; (c) what are reasonable recordkeeping charges for a 401(k) like the Plan; and (d) the amount of damages because of Defendants' fiduciary breaches. In *Urakchin*, a comparable case involving a mutual fund company's 401(k) plan which

settled at the conclusion of discovery, the plaintiffs incurred $591,000 in expenses. *Urakchin*, No. 15-cv-1614 (C.D. Cal. Feb. 6, 2018), Docket Entries 185 and 186 (final approval order and judgment of that settlement). If this case continued, Plaintiffs would incur comparable costs that would reduce the Class's recovery.

4. The Opposition to the Proposed Settlement.

This factor is more relevant at the final approval stage after Class members have been notified of the Settlement. *See*, *e.g.*, *Cooper*, 2018 WL 3468372, at * 4. Regardless, Plaintiffs are not aware of any Class member who intends to oppose the Settlement. Porter Decl. at ¶ 13.

C. The Settlement Does Not Have Any Substantive or Procedural Deficiencies.

A class action settlement is a private contract negotiated between the parties that is "presumptively valid." *In re Uponor, Inc., F1807 Plumbing Fittings Prod. Liab. Litig*., 716 F.3d 1057, 1063 (8th Cir. 2013) (internal quotations omitted). "Rule 23(e) requires the court to intrude on that private consensual agreement merely to ensure that the agreement is not the product of fraud or collusion…" *In re Wireless Tel. Fed. Cost Recovery Fees Litig*., 396 F.3d at 934. In doing so, courts look for "glaring substantive or procedural deficiencies" and consider whether the "settlement carries the hallmarks of collusive negotiation or uninformed decision-making, is unduly favorable to class representatives or certain class members, or excessively compensates attorneys." *Adams*, 2016 WL 7664135, * 3 (citing *Schoenbaum v. E.I. Dupont De Nemours and Co.*, No. 4:05-cv-1108, 2009 WL 4782082, * 3 (E.D. Mo. Dec. 8, 2009)).

The Settlement does not contain any deficiencies, glaring or otherwise. Substantively, in simplest terms, the Settlement provides Class members with money in exchange for a release and a covenant-not-to-sue. Settlement Agreement at § 1.30. The monetary amount of the Settlement is fair given the strength and risks associated with Plaintiffs' claims. And, the Settlement's release and covenant-not-to-sue clauses are limited to the claims that arise out of the allegations

in the First Amended Complaint. Settlement at § 1.30. Class members are not releasing their rights to vested benefits under the Plan, or any claims outside of the Plan that they may have against Edward Jones. *Id.* Class members are also not releasing or waiving any future claim that may arise over Defendants' future administration of the Plan.

The Settlement also does not unduly favor the Plaintiffs. Plaintiffs' shares of the Settlement will be based on the Plan of Allocation, a formula based on the losses to their Plan account. Settlement at Exhibit C. While Plaintiffs also intend to request Case Contribution Awards, the Settlement is not contingent on Plaintiffs receiving an award in a specified amount (*see* Settlement Agreement at § 7.2(b)) and the amount that Plaintiffs intend to request is consistent with the awards in other cases. *See*, *e.g.*, *Calogiuri v. Symantec Corp.*, 855 F.3d 860, 867 (8th Cir. 2017) (affirming decision to give case contribution awards of $10,000 to each of the plaintiffs); *see also Kruger*, 2016 WL 6769066, at * 6 (awarding class representatives $25,000 each for their contributions); *Adams v. Craddock*, 2016 WL 7664135, at * 6 (granting preliminary approval when "class counsel's compensation is not set by the settlement but will be determined by petition to the Court.").

Likewise, the Settlement does not excessively compensate Class Counsel. The amount of fees that Class Counsel intends to request, 1/3 of the Settlement, is reasonable and consistent with the awards in other ERISA cases. *Spano v. The Boeing Co.*, 2016 WL 3791123, *2 (S.D. Ill. Mar. 31, 2016) (collecting cases); *see also Denard v. Transamerica Corporation*, No. 15-cv-30, 2016 WL 3554978, at * 2 (N.D. Iowa June 24, 2016) (preliminarily approving settlement in ERISA class action where class counsel could seek fees of up to one third of the settlement fund); *Kruger*, 2016 WL 6769066 (approving attorneys fees of one third of the settlement fund in ERISA 401(k) fiduciary breach class action).

The Parties reached the Settlement in a procedurally fair manner. For this factor, courts consider the stage of proceedings and amount of discovery completed, the opinion of experienced counsel, and whether the settlement was negotiated at arm's length. *In re Wireless Tel. Fed. Cost Rec. Litig*., 396 F.3d at 934; *see also Adams*, 2016 WL 7664135, at * 3 ("[C]ourts should consider issues such as whether the settlement carries the hallmarks of collusive negotiation or uninformed decision-making…")

Class Counsel was fully aware of this case's strengths and weaknesses when negotiating the Settlement, which supports the Settlement's preliminary approval. *See*, *e.g.*, *Risch v. Natoli Engineering Co., LLC*, No. 11-cv-1621, 2012 WL 4357953, at * 3 (E.D. Mo. Sept. 24, 2012) (approving settlement when the parties engaged in "extensive fact discovery, exchanging and reviewing significant numbers of documents…[including] all documents necessary to evaluate the class claims and damages."); *King v. Ranieri Constr., LLC et al.*, No. 14-cv-1828, 2015 WL 631253, at * 3 (E.D. Mo. Feb. 12, 2015) (approving settlement when the "parties engaged in settlement negotiations and exchanged a large amount of documents and information for a month before submitting the proposed settlement.").

Class Counsel also has in-depth knowledge of the legal framework applicable to this case. Plaintiffs' attorneys have decades of experience prosecuting, settling, and trying ERISA cases on behalf of retirement plan participants, which they used to evaluate and negotiate the Settlement. Porter Decl. at ¶¶ 7–8. It is Class Counsel's opinion that the proposed Settlement is fair and reasonable, a factor which supports the Settlement's approval. *See*, *e.g.*, *Netzel v. West Shore Grp.*, No. 16-cv-2552, 2017 WL 1906955, at * 6 (D. Minn. May 8, 2017) (approving settlement when class counsel had "sufficient and extensive experience…").

Because the Settlement was negotiated by experienced counsel, there is a presumption

that it was "the product of arm's length negotiations." *Netzel*, 2017 WL 1906955, at * 6; *see also Bonetti v. Embarq Mgmt. Co.*, 715 F. Supp. 2d 1222, 1227 (M.D. Fla. 2009) ("If the parties are represented by competent counsel in an adversary context, the settlement they reach will, almost by definition, be reasonable."). The Settlement was also reached after many rounds of negotiation, which allowed Plaintiffs to increase the Settlement's monetary benefits. Porter Decl. at ¶ 9; *Cullan LLC v. M-Qube, Inc.,* No. 8:13-cv-172, 2016 WL 5394684, * 7 (D. Neb. Sept. 27, 2016) (approving settlement when it was negotiated "in several rounds of settlement negotiations" after "discovery targeted at information relevant to the settlement was collected and reviewed").

VI. THE COURT SHOULD PRELIMINARILY CERTIFY THE CLASS

For settlement purposes only, Plaintiffs seek certification of a Settlement Class compromised of:

> All Current and Former Participants in the Plan who maintained a balance of any amount in the Plan at any point during the period from January 1, 2010 to the date of entry of the Preliminary Approval Order.

Settlement at § 2.2. Defendants are excluded from the Settlement. *Id.* Plaintiffs' claims for breach of fiduciary duty under ERISA are well-suited for certification.

Class certification for settlement purposes under Rule 23 of the Federal Rules of Civil Procedure entails a two-step analysis. First, the Court must determine whether Rule 23(a)'s prerequisites are met, which are: (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy of representation. Next, the court must determine whether Plaintiffs have met the requirements of Rule 23(b). *See*, *e.g.*, *Wildman v. Amer. Cent. Serv., LLC*, No. 16-cv-737, 2017 WL 6045487, at * 2 (W.D. Mo. Dec. 6, 2017). Here, Plaintiffs satisfy the prerequisites of Rule 23(a) as well as the requirements of Rule 23(b)(1).

1. Rule 23(a)'s Requirements are Satisfied.

a) Numerosity.

Numerosity requires that the class be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). This threshold is easily met, as the Plan had 35,929 participants as of the end of 2014. Doc. 72 at ¶ 33; *Speer v. Cerner Corp.*, 2016 WL 5444648, at *5 (W.D. Mo. Sept. 27, 2016) (numerosity met when there were thousands of proposed class members). Accordingly, numerosity is satisfied.

b) Commonality.

In a defined contribution plan like the Plan, participants operate against a common background. The fiduciaries make decisions that affect the entire plan and its participants. The allegation that a fiduciary failed to satisfy its fiduciary duties when selecting investment options or defray expenses affects the plan as a whole, not just at the individual level.

Accordingly, "commonality is quite likely to be satisfied" for ERISA breach of fiduciary duty claims, like the ones made here. *In re Schering Plough Corp. ERISA Litig.*, 589 F.3d 585, 599 n.11 (3d Cir. 2009). Commonality is typically present in ERISA cases because the "appropriate focus … is the conduct of the defendants, not the plaintiffs." *In re Aquila ERISA Litigation,* 237 F.R.D. 202, 209 (W.D. Mo. 2006) (quoting *In re Williams Cos. ERISA Litig.*, 231 F.R.D. 416, 422 (N.D. Okla. 2005)).

This case is no different than *In re Aquila* and the many others that have found that commonality was met. Plaintiffs' claims center on the Defendants' selection and retention of investment funds for the Plan and their hiring of the Plan's recordkeeper. Defendants' actions affected the entire Plan, not just Plaintiffs' accounts. This satisfies commonality. *Kanawi v. Bechtel*, 254 F.R.D. 102, 109 (N.D. Cal. 2008) ("[T]he common focus is on the conduct of

Defendants: whether they breached their fiduciary duties to the Plan as a whole by paying excessive fees, [and] whether they made imprudent investment decisions.").

Plaintiffs must also show that at least one of the questions common to the class can be answered with a common answer, meaning "that determination of its truth or falsity will resolve *an* issue that is central to the validity of each one of the claims in one stroke." *Dukes v. Wal-Mart Stores, Inc.*, 131 S.Ct. 2541, 2551 (2011) (emphasis added). Here, there are several common questions in this case with respect to each Class member, including (1) whether Defendants were fiduciaries of the Plan; (2) whether Defendants breached their fiduciary duties to the Plan; (3) whether the Plan and its participants and beneficiaries were injured by Defendants' breaches; (4) whether the Class is entitled to damages; and (5) if so, the proper measure of damages. Commonality will not be defeated merely because there are some factual variations among the claims of the class members. Determining the truth or falsity of those questions "will resolve an issue that is central to the validity of each one of the claims in one stroke." *Dukes*, 131 S.Ct. at 2551.

These common questions and issues satisfy the requirement of Rule 23(a). *Krueger v. Ameriprise Fin., Inc.*, 304 F.R.D. 559, 572 (D. Minn. 2014) (certifying class because "the questions of whether Defendants breached their fiduciary duties by causing the Plan to select imprudent investment options … , and whether the Plan suffered losses from those breaches, are common to all Plan participants' claims[.]")*; Tussey*, 2007 WL 4289694, at *5 (certifying class "[b]ecause all members of the class are interested in these excess fees being returned to the Plan, there is clearly a common question …"); *In re Northrup Grumman Corp. ERISA Litig.*, No. 06-cv-6213, 2011 WL 3505264, at *8 (C.D. Cal. Mar. 29, 2011) (common questions included "whether the Plans' fees and expenses are reasonable; [and] whether the investment options

selected by Defendants have been prudent"); *Kanawi*, 254 F.R.D. at 109 (noting common questions regarding whether Defendants' selection of investments "was affected by serious and ongoing conflicts of interest"); *Tibble*, 2009 WL 6764541, at *3–4 (common issues included "[w]hether Defendants chose certain investment options in order to maximize the amount that Defendants could obtain from the mutual funds, rather than to maximize the return to the Plan participants").

c) Typicality.

The commonality and typicality requirements are "closely related." *Newman v. CheckRite Cal., Inc.*, 1996 WL 1118092, *5 (E.D. Cal. Aug. 2, 1996) (citing H. Newberg, *Class Actions,* § 3.13 (1977)). A finding of commonality often fulfills the typicality requirement as well. *See id.* Typicality requires that "the claims or defenses of the representative parties are typical" of those of the class. Fed. R. Civ. P. 23(a)(3). This requirement is "fairly easily met so long as other class members have claims similar to the named plaintiff." *DeBoer*, 64 F.3d at 1174; *Wildman*, 2017 WL 6045487 at *4. "[I]f the claim arises from the same event or course of conduct as the class claims, and gives rise to the same legal theory or remedial theory" individual factual variations will not normally defeat class certification. *Bradford*, 187 F.R.D. at 603 (citing *Donaldson v. Pillsbury Co.*, 554 F.2d 825, 831 (8th Cir. 1997)). This is especially true in ERISA cases where plaintiffs raise claims on behalf of the plan. *Tussey*, 2007 WL 4289694, at *3.

Plaintiffs' claims are typical of the class because they arise from Defendants' course of conduct that affected the entire Plan. Plaintiffs assert their claims on behalf of the Plan as a whole pursuant to 29 U.S.C. §§ 1109(a) and 1132(a). To the extent that Defendants breached their duty, it was breached with respect to the Plan as a whole. To the extent that Defendants lacked a prudent process for managing the Plan's investments, that process was defective for the Plan as a whole. Plaintiffs do not base their claims on any unique facts specific to themselves or

their particular investments. Plaintiffs' "claims are typical of those of the putative class members because all class members are participants in the Plan, and the alleged breaches of fiduciary duties were directed to the Plan rather than to individual participants." *Wildman*, 2017 WL 6045487 at *5; *see also Ameriprise*, 304 F.R.D. at 573. Thus, "typicality is satisfied." *Id.*

The Class can and should be certified so as to include the participants in the Plan during the class period because Plaintiffs allege all participants during the class period were harmed and, under the settlement, all are eligible to benefit. Accordingly, the Named Plaintiffs' claims with respect to these allegations are typical of the Class, and the requirement of Rule 23(a)(3) is met.[2]

d) Adequacy.

Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). To meet this requirement, Plaintiffs must demonstrate that (1) they "will vigorously prosecute the interest of the class through qualified counsel" and (2) they "have common interests with the members of the class." *Paxton v. Union Nat. Bank,* 688 F.2d 552, 562-563 (8th Cir. 1982). Both elements are satisfied here.

The Plaintiffs' claims and interests are aligned with those of the Class, as they are seeking to prove Defendants' liability based on common facts and claims and to maximize monetary recovery to the Plan and protect the Plan from excessive fees in the future. The interests of the Plaintiffs are not antagonistic to any class member. Since the damages and remedies for ERISA fiduciary breach and prohibited transaction claims all go to the Plan as a whole, to then be credited later to the accounts of individual participants, the named Plaintiffs

[2] Although not a requirement for class certification under Fed.R.Civ.P. 23, the class is clearly ascertainable here as it is defined by objective criteria — participation in the Plan during the defined class period. Defendants have lists of such people throughout the class period.

have the same interest as any Plan participant: specifically, recovering their share of Plan losses.

Moreover, no class members benefited from paying improper fees or from prohibited transactions using Plan assets, and no class member would be harmed by the relief. In any event, "the class representative represents the *legal* interest of the class." *Clark v. Duke Univ*., No. 16-1044, 2018 WL 1801946, *8 (M.D.N.C. Apr. 13, 2018) (emphasis in original). A class representative "has no duty to make all class members happy." *Id.* Accordingly, no conflict exists between the named representatives and the unnamed class members.

Plaintiffs' attorneys also meet Rule 23(a)'s adequacy requirement. They have diligently prosecuted this action, drafting a thorough Complaint after an extensive examination of the documents and legal framework and aggressively pursued Plaintiffs' claims, defeating Defendants' motion to dismiss and conducting discovery to support the claims. Class Counsel have and will fairly and adequately represent the class' interests.

As shown in their accompanying declaration of Gregory Porter and firm biographies of Class Counsel, Class Counsel are experienced in successfully handling ERISA class actions, and have litigated many class actions involving defined contribution retirement plans and investments, particularly those sponsored by financial services companies, including Citigroup, Franklin Templeton, and TIAA-CREF and have served or are serving as lead counsel or co-lead counsel for classes in numerous cases alleging breaches of ERISA by defendant fiduciaries. See, Declaration of Gregory Porter at Exhibits A–C. Each of these factors weigh in favor of a finding that Plaintiffs' proposed class counsel is adequate. *Ameriprise*, 304 F.R.D. at 574.

2. The Settlement Class satisfies the requirements of Rule 23(b).

Plaintiffs' claims should be certified under Rule 23(b)(1). That Rule provides for certification where:

> the prosecution of separate actions by … individual members of the class would create a risk of (A) inconsistent or varying adjudications … which would establish incompatible standards for the party opposing the class, or (B) adjudications with respect to the individual members of the class which would be dispositive of the interest of the other members not parties to the adjudications.

Fed. R. Civ. P. 23(b)(1)(A), (B). Rule 23(b)(1)(A) "considers possible prejudice to the defendants, while 23(b)(1)(B) looks to possible prejudice to the putative class members." *In re IKON Office Solutions*, 191 F.R.D. 457, 466 (E.D. Pa. 2000). In both cases, the court is concerned with the problems that would be caused if each potential class member were free to pursue his or her own lawsuit.

The Rule 23 Advisory Committee noted that "an action which charges a breach of trust … by [a] … fiduciary similarly affecting the members of a large class of … beneficiaries" calls for certification under this section. *See also Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 833-34 (1999) (citing same).

"[S]everal courts have held the type of ERISA claims for breach of fiduciary duty raised here are particularly appropriate for Rule 23(b)(1)(A) and (B) certification because of ERISA's distinctive 'representative capacity' and remedial provisions." *Paschal v. Child Dev., Inc.*, 2014 WL 112214, at *6 (E.D. Ark. Jan. 10, 2014); *see also Wildman*, 2017 WL 6045487, at *5–6; *Tussey*, 2007 WL 4289694, at *8. Indeed, "ERISA litigation of this nature presents a paradigmatic example of a (b)(1) class." *Jones*, 257 F.R.D. at 194 (citation and quotation marks omitted); *see also Ameriprise*, 304 F.R.D. at 576–78 (certifying class under prongs (A) and (B) in case involving similar claims against mutual fund company).

This action is no exception. Plaintiffs, and the members of the Class they seek to represent, are the participants of the Plan. They claim that the Defendants breached their ERISA-mandated fiduciary duties and they are bringing suit in a representative capacity to recover the Plan's losses arising out of the breaches. "In light of the derivative nature of ERISA §502(a)(2)

[29 U.S.C. §1132(a)(2)] claims, breach of fiduciary duty claims brought under §502(a)(2) are paradigmatic examples of claims appropriate for certification as a Rule 23(b)(1) class, as numerous courts have held." *In re Schering Plough Corp. ERISA Litig.*, 589 F.3d at 604.

This class can be certified under Rule 23(b)(1)(A) because, without question, "inconsistent or varying adjudications with respect to individual class members [] would establish incompatible standards of conduct for the party opposing the class." Fed. R. Civ. P. 23(b)(1)(A). The risk of establishing inconsistent standards under ERISA is particularly strong where, as here, the central element of the prudence claims is not individualized: the fiduciary duties are owed to, and carried out for, the plans.

Thus, a court adjudicating a suit by an individual plaintiff would determine the issues of the existence of the fiduciary duty and its breach not in relation to the individual plaintiff, but in relation to the entire plan since the fiduciaries' actions are taken as to the plan as a whole. The language of ERISA § 409 makes clear that the liability of the fiduciary is to the *plan*, and that a fiduciary found liable for damages due to a breach must reimburse the *plan*. Thus, as the Supreme Court stated: "Section 502(a)(2) provides for suits to enforce the liability-creating provisions of §409, concerning breaches of fiduciary duties that harm *plans." LaRue v. DeWolff, Bogerg & Assoc., Inc.,* 552 U.S. 248, 251, 128 S.Ct. 1020, 1023 (2008) (emphasis added). This produces not only a significant risk, but a near certainty that separate actions would establish differing standards for the duty under ERISA owed by a fiduciary to the Plan. The tremendous number of plan participants only enhances the likelihood of separate actions producing inconsistent and incompatible results.

Indeed, the very purpose of ERISA is to "provide a uniform regulatory regime over employee benefit plans." *Aetna Health Inc. v. Davila*, 542 U.S. 200, 208 (2004). As part of that

regime, ERISA requires that similarly situated plan participants be treated the same. *See, e.g.*, 29 C.F.R. § 2560.503-1(b)(5) (claims procedures regulation requiring that plan provisions be "applied consistently with respect to similarly situated claimants[.]"); *Elser v. I.A.M. Nat'l Pension Fund*, 684 F.2d 648 (9th Cir. 1982), *cert. denied*, 464 U.S. 813 (1983).

Likewise, affirmative remedies participants could seek in separate litigation, such as accounting and surcharge, could not be reconciled by transferring the assets of some participants into different plans that are created by litigation. Meanwhile, affirmative remedies negotiated for the Class benefit all participants, and those who might otherwise "opt-out" cannot be excluded from this relief and could, if they brought individual actions, obtain inconsistent relief (for example, by offering different investment options within the Plan).

Here, the Defendants have common fiduciary duties to all Plan participants. If Class members were required to bring (and could practically bring) separate, individual actions against Defendants regarding Defendants' identical actions, there very well could be inconsistent or varying adjudications that would establish incompatible standards of conduct for the Defendants. Indeed, if class certification is denied in this case, adjudication of the Plaintiffs' claims raise the specter of incompatible rulings. The amount of the payment, or the fact of whether an individual should be paid at all, may conflict if different courts calculate damages in different ways or if one court orders that no payment be made while another requires payment to a similarly situated participant. With respect to equitable relief, the conflict is even clearer. One court might order the removal of Plan fiduciaries while another holds they should remain. One court might order the removal of the preferred partner funds while this settlement expressly permits options to remain pending review by an independent consultant. Thus, "separate lawsuits by various individual Plan participants to vindicate the rights of the Plan could establish incompatible

standards to govern Defendants' conduct, such as … determinations of differing 'prudent alternatives' against which to measure the proprietary investments, or an order that Defendants be removed as fiduciaries." *Ameriprise*, 304 F.R.D. at 577. "In light of this risk, Plaintiffs have successfully satisfied the requirements of Rule 23(b)(1)(A)." *Kanawi*, 254 F.R.D. at 111.[3]

Class certification is also appropriate under Rule 23(b)(1)(B). *Jones*, 257 F.R.D. at 193 ("Several courts have certified classes alleging breaches of ERISA Fiduciary duties under Rule 23(b)(1)(B)"). Because this action is brought on behalf of the Plan, the present action "will influence a subsequent adjudication of the same claims brought by another participant and … could effectively dispose of the other participants' actions on behalf of the Plan." *Ameriprise*, 304 F.R.D. at 577. Moreover, because "plaintiffs' claims seek 'plan-wide relief, there is a risk that failure to certify the class would leave future plaintiffs without relief.'" *Zilhaver v. UnitedHealth Grp., Inc.*, 646 F. Supp. 2d 1075, 1081 (D. Minn. 2009) (quoting *Jones*, 257 F.R.D. at 193).

The Advisory Committee Notes to Rule 23 expressly recognize that class certification is appropriate under Rule 23(b)(1)(B) in an action that "charges a breach of trust by [a] … fiduciary similarly affecting the members of a large class of … beneficiaries, and which requires … measures to restore the subject of the trust." Fed. R. Civ. P. 23, Adv. Cmte. Note to Subd. (b)(1) Clause (B). "This case falls squarely within the meaning articulated by the Advisory Committee

[3] *See also Shanehchian v. Macy's, Inc.*, 2011 WL 883659, at *9 (S.D. Ohio Mar. 10, 2011) ("If liability is found in one court but not in another, Defendants would be left in limbo, having been vindicated with respect to their duties to the Plans in one court but subject to judgment that would vitiate that vindication in another, thus making compliance impossible."); *Harris v. Koenig*, 271 F.R.D. 383, 394 (D.D.C. 2010) ("[T]his Court could enter a ruling to restore Plan assets, remove Plan fiduciaries, or reform Plan investigative practices and monitoring practices that would directly contradict another Court's ruling on the very same issues. In that event, Defendants would be faced with incompatible standards of conduct with respect to their duties and obligations toward the Plan.").

as Plaintiffs allege breaches of fiduciary duties affecting the Plan[] and the thousands of participants in the Plan[]." *Shanehchian*, 2011 WL 883659, at *10. Accordingly, class certification should be granted under Rule 23(b)(1)(B), consistent with the Advisory Committee and the overwhelming weight of case law.[4]

VII. THE COURT SHOULD APPROVE THE PROPOSED NOTICE PLAN.

The notice of a class action settlement "need only satisfy the broad 'reasonableness' standards imposed by due process." *Petrovic v. AMOCO Oil Co*., 200 F.3d 1140, 1153 (8th Cir. 1999) (quoting *Grunin*, 513 F.2d at 123). A proposed notice is adequate if it is "reasonably calculated, under the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Petrovic*, 200 F.3d at 1153 (quoting *Mullane v. Central Hanover Bank and Trust Co*., 339 U.S. 306, 314 (1950)).

Here, the proposed form and method of Notice satisfy all due process considerations and Fed. R. Civ. P. 23(e)(1). The proposed Notice tells Class members about the lawsuit, the terms of the proposed Settlement and provides them the information they need to make informed decisions about their rights, including how and when to file an objection. Settlement at Exhibit C. The Notice provides this information in a clear, concise manner. Accordingly, the proposed Notice should be approved. *Petrovic*, 200 F.3d at 1153; *Cullan and Cullan LLC v. M-Qube, Inc.*, 2016 WL 5394684, * 7 (D. Neb. Sept. 27, 2016) (approving notice when it was "written in plain English and designed to be read and understood.").

The method for distributing the Notice is also designed to reach all Class members. *Mullane*, 339 U.S. at 315. The Class will receive notice as they have elected to receive all Plan

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[4] *See, e.g., Tussey v. ABB, Inc.*, No. 06-cv-4305, 2007 WL 4289694, at *8 (W.D. Mo. Dec. 3, 2017); *Ameriprise*, 304 F.R.D. at 577; *Cryer v. Franklin Templeton Resources, Inc*., No. 16-cv-4265, 2017 WL 4023149, at *6 (N.D. Cal. July 26, 2017); *Leber v. Citigroup 401(k) Plan Investment Committee*, 323 F.R.D. 145, at 164–65 (S.D.NY. Nov. 27, 2017).

communications — either electronically to their designated email address, or in paper form to the address they have given the Plan's recordkeeper. Settlement at § 2.10(b).

The Notice Plan also requires the Claims Administrator to send follow-up mailings to any Class members whose notice letters are returned because they no longer reside at such address. *Id.* Class Counsel will also develop a dedicated website, www.edwardjones401ksettlement.com, which will include the Settlement, the proposed Notice, the First Amended Complaint and various other documents from this case. Settlement at § 2.12. Thus, the form of notice and proposed procedures for notice satisfy the requirements of due process and the Court should approve the Notice Plan as adequate. *See* Newberg on Class Actions, § 8.34.

VIII. PROPOSED SCHEDULE

The following schedule that the Parties propose for final approval of the Settlement is based on the need to provide the Settlement Class with fair notice and the opportunity to be heard, as well as to provide notice to appropriate federal and state officials as required by the Class Action Fairness Act of 2005 ("CAFA"), 28 U.S.C. §§ 1332(d), 1453, and 1711-1715.

The Settlement requires that notice be given to Class members after the Court enters a Preliminary Approval Order. Settlement at § 2.10. Class members should have at least forty-five days following notice to decide whether or not to object to the Settlement, and should have the ability to review Plaintiffs' motion for final approval and supporting papers prior to that date. Accordingly, the Parties propose that the Fairness Hearing be scheduled at least 110 days after the issuance of the Preliminary Approval Order, with Plaintiffs' motions for final approval and for the award of attorneys' fees and expenses due 30 days prior to the Fairness Hearing, objections due 14 days before the Fairness Hearing and responses to objections due seven days before the Fairness Hearing. The Parties propose that the Fairness Hearing occur as soon after

the 110th day from entry of the Preliminary Approval Order as the Court can accommodate. Below is the proposed schedule in chart form.

Plaintiffs and Defendants agree to the following schedule of events subject to the Court's approval:

Event	**Timing**
Preliminary Approval Hearing	TBD
Edward Jones to provide Settlement Administrator with Class members' names and contact information	Fourteen days after Preliminary Approval Order
Settlement Administrator creates Settlement website	Thirty days after Preliminary Approval Order
E-Mail or Mail Settlement Notice	Thirty-five days after Preliminary Approval Order
Settlement Administrator's declaration on notice	Five days after Notice deadline
Plaintiffs' motion for final approval of the Settlement, an award of attorneys' fees and expenses and a Case Contribution Award	Thirty days before the Fairness Hearing
Objections to the Settlement and notice of the intention to appear at Fairness Hearing	Fifteen days before the Fairness Hearing
Independent Fiduciary report (if hired)	Twenty days before Fairness Hearing
Response to objections	Seven days before Fairness Hearing
Fairness Hearing	At least 110 days after Preliminary Approval Order

IX. CONCLUSION

For the reasons set forth above, the Settlement meets the standard for preliminary approval under Rule 23. Accordingly, Plaintiffs seek an Order: (1) preliminary approving to the Settlement under FED. R. CIV. P. 23(e); (2) preliminarily certifying the below-defined Class; (3) appointing Plaintiffs' Counsel as Class Counsel under FED. R. CIV. P. 23(g); (4) approving the manner of notifying the Class of the Settlement; and (5) setting a date for a Fairness Hearing.

Dated: December 11, 2018

Respectfully submitted,

/s/ Mark G. Boyko
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CERTIFICATE OF SERVICE

I, Mark G. Boyko, hereby certify that on this 11th day of December, 2018, a true and correct copy of the foregoing was served upon all counsel of record by operation of this Court's CM/ECF system.

/s/ Mark G. Boyko
Mark G. Boyko, Bar #57318