UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LARRY W. JANDER, RICHARD J. WAKSMAN, and all other individuals similarly situated, Plaintiffs, v. RETIREMENT PLANS COMMITTEE OF IBM, RICHARD CARROLL, MARTIN SCHROETER, and ROBERT WEBER, Defendants.	Case No. 1:15-cv-03781-WHP

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT AND FOR RELATED RELIEF

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INTRODUCTION

Plaintiffs Larry W. Jander and Richard Waksman and Defendants Retirement Plans Committee of IBM, Richard Carroll, Martin Schroeter, and Robert Weber, after almost six years of litigation, have agreed to a Settlement of this case for $4,750,000. This fund will provide a substantial recovery to the Class. In light of the significant costs and risks of continued litigation, the proposed Settlement constitutes a fair, reasonable and adequate outcome for all parties and is in the best interests of the Class.

The Settlement was achieved with the assistance of a highly experienced and respected mediator, Robert Meyer, and was negotiated at arm's length by well-informed and experienced counsel. The proposed Notice Plan and Plan of Allocation are substantially similar to those that have been used and approved in numerous other settled ERISA actions, and they are designed to ensure that due process and the requirements of Federal Rule of Civil Procedure 23 are protected and upheld.

For these reasons, and the reasons discussed below, Plaintiffs respectfully request that the Court order preliminary approval of the Settlement.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff Larry W. Jander filed a class action complaint against Defendants alleging breaches of their fiduciary duties under ERISA on May 15, 2015. (Dkt. No. 1.) Plaintiff Richard Waksman joined the lawsuit in an amended complaint that was filed on August 13, 2015. (Dkt. No. 12.) Defendants moved to dismiss the action on October 26, 2015 (Dkt. No. 19); that motion was granted without prejudice by the Court on September 7, 2016. (Dkt. No. 34.) Plaintiffs filed their second amended complaint on October 21, 2016. (Dkt. No. 38.) Defendants also moved to dismiss that complaint on December 16, 2016 (Dkt. No. 43), which motion was granted, this time with prejudice, on September 29, 2017. (Dkt. No. 56.)

Plaintiffs filed a notice of appeal to the Second Circuit on October 27, 2017. (Dkt. No. 58.) The Second Circuit reversed the Court's decision on December 10, 2018. *See Jander v. Ret. Plans Comm. of IBM*, 910 F.3d 620 (2d Cir. 2018).

Defendants filed a petition for writ of certiorari from the United States Supreme Court. Certiorari was granted on June 3, 2019. *Ret. Plans Comm. of IBM v. Jander, 139 S. Ct. 2667* (2019). Ultimately, the Supreme Court vacated the Second Circuit's decision and remanded the case to them to decide whether to address certain arguments raised by Defendants and the United States Government. *See Ret. Plans Comm. of IBM v. Jander*, 140 S. Ct. 592, 594-95 (2020).

On June 22, 2020, the Second Circuit reinstated its original opinion denying Defendants' motion to dismiss. *See Jander v. Ret. Plans Comm. of IBM*¸ 962 F.3d 85 (2d Cir. 2020). Defendants filed a petition for writ of certiorari to the Supreme Court, which was denied on November 9, 2020. *Ret. Plans Comm. of IBM v. Jander*, 208 L. Ed. 2d 399 (2020).

After the Second Circuit reinstated its original opinion, the parties resumed their litigation in this Court. (*See* Dkt. No. 90.) Both sides have served document requests and interrogatories on each other. To date, Defendants have produced approximately 500 pages of documents, including numerous records relating to the Retirement Plans Committee of IBM and the data reflecting purchase, sale, and ownership of shares of the IBM Stock Fund during the relevant time period. (*See* Declaration of Samuel E. Bonderoff in Support of Plaintiffs' Motion for Preliminary Approval of Settlement and for Related Relief ("Bonderoff Decl.") at ¶¶ --.)

In early 2021, the parties discussed the possibility of exploring settlement through mediation. Robert Meyer, an esteemed and experienced mediator affiliated with JAMS Mediation, Arbitration and ADR Services ("JAMS"), was selected with the mutual assent of the parties to be the case mediator. The parties conducted a virtual mediation via Zoom on February 15, 2021.

After several follow-up discussions, the parties ultimately agreed to terms of settlement on February 19, 2021. On February 23, 2021, the Court was informed of this development and a stay of proceedings was requested. (*See* Dkt. No. 110.)

The Settlement provides for Defendants to make a payment of $4,750,000.00 to a Qualified Settlement Fund to be allocated to Participants pursuant to a Plan of Allocation. In exchange, Plaintiffs and the Plan will dismiss and release their ERISA claims, as set forth in more detail in the Settlement Stipulation. The parties request that the Court schedule a Fairness Hearing, and that the parties adopt the schedule proposed in the attached Proposed Order Granting Preliminary Approval.

STATEMENT OF LAW

I. The Settlement Should Be Preliminarily Approved

A. Standard of Review

"The settlement of complex class action litigation is favored by the Courts." *In re Warner Chilcott,* 2008 U.S. Dist. LEXIS 99840, at *1 (S.D.N.Y. Nov. 20, 2008); *In re Prudential Sec. Inc. Ltd. P'ships Litig.,* 163 F.R.D. 200, 209 (S.D.N.Y. 1995) ("It is well established that there is an overriding public interest in settling and quieting litigation, and this is particularly true in class actions.").[1]

A class action "may be settled … or compromised only with the court's approval." Fed. R. Civ. P. 23(e). This process requires preliminary approval followed by a Fairness Hearing. The standards for preliminary approval of a settlement are more relaxed than those for final approval. *See Karvaly v. eBay Inc.*, 245 F.R.D. 71, 86 (E.D.N.Y. 2007). The Court must "ascertain whether

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[1] *See also Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 394 F.3d 96, 116-17 (2d Cir. 2005) ("We are mindful of the strong judicial policy in favor of settlements, particularly in the class action context. The compromise of complex litigation is encouraged by the courts and favored by public policy.").

there is any reason to notify the class members of the proposed settlement and to proceed with a fairness hearing." *Prudential*, 163 F.R.D. at 209. "Preliminary approval of settlements should be given if the settlement is the result of serious, informed and non-collusive negotiations and the proposed settlement has no obvious deficiencies, such as giving preferential treatment to class representatives, or granting excessive attorneys fees." *In re Medical X-Ray Film Antitrust Litig.*, 1997 U.S. Dist. LEXIS 21936, at *19 (E.D.N.Y. Dec. 10, 1997) (citing *In re NASDAQ Market-Makers Antitrust Litig.,* 176 F.R.D. 99, 102 (S.D.N.Y. 1997)). "[T]he court must make a preliminary evaluation as to whether the settlement is fair, reasonable and adequate." *In re Currency Conversion Fee Antitrust Litig.*, 2006 U.S. Dist. LEXIS 81440, at *13 (S.D.N.Y. Nov. 8, 2006) (internal quotation marks omitted). Preliminary approval is not a final determination; that determination is made only at the final approval stage, after class members have notified of the proposed settlement. *Prudential*, 163 F.R.D. at 210.

B. The Settlement Results from Good Faith, Arm's-Length Negotiations by Well-Informed and Experienced Counsel

As set forth in the declaration of counsel in support of this motion, the settlement was negotiated at arm's length between sophisticated, diligent counsel representing both sides and with the assistance of a respected and experienced mediator. (Bonderoff Decl. ¶ 3.) Accordingly, the Court should presume that the settlement achieved through these negotiations is fair and reasonable. *See Wal-Mart*, 296 F.3d at 116; *In re Flag Telecom Holdings Ltd. Sec. Litig.*, 2010 U.S. Dist. LEXIS 119702, at *41 (S.D.N.Y. Nov. 8, 2010).

The parties' use of a mediator further supports a presumption that the settlement is fair and that there was no collusion between the parties. *See D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001) (a "mediator's involvement in … settlement negotiations helps to ensure that the proceedings were free of collusion and undue pressure"); *Flag Telecom*, 2010 U.S. Dist. LEXIS

119702, at *40 ("The presumption in favor of the negotiated settlement in this case is strengthened by the fact that settlement was reached in an extended mediation"); *In re Giant Interactive Corp., Inc. Sec. Litig.,* 279 F.R.D. 151, 160 (S.D.N.Y. 2011) (parties entitled to presumption of fairness when mediator was used); *In re AOL Time Warner, Inc. Sec. & ERISA Litig*., 2006 U.S. Dist. LEXIS 17588, at *26 (S.D.N.Y. Apr. 6, 2006) (involvement of mediator helped "ensure that the proceedings were free of collusion and undue pressure").

In addition, "'[g]reat weight' is accorded to the recommendation of counsel, who are mostly clearly acquainted with the facts of the underlying litigation." *In re Painewebber Ltd. P'ships Litig*., 171 F.R.D. 104, 125 (S.D.N.Y. 1997), aff'd, 117 F.3d 721 (2d Cir. 1997); see also *In re Veeco Instruments Inc. Sec. Litig.*, 2007 U.S. Dist. LEXIS 85629, at *36 (S.D.N.Y. Nov. 7, 2007 (courts should "consider the opinion of experienced counsel with respect to the value of the settlement"). Class Counsel has significant experience in similar litigations and are well-versed in the allegations and probabilities of this action. (See Bonderoff Decl. ¶¶ 1-2, 4-5; id. Ex. A.) The Court should find that that the Settlement is the result of non-collusive, arm's-length negotiations and constitutes a fair and reasonable outcome to the litigation.

C. The Settlement Satisfies the Second Circuit's Nine-Factor Test for Approval

There are nine factors that must be considered in determining whether to approve a settlement. While these factors are used to assess whether final approval is appropriate, they provide a useful benchmark for determining whether preliminary approval should obtain:

> (1) the complexity, expense and likely duration of the litigation, (2) the reaction of the class to the settlement, (3) the stage of the proceedings and the amount of discovery completed, (4) the risks of establishing liability, (5) the risks of establishing damages, (6) the risks of maintaining the class action through the trial, (7) the ability of the defendants to withstand a greater judgment, (8) the range of reasonableness of the settlement fund in light of the best possible recovery, (9) the range of reasonableness of the settlement

> fund to a possible recovery in light of all the attendant risks of litigation.

Warner Chilcott, 2008 U.S. Dist. LEXIS 99840, at *3 (quoting *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 462 (2d Cir. 1974)) (internal quotation marks omitted). In deciding whether to preliminarily approve a settlement, the Court need not engage in a complete analysis of all of these factors. Id. (citing *Prudential*, 163 F.R.D. at 210).

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

This is plainly a complex litigation. *See In re Schering-Plough Corp. Enhance ERISA Litig.,* 2012 WL 1964451, at *5 (D.N.J. May 31, 2012) (ERISA breach of fiduciary duty actions "involve a complex and rapidly evolving area of law"). Simply litigating the sufficiency of Plaintiffs' allegations has taken more than five years and involved every stratum of the federal courts. Class Counsel believes that litigating this case through fact and expert discovery will likely necessitate, at a minimum, hundreds of thousands of pages of document production, as well as the depositions of numerous witnesses. A trial might not take place until a year or more from now, and even if Plaintiffs prevail, the decision could be appealed for years to come. Both sides will take on enormous expense in the meantime. Thus, it could easily be several more years before Class members see any recovery under the most optimistic projection. And, during that wait, the increased expense of the litigation could diminish the amount of money that ultimately is available to Class members. Because of "the lengthy, costly, and uncertain course of further litigation, the settlement provides a significant and expeditious route to recovery for the Class," and "it may be preferable 'to take the bird in the hand instead of the prospective flock in the bush.'" *Prudential*, 163 F.R.D. at 210 (*quoting Oppenlander v. Standard Oil Co.*, 64 F.R.D. 597, 624 (D. Colo. 1974)); see also *AOL Time Warner*, 2006 U.S. Dist. LEXIS 17588, at *31.

2. The Reaction of the Class to the Settlement

Although both named Plaintiffs have actively monitored this litigation and its settlement negotiations, it is not yet known how other Class members will react to the Settlement, because the Notice Plan has not yet been implemented. Plaintiffs will address this issue in connection with their motion for final approval of the Settlement.

3. The Stage of the Proceedings and the Amount of Discovery Completed

Although fact discovery has just begun, Class Counsel conducted a thorough investigation of this matter before filing this case; they have had the opportunity to consider not just the discovery produced thus far by Defendant, but also additional information provided in connection with the mediation; and they have retained and consulted with an expert to analyze the potential damages in this case. Accordingly, Class Counsel are able to evaluate "the merits of Plaintiffs' claims, the strengths of the defenses asserted by Defendants, and the value of Plaintiffs' causes of action for purposes of settlement." *Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 364 (S.D.N.Y. 2002). (See Bonderoff Decl. ¶¶ 4-5.)

4. The Risks of Establishing Liability

Plaintiffs have alleged that the price of IBM's stock became artificially inflated when the Company failed to disclose that the value of its Microelectronics business had declined to zero while it was looking to sell the business, that Defendants knew or should have known about this inflation, and that Defendants should have therefore sought to effectuate corrective disclosure during the Class Period. While Plaintiffs strongly believe in their theory of liability, the case presents several considerable challenges.

To prevail, Plaintiffs will have to prove that IBM's stock was indeed artificially inflated during the Class Period, and that the drop in the stock price that occurred at the conclusion of the Class Period can be attributed, at least in part, to the revelation of the value of the Microelectronics

business. Defendants will vigorously contest this issue and argue that the stock-price drop was attributable to other factors and that the market was aware of the true value of Microelectronics before IBM announced its sale. Defendants will also argue that the Company's decision not to write down the value of Microelectronics before the end of the Class Period was consistent with generally accepted accounting principles. In addition, Defendants will argue that Defendants adequately fulfilled any and all fiduciary duties they had to the Plan during the Class Period. Each of these arguments could ultimately challenge Plaintiffs' ability to prove their case. While Plaintiffs have arguments to make in response to all of these contentions, their success is by no means guaranteed. Indeed, the vast majority of ERISA stock-fund cases brought as duty-of-prudence claims do not make it past the motion-to-dismiss stage, and most of those that have reached the trial stage have been won by defendants. The risks of establishing liability in this case are substantial.

5. The Risks of Establishing Damages

Plaintiffs also face obstacles in trying to establish damages in this case. Even if they can prove that IBM's stock was artificially inflated during the Class Period, there will be debate over when the stock became artificially inflated, and, therefore, what should have been the appropriate corrective disclosure date. The parties will strenuously disagree whether damages were suffered only by purchasers of the IBM Stock Fund, or whether mere holders of the Stock Fund suffered damages as well. Defendants will also likely point out that the IBM Stock Fund as a whole was a net seller of stock during the Class Period, and that the gains received by Plan participants who sold at inflated prices should be offset against the losses suffered by purchasers, resulting in no recovery at all. At a minimum, damages will be disputed heavily by experts, which should militate in favor of settlement. *See In re Processed Egg Prods. Antitrust Litig.*, 284 F.R.D. 278, 301 (E.D. Pa. 2012) (where "[t]he parties … contemplate expert discovery on damages, which will likely

result in competing expert opinions representing very different damage estimates that will present further ambiguity as to resolution on damages[,]" it weights in favor of settlement).

6. The Risks of Maintaining the Action Through Trial

While Plaintiffs believe that class certification would be granted, and that any summary judgment motion brought by Defendants would be denied, the possibilities that Plaintiffs do not prevail on a motion for class certification or that Defendants prevail at summary judgment increase the risk that this action might not be able to be maintained through trial.

7. The Ability of Defendants to Withstand a Greater Judgment

Defendants could likely withstand a greater judgment, but "in any class action against a large corporation, the defendant entity is likely to be able to withstand a more substantial judgment, and, against the weight of the remaining factors, this fact alone does not undermine the reasonableness of the instant settlement." *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 323 (3d Cir. 2011).

8. The Range of Reasonableness of the Settlement Fund in Light of the Best Possible Recovery

"In analyzing the size of the settlement compared to the best possible recovery and in view of the attendant risks, the issue for the Court is not whether the Settlement represents the 'best possible recovery,' but how the Settlement relates to the strengths and weaknesses of the case." *Flag Telecom*, 2010 U.S. Dist. LEXIS 119702, at *57.

Here, Plaintiffs' expert conducted a preliminary analysis of the total possible damages, and the outer limit of those possible damages is approximately $18.4 million. That figure presumes, of course, that every factual dispute and legal argument is resolved in Plaintiffs' favor. The Settlement amount of $4.75 million represents approximately 25.8% of the most optimistic estimate of recoverable damages.

9. <u>The Range of Reasonableness of the Settlement Fund in Light of All the Attendant Litigation Risks of</u>

As discussed above, Defendants have numerous arguments to advance at every stage of this litigation to prevent Plaintiffs from achieving any recovery at all, let alone the upper limit of potential recovery. Defendants will argue that, because the Plan was a net seller of IBM stock during the Class Period, recovery should be zero. In light of the costs and risks of litigation, the Settlement is well within the range of reasonableness.

II. The Notice Plan Should Be Approved

"Adequate notice is essential to securing due process of law for the class members, who are bound by the judgment entered in the action." *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 448 (S.D.N.Y. 2004). To satisfy these concerns, notice must be "reasonably calculated under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Trust Co.,* 339 U.S. 306, 314 (1950); *In re Prudential Sec. Inc. Ltd. P'ships Litig.,* 164 F.R.D. 362, 368 (S.D.N.Y. 1996).

Here, the Notice Plan provides for the Notice to be sent via first-class mail to all Class members, to be posted on a website, and to be published in PR Newswire and USA Today. Contact information for Class Counsel will be provided. The Notice describes in plain English the Settlement terms and operations, the nature and extent of the released claims, the maximum attorneys' fees that may be sought, the procedure and timing for objecting to the Settlement, and the date and place of the Fairness Hearing, thus complying with the requirements of due process and Federal Rule 23(e). The Notice Plan, therefore, merits approval. *See, e.g., In re Marsh ERISA Litig.,* 265 F.R.D. 128, 145 (S.D.N.Y. 2010) (substantially similar "notice forms and methods employed [we]re substantially similar to those successfully used in many previous ERISA class

settlements"); *Griffin v. Flagstar Bancorp, Inc.*, 2013 U.S. Dist. LEXIS 129631, at *7-9 (E.D. Mich. July 29, 2013) (adopting substantially similar plan).

III. The Proposed Settlement Class Should Be Certified

At the stage of preliminary approval, if a court has not yet certified a class, it may conditionally certify a class for the purpose of providing notice to the absent class members, leaving the final certification decision for the fairness hearing. *Bourlas v. Davis Law Assocs.,* 237 F.R.D. 345, 354 (E.D.N.Y. 2006). The Court must determine whether the proposed class satisfies the requirements of Rule 23(a)—numerosity, commonality, typicality, and adequacy—as well as at least one of the requirements of Rule 23(b). Id. at 349-50. Here, the proposed Class satisfies both criteria. Indeed, ERISA breach-of-fiduciary-duty cases like this one are "particularly appropriate for class certification[.]" *Marsh*, 265 F.R.D. at 142.

A. Rule 23(a)'s Requirements Are Satisfied

1. Numerosity

Where a class consists of 40 or more members, numerosity is presumed. *See Consol. Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995). Here, it is estimated that the number of Class members is in the tens of thousands, thus easily satisfying the numerosity requirement.

2. Commonality

"The commonality requirement is met if plaintiffs' grievances share a common question of law or of fact." *Marisol A. v. Giuliani*, 126 F.3d 372, 376 (2d Cir. 1997). "By their very nature, ERISA actions often present common questions of law and fact, and are therefore frequently certified as class action. 'In general, the question of defendants' liability for ERISA violations is common to all class members because a breach of a fiduciary duty affects all participants and beneficiaries.'" *Marsh*, 265 F.R.D. at 142-43 (*quoting Banyai v. Mazur*, 205 F.R.D. 160, 163 (S.D.N.Y. 2002)).

3. Typicality

Typicality "does not require that all of the putative class members' claims are identical[,]" but rather "concerns whether 'each class member's claim arises from the same course of events, and [whether] each class member makes similar legal arguments to prove the defendant's liability.'" *Marsh*, 265 F.R.D. at 143 (*quoting Cromer Fin. Ltd. v. Berger*, 205 F.R.D. 113, 122 (S.D.N.Y. 2001)). The typicality requirement 'is often met in putative class actions brought for breaches of fiduciary duty under ERISA." Id. (*citing Koch v. Dwyer,* 2001 WL 289972, at *3 (S.D.N.Y. Mar. 23, 2001)).

Here, Plaintiffs—like the other members of the Class—held shares of the IBM Stock Fund during the Class Period. They allege that they suffered economic loss as a direct result of Defendants' alleged breaches of their fiduciary duties. Under these circumstances, typicality is appropriately found. *See In re Schering-Plough/Merck Merger Litig.,* 2010 WL 1257722, at *7 (D.N.J. Mar. 26, 2010).

4. Adequacy

Adequacy is satisfied where "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). "To ensure that all members of the class are adequately represented, district courts must make sure that the members of the class possess the same interests, and that no fundamental conflicts exist among the members." *Charron v. Wiener,* 731 F.3d 241, 249 (2d Cir. 2013).

Here, Plaintiffs Jander and Waksman have devoted substantial time and effort to this action, monitoring the case for nearly six years, responding to discovery requests, and reviewing pleadings. Their interests are aligned with the rest of the Class, because both of them seek to prove Defendants' liability and to maximize recovery. *Marsh*, 265 F.R.D. at 143 (citation omitted).

B. Rule 23(b)(1)'s Requirement Is Satisfied

The Class satisfies the requirement of Federal Rule 23(b)(1), which states that a class may be certified if:

> (1) prosecuting separate actions by or against individual class members would create a risk of:
>
> (A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class, or
>
> (B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests[.]

Courts generally certify ERISA classes under Rule 23(b)(1)(B) when, as here, the plaintiffs allege breaches of fiduciary duties, because such actions are, by law, representative actions, which, if successful, oblige the defendants to provide relief applicable to all ERISA plan participants. *Marsh*, 265 F.R.D. at 143-44 (collecting cases). "In light of the derivative nature of ERISA § 502(a)(2) claims, breach of fiduciary duty claims brought under § 502(a)(2) are paradigmatic examples of claims appropriate for certification as a Rule 23(b)(1)(B) class, as numerous courts have held." *In re Schering-Plough Corp. ERISA Litig.,* 589 F.3d 585, 604 (3d Cir. 2009) (collecting cases).

C. Plaintiffs' Counsel Should Be Appointed Class Counsel

Federal Rule 23(g) provides, in relevant part:

> (1) Unless a statute provides otherwise, a court that certifies a class must appoint class counsel. In appointing class counsel, the court: (A) must consider: (i) the work counsel has done in identifying or investigating potential claims in the action; (ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action; (iii) counsel's knowledge of the applicable law; and (iv) the resources that counsel will commit to representing the class.

Class Counsel are qualified, experienced attorneys with broad-based, multi-jurisdictional experience in complex class action litigation, including extensive experience in ERISA class actions. This experience and knowledge are reflected in the biographies of Class Counsel attached to the Bonderoff Declaration. (Bonderoff Decl., Ex. A.)

Over nearly six years, Class Counsel have prosecuted this action with unfailing diligence, litigating the case all the way to the United States Supreme Court and back. Indeed, this case is a rarity among ESOP prudence cases brought since *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409 (2014), in even getting past the pleading stage. Class Counsel have demonstrated their acumen and their commitment to this case; Plaintiffs respectfully request that their Counsel be appointed Class Counsel.

IV. The Plan of Allocation Should Be Preliminary Approved

"As a general rule, the adequacy of an allocation plan turns on whether the proposed apportionment is fair and reasonable under the particular circumstances of the case. An allocation formula need only have a reasonable, rational basis, particularly if recommended by experienced and competent class counsel[.]" *Precision Assocs. v. Panalpina World Transp.* (Holding) Ltd., 2015 U.S. Dist. LEXIS 1523688, at *32 (E.D.N.Y. Nov. 10, 2015) (internal citations and punctuation omitted).

The Plan of Allocation proposed here provides for a pro rata distribution of the Qualified Settlement Fund to Class members whose Plan accounts were invested in the IBM Stock Fund relative to their net losses as determined by a straightforward formula. A "plan of allocation that reimburses class members based on the extent of their injuries is generally reasonable." *In re Oracle Sec. Litig.,* 1994 U.S. Dist. LEXIS 21593, at *3 (N.D. Cal. June 16, 1994); *AOL Time Warner,* 2006 U.S. Dist. LEXIS 17588, at *59 (approving plan of allocation that provided "recovery to damaged investors on a pro rata basis according to their recognized claims of

damages"); *Summers v. UAL Corp. ESOP Comm.*, 2005 U.S. Dist. LEXIS 29731, at *7 (N.D. Ill. Nov. 22, 2005) ("Given that the settlement funds in the instant action will be disbursed on a pro rata basis to all class members, we find that the allocation plan is reasonable and, thus, we grant Plaintiffs' motion approval of the allocation plan.").[2]

CONCLUSION

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

New York, New York
April 2, 2021

[2] The Plan of Allocation is substantially similar to plans of allocation used in the vast majority of company stock fund ERISA cases. *See, e.g., Griffin v. Flagstar Bancorp, Inc.*, 2013 U.S. Dist. LEXIS 173702, at *21 (E.D. Mich. Dec. 12, 2013) (noting that the same Plan of Allocation "is similar to plans used and approved in many ERISA company stock fund cases."); *In re Delphi Corp.*, 248 F.R.D. 483, 491-93 (E.D. Mich. 2008) (approving a materially similar plan of allocation); *In re AOL Time Warner ERISA Litig.*, 2006 U.S. Dist. LEXIS 70474, at *31 (approving materially identical plan of allocation where "Class members will have their recovery calculated according to the decrease in value of their Plan holdings during the Class Period. All Settlement Class members are treated equally under the formula, and all members qualifying for recovery will have their share of the funds automatically distributed to their Plan accounts or, if they are no longer Plan members, an account created for them under the terms of the Settlement."); *In re Worldcom, Inc. ERISA Litig.*, 2004 U.S. Dist. LEXIS 20671, at *29 (S.D.N.Y. Oct. 18, 2004) (approving plan of allocation based on the "proportional share of the loss of each participant"); *In re Sprint Corp. ERISA Litig.*, 443 F. Supp. 2d 1249, 1262 (D. Kan. 2006) (approving plan of allocation virtually identical to that here where the plan administrator would calculate "each participant's and former participant's net loss, then exclude those with a net gain, calculate each participant's and former participant's preliminary fractional share, use that to calculate the preliminary dollar recovery, exclude those with a de minimis preliminary dollar recovery of less than $[10], then recalculate as many times as necessary so as to arrive at a final fractional share and final dollar recovery for each participant and former participant who is entitled to receive more than a de minimis amount until the sum of the final dollar recoveries equals the cash settlement fund").

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