UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE 2014 AVON PRODUCTS, INC. ERISA LITIGATION	14 Civ. 10083 (LGS)

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

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Named Plaintiffs Kay E. Comstock, Mark Jacobs, Kathleen A. McCoy, Frank Pacific, George Poovathur and Katherine C. Walker ("Named Plaintiffs") respectfully submit this Memorandum in Support of their Unopposed[1] Motion for Preliminary Approval of Class Action Settlement and related relief (the "Motion"),[2] which moves this Court for an Order, *inter alia*:

(1) preliminarily approving the proposed Class Action Settlement Agreement and Release, dated February 29, 2016 (Exhibit 1 hereto) (the "Settlement Stipulation");[3]

(2) preliminarily certifying the Settlement Class, defined in the Settlement Stipulation and below, solely for Settlement purposes;

(3) approving the Parties' proposed Notice Plan, and

(4) scheduling a Fairness Hearing no sooner than 120 days from the filing of this motion, or not before June 28, 2016.

I. INTRODUCTION

The Parties have agreed to a proposed Settlement of this ERISA case for $6,250,000 which will provide a substantial recovery to the Settlement Class members.[4] The proposed Settlement, if finally approved by the Court, will resolve all claims asserted by Named Plaintiffs and the Settlement Class. In light of the substantial Settlement Payment and the substantial risks

[1] The Parties conferred on February 29, 2016, and Defendants' Counsel represented Plaintiffs' Motion is unopposed.

[2] This Memorandum is filed only by Plaintiffs, and sets forth only the views of Plaintiffs about the strengths and weaknesses of the claims and defenses and the risks of further litigation. Unsurprisingly, there are significant differences between the views of Plaintiffs and Defendants about the strengths and weaknesses of Plaintiffs' claims and Defendants' defenses to those claims, as well as significant differences concerning the amount of recoverable damages if Plaintiffs prevailed. To be clear, Defendants deny any and all liability in the Action and disagree with many of the assertions made herein. The proposed Settlement is a compromise of those differences.

[3] Capitalized terms used herein are defined in the Settlement Stipulation.

[4] The Settlement Class members are: "All Persons who were participants in or beneficiaries of the Avon Personal Savings Account Plan (the "Plan") at any time from July 31, 2006 through February 29, 2016 (the "Class Period"), and whose Plan accounts included investments in the Avon Stock Fund."

of continued litigation (as to both liability and damages) discussed herein, Class Counsel believe the proposed Settlement is fair, reasonable, adequate and in the best interest of the Settlement Class and should be approved.

Class Counsel has vigorously prosecuted this Action on behalf of Plaintiffs, the Plan and its participants (the "Participants"). The Parties agreed to the Settlement only after arm's length negotiations by experienced counsel, facilitated by a well-respected mediator, as discussed below. Resolving the case now allows the Parties to avoid continued and costly litigation that would deplete available insurance and other resources, and which could result in a recovery of less than $6,250,000, or in no recovery at all. Indeed, the Settlement Class faces significant litigation risks absent settlement, as discussed below.

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

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Description of the Action and Procedural History

On December 23, 2014, Plaintiff George Poovathur, a former Avon employee and a Plan Participant, filed the first ERISA class action complaint against Defendants. Plaintiffs Mark Jacobs and Frank Pacific joined Plaintiff Poovathur on an amended complaint filed on January

28, 2015. On March 12, 2015, Plaintiffs Kathleen A. McCoy and Katherine C. Walker filed Case No. 15-cv-1828. On April 8, 2015, the pending actions were consolidated and the Court appointed Class Counsel as Interim Co-Lead Class Counsel.

On May 8, 2015 Named Plaintiffs filed a consolidated complaint (the "Complaint") which superseded their previous complaints, and which added Named Plaintiff Kay E. Comstock. On July 9, 2015, Defendants moved to dismiss Plaintiffs' Complaint. The Court stayed the Action on August 24, 2015 and directed the Parties to pursue nonbinding mediation.

B. Discovery Efforts

Before the case was stayed, the parties served document requests and interrogatories and were moving forward with substantial discovery efforts. While the Action was stayed, the Parties focused on discovery to facilitate settlement negotiations. Defendants produced what would be, if printed, in excess of one hundred thousand pages of damages-related data (the "Plan Data"), and approximately 3,934 pages of Plan-intensive documents demonstrating, *inter alia*, how the Plan's fiduciaries operated and of documents related to Avon's investigation of potential Foreign Corrupt Practices Act violations. *See* Joint Declaration of Michael J. Klein and Samuel Bonderoff in Support of Plaintiffs' Motion for Preliminary Approval of Settlement and for Related Relief (the "Joint Decl." or "Joint Declaration") at ¶¶ 6-7.

C. Settlement Discussions

In early August 2015, contemporaneously with the disclosure of Avon's settlement of the Securities Action, Defendants' opened to a possible settlement of the Action. The Parties met and conferred about the potential for early resolution of the Action, and began discussed engaging an independent mediator. The Parties ultimately agreed upon a well-known, respected

and experienced mediator, David Geronemus, Esq., of JAMS[5] (the "Mediator") in August 2015.

In anticipation of mediation, Defendants produced voluminous Plan Data and the Parties exchanged opening and responsive mediation briefs setting forth their positions regarding Plaintiffs' likelihood of successfully prosecuting their claims and the potential damages if Plaintiffs could prove their claims. The Parties then met for an in-person mediation on November 19, 2015, which proved unsuccessful. The Parties continued exchanging information and discussing a potential resolution with the Mediator, and conducted another in-person mediation on December 11, 2015. The December 11, 2015 mediation commenced at approximately 9:30 a.m. and continued until approximately 7:30 p.m. with the Parties executing a Term Sheet setting forth the material terms of the Settlement. The Parties continued negotiating the remaining terms of the Settlement Stipulation and the exhibits thereto until the Settlement Stipulation was executed on February 29, 2016.

D. The Proposed Settlement

The Settlement provides that Defendants and Insurer will make a Settlement Payment in an aggregate amount of $6,250,000.00 in a Qualified Settlement Fund to be allocated to Participants pursuant to a Plan of Allocation. In exchange, Plaintiffs and the Plan will dismiss their ERISA claims, as set forth more fully in the Settlement Stipulation. The Settlement Stipulation also sets forth a proposed Notice Plan to Participants, and provides for the payment of attorneys' fees, expenses and for Plaintiffs' Case Contribution Awards, all of which are subject to Court approval.

E. Proposed Timetable for Effectuation of the Settlement

The Parties request that the Court schedule a Fairness Hearing. To effectuate the

[5] http://www.jamsadr.com/geronemus/

Settlement, Plaintiffs request the Court schedule a Fairness Hearing no sooner than June 28, 2016. Plaintiffs respectfully suggest the following:

Actions to Be Taken	**Settlement Stipulation ("§ __") and/or Preliminary Approval Order ("¶ __") Reference**	**Proposed Date**
Defendants serve Class Action Fairness Act Notice	§§ 3.4; 15.8	CAFA provides for mailing 10 days after filing the Motion
Defendants' Counsel to provide names and last known addresses of Settlement Class members	§ 5	as soon as reasonably possible upon entry of the Preliminary Approval Order
Deadline to mail Class Notice	¶ 7	45 days after entry of Preliminary Approval Order
Deadline for Publication of Summary Notice and Establishment of Settlement Website	¶ 7	45 days after entry of Preliminary Approval Order
Deadline to file motion papers in support of Final Settlement approval and Attorneys' fees and expenses	¶ 8	To be set by the Court; the Parties propose thirty-one (31) calendar days before the Fairness Hearing
Deadline for Settlement Class Member Objections	¶ 10	To be set by the Court; the Parties propose 14 calendar days before the Fairness Hearing
Deadline for Settlement Class members to serve notice of intention to appear at Fairness Hearing	¶ 12	To be set by the Court; the Parties propose 14 calendar days before the Fairness Hearing
Independent Fiduciary Determination Due	§ 3.6	10 days before the Fairness Hearing
Deadline for Parties to respond to Objections or file additional briefs	¶ 11	To be set by the Court; the Parties propose 7 calendar days before the Fairness Hearing
Fairness Hearing	¶6 ("At least one hundred twenty (120) calendar days from the date the Preliminary Approval Motion is filed, and at least ninety (90) calendar days following the mailing of the Class Notice")	To be set by the Court on or after June 28, 2016 (which is 120 days after the filing of the motion). Note that Class Counsel are advised by a potential Settlement Administrator that it may take up to 3 weeks to print and mail notices with bearing additional costs, so Plaintiffs ask the hearing be set no sooner than 111 days after Preliminary Approval is granted.

III. THE SETTLEMENT WARRANTS PRELIMINARY APPROVAL

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 (S.D.N.Y Nov. 20, 2008), at *1; *see also Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 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.") (internal quotation marks and citation omitted); *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.").

Federal Rule of Civil Procedure 23(e) requires judicial approval for the compromise of class claims. Judicial review of a proposed class action settlement consists of a two-step process: preliminary approval and a subsequent Fairness Hearing. At the preliminary approval stage, the standards 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's function in the preliminary approval stage is "to ascertain whether 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. "Where the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class and falls within the range of possible approval, preliminary approval is granted." *In re Initial Pub. Offering Sec. Litig.*, 243 F.R.D. 79, 87 (S.D.N.Y. 2007) (quoting *In re NASDAQ Market-Makers Antitrust Litig.*, 176 F.R.D. 99, 102 (S.D.N.Y. 1997)); *accord In re Foreign Exch. Benchmark Rates Antitrust Litig.*, No. 1:13-cv-07789-LGS, 2015 U.S. Dist.

LEXIS 175877, at *19 (S.D.N.Y. Dec. 15, 2015) (preliminarily approving settlement, finding it "resulted from arm's-length negotiations between highly experienced counsel and fall within the range of possible approval" and "raises no obvious reasons to doubt [its] fairness and provide[s] a reasonable basis for presuming [it] satisfy[ies] the requirements of Rules 23(c)(2) and 23(e) . . . and due process so that an appropriate notice of the Settlement Agreements should be given, subject to the Court's approval of a notice plan as provided in this Order.")

When a proposed settlement is reached, "a court must determine whether the terms of the proposed settlement warrant preliminary approval. In other words, the court must make a 'preliminary evaluation' as to whether the settlement is fair, reasonable and adequate." *In re Currency Conversion Fee Antitrust Litig.*, No. 01 MDL 1409, M-21-95, 2006 U.S. Dist. LEXIS 81440, at *13 (S.D.N.Y. Nov. 8, 2006). Preliminary approval is not a final determination; a full evaluation is made at the final approval stage, following notice of the settlement to class members. *See In re Prudential Sec. Inc. Ltd. P'ships Litig.*, 163 F.R.D. at 210. Plaintiffs now request only that the Court take the first step in the settlement approval process and preliminarily approve the Settlement so that notice of the Settlement can be given to the Settlement Class. *See, e.g., Torres v. Gristedes Operating Corp.*, No. 04 Civ. 3316, 2010 U.S. Dist. LEXIS 75362, at *12-13 (S.D.N.Y. June 1, 2010).

As shown below, and as will be detailed further in a subsequent motion for final approval of the Settlement, a preview of the factors considered by courts in approving class action settlements demonstrates preliminary approval should be granted because the Settlement is well "within the range of possible approval." *Initial Pub. Offering*, 243 F.R.D. at 87.

B. The Settlement Is the Result of Good Faith, Arm's-Length Negotiations by Well-Informed and Experienced Counsel

There has been no collusion or complicity of any kind in connection with the negotiations for, or the agreement to, settle this class action. Joint Decl. ¶ 4; Settlement Stipulation § 8.3.1. All settlement negotiations in this case were conducted at arms'-length by adverse, represented parties. Joint Decl. ¶ 4; Settlement Stipulation § 8.3.1. Class Counsel's experience is set forth in their respective firm biographies. Joint Decl. Exs. A & B.

Where, as here, a proposed settlement is the result of arm's-length negotiations between well-informed counsel, courts presume that proposed settlement is fair and reasonable. *See Wal-Mart*, 396 F.3d at 116 (noting strong "presumption of fairness" where settlement is product of arm's-length negotiations conducted by experienced, capable counsel after meaningful discovery); *In re Flag Telecom Holdings Ltd. Sec. Litig.*, No. 02-CV-3400, 2010 U.S. Dist. LEXIS 119702, at *41 (S.D.N.Y. Nov 8, 2010) (same).

The use of a mediator in settlement negotiations, as was needed here for two separate sessions, further supports this presumption of fairness and the conclusion that the Settlement achieved here was free of collusion. *See D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001) (noting that 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 were entitled to a presumption of fairness where mediator facilitated arms'-length negotiations); *In re AOL Time Warner, Inc. Sec. Litig*., 02 Civ. 5575, 2006 U.S. Dist. LEXIS 17588, at *26 (S.D.N.Y. April 6,

2006) (noting that involvement of mediator in settlement negotiations helped "ensure that the proceedings were free of collusion and undue pressure").

Moreover, in determining the good faith of this settlement proposal, the Court should consider the judgment of Class Counsel. *See, e.g., In re Veeco Instruments Inc. Sec. Litig.*, No. 05 MDL 01695, 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"); *In re Painewebber Ltd. P'ships Litig.,* 171 F.R.D. 104, 125 (S.D.N.Y.) ("'Great weight' is accorded to the recommendation of counsel, who are most closely acquainted with the facts of the underlying litigation."), *aff'd*, 117 F.3d 721 (2d Cir. 1997). Class Counsel have significant experience in analogous litigations, as shown by Exhibits A and B to the Joint Declaration, and Class Counsel are well-informed as to the specifics of this Action, as shown by ¶¶ 5-8 of the Joint Declaration. Accordingly, their judgment that the Settlement is in the best interest of the Settlement Class should be given considerable weight. Consequently, the Court has ample evidence to find that the Settlement was negotiated in good faith by well-informed counsel and was not the product of collusion.

C. The Settlement Satisfies the Criteria for Final Approval of a Class Action Settlement

The Second Circuit has identified nine factors that district courts must consider in determining whether to finally approve a class action settlement. To the extent that they are applicable at this stage, they can be used as guidelines for considering preliminary approval:

> (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.

In re 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)). Complete analysis of these factors is not required for preliminary approval to be granted. *Id.* (citing *In re Prudential*, 163 F.R.D. at 210).

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

ERISA breach of fiduciary duty actions are difficult to prosecute and "involve a complex and rapidly evolving area of law." *In re Schering-Plough Corp. Enhance ERISA Litig.*, No. 08-cv-1432, 2012 WL 1964451, at *5 (D.N.J. May 31, 2012) ("*Schering-Plough Enhance*"); *In re Wachovia Corp. ERISA Litig.*, No. 09-cv-0262, 2011 WL 7787962, at *4 (W.D.N.C. Oct. 24, 2011). New precedents are frequently issued, and the demands on counsel and the Court are complex and require the devotion of significant resources. Indeed, *Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459 (2014) ("*Fifth Third*"), recently abrogated a presumption that employer securities offered pursuant to the terms of an ERISA plan were prudent, setting the groundwork for undeveloped standards that presented large litigation risks that present significant risks to all Parties.

Absent settlement, and assuming Defendants' motion to dismiss were denied, the Parties would take substantial discovery including numerous depositions of fact and expert witnesses. Any trial would be complex given the factual and legal issues relevant to Plaintiffs' allegations. Further, even if Plaintiffs prevailed, it could be years before any recovery would be received in light of appeals. Continued litigation thus would not only be extremely expensive, it would delay any recovery 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.'" *In re Prudential*, 163 F.R.D. at 210 (quoting *Oppenlander v. Standard Oil Co.*, 64 F.R.D. 597, 624 (D. Colo. 1974)); *see also In re AOL Time Warner, Inc. Sec. & ERISA Litig.*, No. MDL 1500, 02 Civ. 5575 (SWK), 2006 U.S. Dist. LEXIS 17588, at *31 (S.D.N.Y. Apr. 6, 2006) (because of their "notorious complexity," securities class actions often settle to "circumvent[] the difficulty and uncertainty inherent in long, costly trials") (citations omitted). Moreover, because continued litigation increases the litigation expense, it could result in less recovery ultimately going to the class, even ignoring the time value of money.

2. The Reaction of the Class to the Settlement

All six Named Plaintiffs actively monitored the litigation, were aware of settlement negotiations, and approve of the Settlement. It is impossible to predict how the rest of the Class will react to the Settlement until the Notice Plan has been implemented. Plaintiffs will comment on this issue further in connection with their motion for final approval of the Settlement.

3. The Stage of the Proceedings and the Amount of Discovery Completed Support Preliminary Approval

This *Grinnell* factor inquires "whether the parties had adequate information about their claims," *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 458 (S.D.N.Y. 2004), such that counsel could sufficiently 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). Here, Class Counsel's thorough investigation, together with document discovery produced in anticipation of mediation and the Plan Data produced gave Class Counsel a significant understanding of the merits of the claims asserted, the strength of Defendants' defenses, and the values of theoretical outcomes of the case. Joint Declaration ¶¶ 5-8.

4. The Risks of Establishing Liability Support Preliminary Approval

Plaintiffs allege Defendants violated ERISA's duty of prudence by permitting investment of Plan assets in Avon stock. In order to succeed on the merits, Plaintiffs would have to overcome several significant obstacles. Defendants would certainly assert affirmative defenses and would undoubtedly vigorously argue for a judgment in their favor at summary judgment and trial. A favorable result at trial would be uncertain; Class Counsel knows of only four ERISA company stock fund cases that have been tried, with defense verdicts in each.[6] As another court recently observed:

> ERISA class actions based on the same theories as the present matter involve a complex and rapidly evolving area of law. This uncertainty, combined with the risks associated with a potential trial and the need to overcome likely summary judgment motions, indicates that Plaintiff faced significant risks in establishing liability and damages . . . .

Schering-Plough Enhance, 2012 WL 1964451, at *5. The same risks are inherent here, underscoring the Settlement's appropriateness. Indeed, this uncertainty is even greater here in light of the Supreme Court's opinion in *Fifth Third*, which eliminated a presumption of prudence while directing courts to evaluate other factors in evaluating claims, and left it for the lower courts to consider and develop common law consistent with its opinion. *E.g.*, *Fifth Third*, 134 S.

[6] *DiFelice v. U.S. Airways, Inc*., 436 F. Supp. 2d 756 (E.D. Va. 2006), *aff'd*, 497 F.3d 410 (4th Cir. 2007) (the Fourth Circuit affirmed the district court's ruling that defendants did not breach ERISA mandated fiduciary duties by continuing to offer company stock as plan investment option.); *Nelson v. IPALCO Enters., Inc*., 480 F. Supp. 2d 1061 (S.D. Ind. 2007) (holding defendant fiduciaries did not breach their fiduciary duties under ERISA by failing to remove company stock as a plan investment option.); *Langraff v. Columbia Healthcare Corp*., No. 98-cv-0090, 2000 U.S. Dist LEXIS 21831 (M.D. Tenn. May 24, 2000) (same); *Brieger v. Tellabs, Inc*., No. 06-cv-1882, 2009 WL 1565203 (N.D. Ill. June 1, 2009) (same); *cf. Peabody v. Davis*, No. 05-cv-5026, 2010 WL 1416933 (N.D. Ill. Apr. 5, 2010) (finding at trial that fiduciaries of a retirement plan in a closely-held corporation breached their fiduciary duties under ERISA), *aff'd in part, rev'd in part, and remanded*, *Peabody v. Davis*, 636 F.3d 368 (7th Cir. 2011).

Ct. at 2473. The Parties have drastically different understandings of *Fifth Third*, as shown by the Complaint and Defendants' motion to dismiss. If Defendants' interpretation of *Fifth Third* was adopted, there would be no recovery whatsoever.

5. The Risks of Establishing Damages Support Preliminary Approval

Determination of damages, the potential range of which is discussed below, would require experts. Plaintiffs believe damages are the difference between what the retirement plan earned on the investment in question compared with what the plan would have earned from a prudent investment. *See Graden v. Conextant Sys. Inc.*, 496 F.3d 291 (3d Cir. 2007). Defendants argue that there were no damages because there was no breach, but also that other measures of damage, such as "artificial inflation," are more appropriate given the nature of Plaintiffs' claims. Defendants assert that the Plan's trading patterns further limit damages significantly, because it was a "net seller" of Avon common stock at relevant times.

Even assuming liability, the Parties and their experts would debate *when* holding or acquiring Avon stock violated ERISA (the "breach date") and how much Avon common stock was artificially inflated (as compared to how much it fell because of the "Great Recession"). If the Court found the breach date was late in the Class Period, or Defendants were able to demonstrate that little of Avon's stock price decline was caused by artificial inflation, damages recoverable would be significantly decreased. Plaintiffs would argue that holder and purchaser damages (*i.e.*, damages arising from holding stock and damages arising from selling stock at a loss) are available, but Defendants would argue that only purchaser damages were available in light of, *inter alia*, *Fifth Third*, 134 S. Ct. at 2472-73, or that "holder" damages (*i.e.* damages for shares held at the start of the Settlement Class Period) were severely limited thereby. Where, as here, "[t]he parties . . . contemplate expert discovery on damages, which likely will result in

competing expert opinions representing very different damage estimates that will present further ambiguity as to resolution on damages…[,]" it weighs in favor of settlement. *In re Processed Egg Products Antitrust Litig.*, 284 F.R.D. 278, 301 (E.D. Pa. 2012).

6. The Stage of the Proceedings at the Time of the Settlement Supports Preliminary Approval

This factor concerns whether there is "some evidentiary foundation in support of the proposed settlement." *Plummer v. Chem. Bank*, 668 F.2d 654, 659 (2d Cir. 1982). As will be set forth in further detail prior to the Settlement Hearing and as summarized herein, Plaintiffs' decision to enter into the Settlement was based on their thorough understanding of the strengths and weaknesses of their claims. Although there has been no formal discovery, as shown by ¶¶ 5-8 of the Joint Declaration Class Counsel has conducted a detailed factual investigation so as to be thoroughly apprised of the merits of Plaintiffs' case, as demonstrated by the Complaint and the briefing on Defendants' motions to dismiss. *See In re Canadian Superior Secs. Litig.*, 09 Civ. 10087 (SAS), 2011 U.S. Dist. LEXIS 132708, at *5 (S.D.N.Y. Nov. 16, 2011).

7. The Risks of Maintaining the Class Action Through Trial Support Preliminary Approval

Plaintiffs' claims are pled as class claims and derivatively. *See In re Wilmington Trust Corp.*, No. 10-1114-SLR, 2013 U.S. Dist. LEXIS 125891, at *5 (D. Del. Sept. 4, 2013). While Plaintiffs are confident that this action would satisfy Federal Rule of Civil Procedure 23, as discussed below, there is always a risk that circumstances or the law could change and the Court could find a reason to deny class certification or decertify the class. Settlement avoids that risk.

8. The Ability of Defendants to Withstand a Greater Judgment Supports Preliminary Approval

Defendants could withstand a larger judgment, but that is not an obstacle to settlement because "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 Investments, Inc.*, 667 F.3d 273, 323 (3d Cir. 2011).

"[T]he fact that a defendant is able to pay more than it offers in settlement does not, standing alone, indicate that the settlement is unreasonable or inadequate. This factor must be weighed in conjunction with all of the *Grinnell* factors, most notably the risk of the class prevailing and the reasonableness of the settlement fund." *In re AOL Time Warner ERISA Litig.*, 02 Civ. 8853 (SWK), 2006 U.S. Dist. LEXIS 70474, at *26-27 (S.D.N.Y. Sept. 27, 2006) (internal citations and quotation marks omitted).

Indeed, while the Defendants have wasting insurance coverage, as outlined in the Complaint, Plaintiffs allege that Avon has been struggling to reinvent itself for years. As Plaintiffs further allege, absent a turn-around, there are questions about what the Company's future will look like,[7] and it is not assured that Plaintiffs would be able to collect their best-case judgment after trial and appeals had been exhausted, otherwise assuming away the risks discussed above.

9. The Range of Reasonableness of the Settlement Fund in Light of the Best Possible Recovery and Attendant Risks Supports Preliminary Approval of the Settlement

"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." *In re Flag Telecom*, 2010 U.S. Dist. LEXIS 119702, at *57. "[I]n any case, there is a

[7] *See* Leslie Pickerdec, Avon in Deal to Split Off North American Business, *The New York Times*, Dec. 17, 2015, *available at* http://www.nytimes.com/2015/12/18/business/dealbook/avon-in-deal-to-split-off-north-american-business.html?_r=0,

range of reasonableness with respect to a settlement." *Id.* (quoting *Newman v. Stein*, 464 F.2d 689, 693 (2d Cir. 1972)). This range of reasonableness "recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion." *Newman*, 464 F.2d at 693.

Using an "alternative investment" methodology to calculate damages (where funds are hypothetically invested in other investment vehicles in the Plan at the time of investment), damages could be hundreds of millions of dollars. That would require Plaintiffs proving that every penny invested into the Avon stock would have instead been invested in a weighted basket of other plan investment options.[8] According to Plaintiffs' calculations, the Plan would have been better off by approximately $310 million had Company Stock Fund and all inflows been into such a weighted basket of funds during the period where Avon common stock is alleged to have been artificially inflated, with all other things being the same.

Plaintiffs also calculate that during the alleged class period, based upon undue risk, damages could be approximately $60 million, assuming a modest price adjustment for a liquidation of the Plan's holdings.[9]

[8] Defendants would argue, among other things, that this is in large part an artificial inflation case (as discussed below), so this is an inappropriate measure of damages; that the Plan was a net seller of shares so it benefited from any alleged artificial inflation; that shares could not be sold without disclosure so if they knew the stock was artificially inflated they could not have sold it at market prices (and if they did not know, or should not have known, that it was artificially inflated they would not be liable); and, that the stock was either not artificially inflated or so minimally artificially inflated as to produce must smaller damages. If Defendants succeeded on any of these arguments, damages could be more than halved. If Defendants succeeded on more than one such argument, damages could be significantly less than the Settlement Payment.

[9] While Plaintiffs believe these claims are valid, they note that such claims have not fared well after *Fifth Third*. *E.g.*, *In re 2014 Radioshack Erisa Litig.*, No. 4:14-cv-959-O, 2016 U.S. Dist. LEXIS 20689 (N.D. Tex. Jan. 25, 2016) (dismissing undue risk claims in light of *Fifth Third*); *In re Citigroup Erisa Litig.*, 104 F. Supp. 3d 599 (S.D.N.Y. 2015) (same) (appeal pending, argued

If an artificial inflation theory were used, such that the Plan were only credited for purchases of shares of Avon common stock, like Defendants believe is appropriate for resolving Plaintiffs' artificial inflation claims, Defendants experts suggest that the Plan's artificial inflation overpayment for Avon common stock is less than the Settlement Payment.

Assuming liability, if Plaintiffs' model is correct, and Plaintiffs overcome ***all*** of the hurdles built into their damages model, the recovery represents approximately 1.7% of recoverable damages. The percentage of recovery would increase significantly if Plaintiffs could not successfully defeat all of the arguments in footnote 8, among others. And that amount ignores an overlap in liability theory periods that would have to lower damages by material amount because of insider trading rules. However, if Defendants' damages models are adopted, the Settlement Payment here represents more than a complete recovery.

IV. THE PROPOSED NOTICE PLAN SHOULD BE APPROVED

In addition to preliminarily approving the proposed Settlement Stipulation, the Court must approve the proposed means of notifying Settlement Class members. Fed. R. Civ. Proc. 23(c)(2); *see also Global Crossing*, 225 F.R.D. at 448. "Adequate notice is essential to securing due process of law for the class members, who are bound by the judgment entered in the action." *Id.* In order to satisfy due process considerations, notice to Settlement Class members 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." M*ullane v. Central 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).

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at the Second Circuit on Feb. 18, 2016); *Pfeil v. State St. Bank & Tr. Co.*, 806 F.3d 377 (6th Cir. 2015) (same). There is thus a significant risk of no recovery on these claims.

The Notice Plan includes multiple components designed to reach the largest number of Settlement Class members possible. First, the Notice, attached as Exhibit A.1 to the Settlement Stipulation, will be sent by first-class mail to the last known address of each Settlement Class member at least two months prior to the Fairness Hearing. Notably, all Settlement Class members had Plan accounts, so the Plan has addresses for them, at least as of the Settlement Class Period, and has their Social Security numbers which can be used to do an address update if Notices are returned as undeliverable. *See Mehling v. New York Life Ins. Co.*, 246 F.R.D. 467, 477-78 (E.D. Pa. 2007). Additionally, the Notice will be posted on a website established by Class Counsel, along with other documents related to the litigation such as a list of frequently asked questions and the Stipulation with all of its exhibits. The Notice will also provide contact information for Class Counsel. In addition, Class Counsel will cause the Summary Notice to be published on a *PR Newswire* and in *USA Today*. Class Counsel will also establish and monitor a dedicated, toll-free Settlement telephone number and provide Settlement Class members the opportunity to leave a voicemail counsel should they have any questions regarding the Settlement.

The Notice Plan agreed to by the Parties satisfies all due process considerations and meets the requirements of Fed. R. Civ. Proc. 23(e). It describes in plain English: (i) the Settlement's terms and operations; (ii) the nature and extent of the released claims; (iii) the maximum attorneys' fees and Plaintiffs' Case Contribution Awards that may be sought; (iv) the procedure and timing for Objection; and (v) the date and place for the Fairness Hearing. Numerous district courts across the country have approved as fair similar notices and/or notice plans. *See, e.g.*, *In re Marsh ERISA Litig.*, 265 F.R.D. 128, 145 (S.D.N.Y. 2010) (concluding that 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.*, 2:10-cv-10610, 2013 U.S. Dist. LEXIS 129631, at *7-9 (E.D. Mich. July 29, 2013) (adopting a nearly identical notice plan).

V. CERTIFICATION OF A SETTLEMENT CLASS IS APPROPRIATE

At the preliminary approval stage, when a court has not previously certified a class, it may conditionally certify a class for purposes of providing notice, leaving the final certification decision for the subsequent fairness hearing. *Bourlas v. Davis Law Assocs.*, 237 F.R.D. 345, 354 (E.D.N.Y. 2006). In determining whether an action may be maintained as a class action under Federal Rule of Civil Procedure 23, a court should preliminarily determine if the proposed class satisfies the criteria set forth in Rule 23(a) (*i.e.*, (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy of representation) and at least one of the subsections of Rule 23(b). *Amchem Prods. v. Windsor*, 521 U.S. 591 (1997); *Bourlas*, 237 F.R.D. at 349-50. In this matter, the proposed Settlement Class satisfies Rule 23(a)'s prerequisites and Rule 23(b)(1).

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

A. The Settlement Class Satisfies Rule 23(a)'s Requirements

1. Numerosity

Numerosity is generally presumed when a class consists of forty or more members. *See Consol. Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995). Here, the Plan Data

reveal there were over 10,000 Settlement Class members who held Avon common stock in their Plan accounts during the Settlement Class Period. Numerosity is thus easily satisfied here.

2. Commonality

"The commonality requirement [of Rule 23(a)(2)] 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 actions. '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.' *Banyai v. Mazur*, 205 F.R.D. 160, 163 (S.D.N.Y, 2002)." *In re Marsh ERISA Litig.*, 265 F.R.D. at 142-43 (finding common questions satisfying Rule 23(a)(2) included: "(1) whether Defendants were fiduciaries of the Plan; (2) whether Defendants breached their fiduciary duties; (3) whether the Plan and its participants and beneficiaries were injured by Defendants' breaches; and (4) whether the Class is entitled to damages and, if so, the proper measure of damages.")

3. Typicality

The typicality requirement of Rule 23(a)(3) "does not require that all of the putative class members' claims are identical" but instead "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." *In re Marsh ERISA Litig.*, 265 F.R.D. at 143 (citation omitted). Rule 23(a)(3) "is often met in putative class actions brought for breaches of fiduciary duty under ERISA." *Id.* (citation omitted).

Named Plaintiffs' claims are typical of those of the Settlement Class as all were Participants in the Plan during the Settlement Class Period who invested in Avon stock during

that time. In fact, "all of the claims are effectively the same unitary claim asserted on behalf of the same Plan." *Id.* Named Plaintiffs allege that they and all Settlement Class members sustained an economic loss arising out of Defendants' alleged violations of ERISA, a statute that explicitly states that §§ 409, 502(a)(2) claims are brought on behalf of retirement plans for plan-wide relief. *See In re Honeywell Int'l ERISA Litig.*, No. 03-cv-1214, 2004 WL 3245931, at *15 (D.N.J. Sept. 14, 2004). Since the interests of Named Plaintiffs are aligned with the Settlement Class members, typicality is satisfied. *In re Schering-Plough/Merck Merger Litig.*, Civil Action No. 09-CV-1099 (DMC), 2010 WL 1257722, at *7 (D.N.J. Mar. 26, 2010).

4. Adequacy

Rule 23(a)(4) permits class certification only if "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). [10]

The adequacy test is easily met. Named Plaintiffs have devoted substantial time and efforts to this Action, and their interests are aligned with those of the Settlement Class, in that all seek to prove Defendants' liability and to maximize recovery. *In re Marsh ERISA Litig.*, 265 F.R.D. at 143 (citation omitted).

[10] The adequacy of counsel is governed by Rule 23(g), and the adequacy of the named plaintiff is governed by Rule 23(a)(4). *See* FED. R. CIV. P. 23 Advisory Committee's Notes; *see also Moreira v. Sherwood Landscaping Inc.*, No. CV 13-2640 (AKT), 2015 U.S. Dist. LEXIS 43919, at *33 n.8 (E.D.N.Y. Mar. 31, 2015). Rule 23(g) is discussed below.

B. The Proposed Settlement Class Satisfies the Requirements of Rule 23(b)(1)

In addition to demonstrating the requirements of Rule 23(a) are met, Plaintiffs must also establish that at least one subsection of Rule 23(b) is satisfied. Here, certification is proper under Rule 23(b)(1), which states that a class may be certified if:

> (1) 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 most often grant class certification of ERISA claims under Rule 23(b)(1)(B) where, as here, the Complaint alleges breaches of fiduciary duties under ERISA because actions for breaches of fiduciary duty under ERISA are by law representative actions, which, if successful, will cause Defendants to be obligated to provide relief applicable to all Plan Participants. *In re Marsh ERISA Litig.*, 265 F.R.D. at 143-44 (collecting cases). That is why the Third Circuit has held that "[i]n light of the derivative nature of ERISA § 502(a)(2) claims, breach of fiduciary duty claims brought under § 502(a)(2) are paradigmatic examples of claims appropriate for certification as a Rule 23(b)(1) class, as numerous courts have held." *In re Schering Plough Corp. ERISA Litig.*, 589 F.3d 585, 604 (3d Cir. 2009) (collecting cases).

C. Interim Co-Lead Class Counsel Should Be Appointed as Class Counsel

As noted above, inquiry into the adequacy of class counsel has been decoupled from the Rule 23(a)(4) inquiry. 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." The Court may also, among other things, "consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class." FED. R. CIV. P. 23(g)(1)(B).

The Court has already appointed Class Counsel as Interim Co-Lead Class Counsel (Dkt. No. 25, ¶ 4). Class Counsel are qualified, experienced attorneys with broad-based, multi-jurisdictional experience in complex class action litigation, including extensive experience in the context of analogous ERISA claims based on the imprudent retention of company stock as a plan investment option. Indeed, Class Counsel are experienced ERISA class action attorneys, and are highly qualified to prosecute this litigation, as shown by their firm biographies which are Exhibits A & B to the Joint Declaration.

The course of this litigation has amply demonstrated Class Counsel's knowledge of the applicable law and willingness to devote the resources necessary to protect the interests of the Class. As discussed herein, Class Counsel has vigorously litigated this action and is committed to continuing to do so. For these reasons, Plaintiffs respectfully request that the Court appoint Interim Co-Lead Class Counsel as Class Counsel.

VI. THE PLAN OF ALLOCATION SHOULD BE PRELIMINARILY APPROVED

"As a general rule, the adequacy of an allocation plan turns on whether the proposed apportionment is fair and reasonable under the particular circumstances of the case. An allocation formula need only have a reasonable, rational basis, particularly if recommended by

experienced and competent class counsel. [and w]hether the allocation plan is equitable is squarely within the discretion of the district court." *Precision Assocs. v. Panalpina World Transp. (Holding) Ltd.*, No. 08-cv-42 (JG) (VVP), 2015 U.S. Dist. LEXIS 152688, at *32 (E.D.N.Y. Nov. 10, 2015) (internal citations and punctuation omitted).

Here, the Plan of Allocation provides for a pro rata distribution of the Qualified Settlement Fund among Settlement Class members who whose Plan accounts included investments in the Avon Stock Fund relative to their net losses on those holdings. A "plan of allocation that reimburses class members based on the extent of their injuries is generally reasonable." *In re Oracle Sec. Litig.*, No. 90-CV-0931, 1994 U.S. Dist. LEXIS 21593, at *3 (N.D. Cal. June 16, 1994); *In re AOL Time Warner, Inc. Secs. & ERISA Litig.*, MDL No. 1500, 2006 U.S. Dist. LEXIS 17588, at *59 (S.D.N.Y. Apr. 6, 2006) (plan of allocation provided "recovery to damaged investors on a pro- rata basis according to their recognized claims of damages."); *Summers v. UAL Corp. ESOP Comm.*, No. 03-CV-1537, 2005 U.S. Dist. LEXIS 29731, at *7 (N.D. Ill. Nov. 22, 2005) ("Given that the settlement funds in the instant action will be disbursed on a pro rata basis to all class members, we find that the allocation plan is reasonable and, thus, we grant Plaintiffs' motion for approval of the allocation plan.").

As further detailed by the Plan of Allocation, distributions to current Plan participants will be made by allocating recovery amounts into their Plan account, while distributions to former Plan participants will be made by through a qualified settlement fund so distributions can be effectuated so as to defer tax consequences if Settlement Class members so desire.

Indeed, the Plan of Allocation is substantially similar to the plans of allocation approved and used in the vast majority of company stock fund ERISA cases.[11]

VII. CONCLUSION

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

[11] *See, e.g., Griffin v. Flagstar Bancorp, Inc.*, 2:10-cv-10610, 2013 U.S. Dist. LEXIS 173702, at *21 (E.D. Mich. Dec. 12, 2013) (noting that the same Plan of Allocation "is similar to plans used and approved in many ERISA company stock fund cases."); *In re Delphi Corp.*, 248 F.R.D. 483, 491-93 (E.D. Mich. 2008) (approving a materially similar plan of allocation); *In re AOL Time Warner ERISA Litig.*, 2006 U.S. Dist. LEXIS 70474, at *31 (approving materially identical plan of allocation where "Class members will have their recovery calculated according to the decrease in value of their Plan holdings during the Class Period. All Settlement Class members are treated equally under the formula, and all members qualifying for recovery will have their share of the funds automatically distributed to their Plan accounts or, if they are no longer Plan members, an account created for them under the terms of the Settlement."); *In re Worldcom, Inc. ERISA Litig.*, No. 02-CV-4816, 2004 U.S. Dist. LEXIS 20671, at *29 (S.D.N.Y. Oct. 18, 2004) (approving plan of allocation based on the "proportional share of the loss of each participant"); *In re Worldcom, Inc. ERISA Litig.*, No. 02-CV-4816, 2005 WL 2035496, at *1 (S.D.N.Y. Aug. 24, 2005) (ordering plan of allocation materially the same as that proposed here); *In re Sprint Corp. ERISA Litig.*, 443 F. Supp. 2d 1249, 1262 (D. Kan. 2006) (approving plan of allocation virtually identical to that here where the plan administrator would calculate "each participant's and former participant's net loss, then exclude those with a net gain, calculate each participant's and former participant's preliminary fractional share, use that to calculate the preliminary dollar recovery, exclude those with a de minimis preliminary dollar recovery of less than $[10], then recalculate as many times as necessary so as to arrive at a final fractional share and final dollar recovery for each participant and former participant who is entitled to receive more than a de minimis amount until the sum of the final dollar recoveries equals the cash settlement fund").

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