

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

In re CMS ENERGY ERISA LITIGATION

Master File No. 02-72834

Judge George Caram Steeh

This Document Relates To:

Class Action

ALL ACTIONS

**PLAINTIFFS' MOTION FOR FINAL APPROVAL
OF ERISA CLASS ACTION SETTLEMENT AGREEMENT**

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June 8, 2006

1. Pursuant to Fed. R. Civ. P. 23 and the requirements of due process, Plaintiffs hereby move the Court to enter an order and judgment that grants final approval to the Class Action Settlement Agreement (“Settlement Agreement”) between all parties and the certified Class. The Settlement Agreement appears in the record as Exhibit 1 to Plaintiffs’ Motion for Preliminary Approval of the Settlement, filed on March 15, 2006 (Docket No. 204) (“Preliminary Approval Mot.”) and is incorporated herein by reference.

2. By an order dated March 23, 2006, this Court preliminarily approved the Settlement and directed that notice be provided to Class members in the manner prescribed in the Order Granting Preliminary Approval of Settlement (“Preliminary Approval Order”) (Docket No. 206). The Court-ordered notice to the Class included sending the Notice of Class Action Settlement to Class members by mail as well as publishing it on the website designated in that Notice. It also included publishing the Court-Ordered Legal Notice (Summary) in *USA Today*, and the *Detroit Free Press*. Class Counsel provided the requisite notice to class members, as is demonstrated by the Declaration of Lynn L. Sarko ¶¶ 75-78, filed in support of Class Counsel’s Motion for Award of Attorneys’ Fees, Reimbursement of Expenses, and Award of Compensation to Class Representatives (“Compensation Motion”) (Docket No. 208). Pursuant to the Preliminary Approval Order, Class Counsel also posted the Compensation Motion on the websites designated in the Notice of Class Action Settlement. Declaration of Amy N. L. Hanson Regarding Compliance With Class Notice Requirements ¶ 4 (Docket No. 212).

3. The Court provided an opportunity for members of the certified class to file objections and to appear at a fairness hearing, which the Court has set for June 15, 2006. As of this date, no objections have been filed out of a class of approximately 12,470 members.

4. As explained more fully in the memorandum accompanying this motion, final approval of the proposed Settlement should now be granted. Class Counsel have satisfied the procedural requirements set by the Court for giving class members notice and an opportunity to

object to the proposed Settlement. Nothing has come to light since entry of the Preliminary Approval Order that calls into question the Court's preliminary finding that the Settlement should be approved.

5. Class Counsel note that in addition to this motion, there are separate motions pending that seek Court approval for (a) a Plan of Allocation for the funds to be made available pursuant to the Settlement Agreement; and (b) an award of compensation to Class Counsel and the Class Representatives. *See* Plaintiffs' Motion and Memorandum for Approval of Plan of Allocation ("Plan of Allocation Motion") (Docket No. 213) and the Compensation Motion. As part of a final resolution of this litigation, Plaintiffs respectfully request that the Court grant those motions as well.

WHEREFORE, for the foregoing reasons and those stated in the supporting memorandum, Plaintiffs respectfully request that the Court enter an order granting final approval to the Settlement, as well as granting the pending Plan of Allocation Motion and Compensation Motion. A proposed form of order is being submitted herewith.

Respectfully submitted this 8th day of June 2006.

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CERTIFICATE OF SERVICE

I hereby certify that on June 8, 2006, the foregoing PLAINTIFFS' MOTION FOR FINAL APPROVAL OF ERISA CLASS ACTION SETTLEMENT, PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR FINAL APPROVAL OF ERISA CLASS ACTION SETTLEMENT, and the [PROPOSED] ORDER AND FINAL JUDGMENT were electronically filed with the Clerk of the United States District Court, Eastern District of Michigan, using the CM/ECF system, which automatically serves notification of filing via email transmission on ECF registered counsel of record listed below. Non-ECF registered counsel will receive notice via U.S. Mail and via email.

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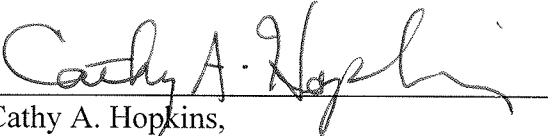
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ALL ACTIONS

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Class Action

**PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR
FINAL APPROVAL OF ERISA CLASS ACTION SETTLEMENT**

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June 8, 2006

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STATEMENT OF ISSUE PRESENTED

Whether the Settlement Agreement between the parties in this ERISA class action is “fair, adequate, and reasonable to those it affects” and “in the public interest,” such that it warrants this Court’s final approval.

**STATEMENT OF MOST
APPROPRIATE AUTHORITY FOR RELIEF SOUGHT**

Pursuant to Local Rule 7.1(c)(2), Plaintiffs list the following cases as the most appropriate authorities for the relief sought in their motion:

- *Granada Invs., Inc. v. DW Corp.*, 962 F.2d 1203 (6th Cir. 1992)
- *In re Cardizem CD Antitrust Litig.*, 218 F.R.D. 508 (E.D. Mich. 2003)
- *In re Rio Hair Naturalizer Prods. Liab. Litig.*, No. 1055, 1996 U.S. Dist. LEXIS 20440 (E.D. Mich. Dec. 20, 1996)
- *Lessard v. City of Allen Park*, 372 F. Supp. 2d 1007 (E.D. Mich. 2005)
- *UAW v. Gen. Motors Corp.*, No. 05-73991, 2006 U.S. Dist. LEXIS 14890 (E.D. Mich. Mar. 31, 2006)
- *Williams v. Vukovich*, 720 F.2d 909 (6th Cir. 1983)

I. INTRODUCTION

The Named Plaintiffs in this ERISA class action, as Class Representatives of the Class that the Court previously certified in this case, seek final approval of a proposed Settlement of this litigation pursuant to a Settlement Agreement that the Court preliminarily approved by order dated March 23, 2006 (“Preliminary Approval Order”).

In granting preliminary approval to the Settlement Agreement, the Court found that the Settlement “appears to be the product of serious, informed and noncollusive negotiations,” that “there are no obvious deficiencies that appeared from the description of the proposed settlement, which does not improperly grant preferential treatment to class representatives or segments of the class,” and that the Settlement appears “to fall within the range of possible approval.” Transcript of Proceedings at 18 (Mar. 23, 2006); *see also* Preliminary Approval Order at ¶ 1.

Since the time that the Court preliminarily approved the Settlement Agreement, Class Counsel have provided notice to the approximately 12,470 members of the Class pursuant to the Court’s Preliminary Approval Order. While this method of notice informed Class members of their right to object, Class Counsel have received no objections to the Settlement Agreement, the Plan of Allocation, or the request of Class Counsel and Class Representatives for compensation and reimbursement of their expenses as of the date of this filing.

As set forth herein, and previously in Plaintiffs’ preliminary approval papers, the Settlement is in all respects fair, adequate, reasonable and in the public interest. Class Counsel accordingly respectfully ask the Court grant final approval to the Settlement at this time.

In addition, in connection with the final approval proceedings, Class Counsel request that the Court grant Plaintiffs’ Motion and Memorandum for Approval of Plan of Allocation (“Plan of Allocation Motion”) (Docket No. 213) and Class Counsel’s Motion for Attorneys’ Fees, Reimbursement of Expenses, and Award of Compensation to Class Representatives (“Compensation Motion”) (Docket No. 208). For the reasons stated therein, the Plan of Allocation Motion should be granted because the proposed Plan of Allocation will distribute the

Net Settlement Fund in a fair, adequate, and reasonable manner among the Class members.

Likewise, for the reasons stated therein, the Compensation Motion should be granted because the compensation sought is in all respects fair, reasonable, and justified based on the work performed and the successful results achieved by Class Counsel and the Class Representatives in this complex and hard-fought case.

II. SETTLEMENT TERMS AND COMPLIANCE WITH NOTICE REQUIREMENTS

Plaintiffs previously set forth a summary of the principal terms of the Settlement Agreement in Plaintiffs' Memorandum in Support of Motion for Order Granting Preliminary Approval of the Settlement Agreement, Approving Form and Method of Notice, and Setting a Date and Time for a Fairness Hearing (Docket No. 206) ("Preliminary Approval Memorandum") at 3-7. They also provided the Court with a copy of the Settlement Agreement in conjunction with that motion. Preliminary Approval Motion, Exhibit 1.

In summary, the Settlement Agreement covers all claims, parties, and defenses asserted in this action and provides relief to the Class previously certified by this Court by order dated December 27, 2004 in the form of a cash payment of \$28 million, plus interest, and substantial non-monetary equitable relief in the form of Company covenants not to restrict the sale of its stock in the Plan, and to provide specified information to Plan fiduciaries, participants and beneficiaries.

Pursuant to the terms of the Settlement Agreement, Class Counsel have filed a separate Plan of Allocation Motion, which is to be considered by the Court at the final approval hearing in this action. As described to the Class in the Notice of Class Action Settlement, in general terms, the Plan of Allocation provides that the Net Proceeds of the Settlement will be allocated to Class members on a *pro rata* basis such that the amount received by each Class member will depend on his or her calculated loss, relative to the losses of other Class members, related to Plan investments in Company stock.

In exchange for this substantial relief to the Class, the Settlement Agreement releases claims against the Defendants and the applicable fiduciary liability insurance policy that would (a) be barred by *res judicata* if the claims actually asserted had been fully litigated and resulted in a final judgment; or (b) that pertain to any decision made by and of the Parties to enter into or approve the Settlement Agreement or that pertain to any conduct related to the direction to calculate, the calculation of, and/or the allocation of the Settlement Amount to the Plan or any participant or beneficiary of the Plan pursuant to the Plan of Allocation. The Settlement Agreement, however, does not release, bar, waive, or otherwise affect any claim that has been asserted in *In re CMS Securities Litigation*, Master File No. 02-CV-72004 (E.D. Mich.).

As required by Fed. R. Civ. P. 23, the requirements of due process, and the Preliminary Approval Order, the Class received proper and adequate notice of the Settlement Agreement, the Fairness Hearing, the Compensation Motion, and the Plan of Allocation Motion. Pursuant to the Preliminary Approval Order, the Notice of Class Action Settlement was mailed to the last known address of Class members, as provided by the Company, as well as published on the website designated in that Notice. Likewise, the Court-Ordered Legal Notice (Summary) was published in *USA Today* and the *Detroit Free Press*. See Declaration of Lynn Sarko in Support of Class Counsel's Motion for Award of Attorney's Fees, Reimbursement of Expenses and Award of Compensation to Class Members ("Sarko Dec.") ¶¶ 75-78 (Docket No. 208). In addition, the Class received notice of the Compensation Motion by the method provided for in the Court's Preliminary Approval Order.¹ See Hanson Decl. ¶ 4. While not expressly required by the Preliminary Approval Order, the Plan of Allocation also was posted on the website described in this Notice as a source of information regarding the Settlement. Moreover, the Settlement

¹ Pursuant to the Court's preliminary approval order, the Compensation Motion was timely posted on <http://www.kellersettlements.com> and <http://www.mctiguelaw.com> at least 30 days before the Fairness Hearing. Declaration of Amy N.L. Hanson Regarding Compliance with Class Notice Requirements (Docket No. 212) ("Hanson Decl.") ¶ 4. There was a slight delay in posting this Motion on <http://www.mdfpc.com> due to technical difficulties, but the motion was posted on <http://www.mdfpc.com> on May 17, 2006 by 1:00 pm Eastern Daylight Time, which is 29 days prior to the Fairness Hearing in this action. *Id.*

Agreement and the Plan of Allocation have been provided to the Independent Fiduciary designated in the Settlement Agreement for its review.

III. THE SETTLEMENT WARRANTS FINAL APPROVAL

The Settlement Agreement in this action warrants final approval because it is “fair, adequate, and reasonable to those it affects” and “in the public interest.” *Lessard v. City of Allen Park*, 372 F. Supp. 2d 1007, 1009 (E.D. Mich. 2005) (citing *Williams v. Vukovich*, 720 F.2d 909, 921-23 (6th Cir. 1983)).

As noted in the Preliminary Approval Memorandum, courts in the Sixth Circuit have found eight factors relevant in considering whether the settlement is fair, adequate, reasonable, and consistent with the public interest: (1) the likelihood of success on the merits weighed against the amount and form of relief offered in the settlement; (2) the risks, expense, and delay of further litigation; (3) the judgment of experienced counsel who have competently evaluated the strength of their proofs; (4) the amount of discovery completed and the character of the evidence uncovered; (5) whether the settlement is fair to the unnamed class members; (6) objections raised by class members; (7) whether the settlement is the product of arm’s length negotiations as opposed to collusive bargaining; and (8) whether the settlement is consistent with the public interest. Preliminary Approval Memorandum at 9 (citing *In re Cardizem CD Antitrust Litig.*, 218 F.R.D. 508, 522 (E.D. Mich. 2003) (citing *Granada Invs., Inc. v. DWG Corp.*, 962 F.2d 1203, 1205 (6th Cir. 1992); *Vukovich*, 720 F.2d at 922-23)).

Plaintiffs previously detailed the factual and legal bases for finding that the Settlement Agreement satisfied the eight final approval considerations, noting that the final approval criteria lent further support to preliminary approval of the Settlement. Preliminary Approval Memorandum at 8-21. Two of those considerations (fairness to the Class and objections by Class members) could not be fully assessed until the requirements of Rule 23 and due process had been satisfied. Plaintiffs have now complied with those requirements, as specified in the Preliminary Approval Order.

Class Counsel will thus provide a brief summary of the reasons previously detailed in the Preliminary Approval Memorandum, as well as relevant information detailed in other pleadings that have been filed since the Court entered its Preliminary Approval Order, that supported six of the eight final approval factors. Class Counsel also will provide a full explanation of the reasons that the remaining two final approval factors (fairness to the Class and objections by Class members) also weigh in favor of granting final approval to the Settlement Agreement.

1. The Likelihood Of Plaintiffs' Success On The Merits Weighed Against The Amount And Form Of The Relief Offered In The Settlement Agreement Favors Final Approval.

As a court in this District has recently recognized, the ultimate question to be answered in evaluating this factor is “whether the interests of the class as a whole are better served if the litigation is resolved by the settlement rather than pursued.” *UAW v. Gen. Motors Corp.*, No. 05-73991, 2006 U.S. Dist. LEXIS 14890, at *46 (E.D. Mich. Mar. 31, 2006) (quoting *In re Cardizem*, 218 F.R.D. at 522 (quoting Manual for Complex Litig. § 30.42 at 238 (3d ed. 1995))).

The reasons that this consideration supports final approval of the Settlement Agreement were fully detailed in the Preliminary Approval Memorandum. Preliminary Approval Memorandum at 10-15. The litigation strengths and successes of Plaintiffs' case can be summarized as follows:

- The Court denied Defendants' extensively briefed and vigorously advocated motions to dismiss on three of Plaintiffs' four ERISA claims in an opinion that has been followed by courts in this and other Circuits grappling with virtually identical issues in similar ERISA company stock cases;
- The Court granted Plaintiffs' motion for Class Certification, which was likewise extensively briefed and vigorously advocated, in an opinion that has been followed by courts in other Circuits grappling with these issues in similar ERISA company stock cases; and
- Plaintiffs conducted extensive document and deposition discovery that set the Class well on its way to proving the allegations in the Complaint.

Despite these litigation strengths and successes, Plaintiffs recognize that they faced risks in bringing this case to trial. For example:

- Plaintiffs' claims are based upon complex and rapidly developing law; and
- Few decisions to date have been rendered at the summary judgment stage or at trial to provide guidance regarding burdens of proof that Plaintiffs face.

In addition, there is a significant risk that the dollar amount of any potential recovery could have been reduced between the date of the Settlement and the date the case would ultimately be tried to a verdict:

- CMS stock could continue to increase in value, thus decreasing the Plan's losses;
- General conditions in the market could change and the benchmark ultimately adopted by the Court may bear a lower rate of interest, thus decreasing the Plan's losses; and
- The parties vigorously dispute the appropriate measure of losses in this case, and, thus, the measure of losses ultimately accepted could have resulted in a recovery that was smaller than the recovery achieved by the Settlement - even if liability were established on all counts of Complaint. At bottom, the case law is sparse on the proper measure of damages in ERISA cases, which presented risks going forward in this case.

Weighing the strengths of Plaintiffs' claims against the risks of litigating those claims to a verdict at trial warrants the conclusion that interests of the Class as a whole are better served if the litigation is resolved by the settlement rather than pursued. As such, the \$28 million cash relief and additional specified equitable relief that Class Counsel achieved is of substantial benefit to the approximately 12,470 members of Class and is well within the range of settlements approved by courts in other cases. *See* Preliminary Approval Memorandum at 14-15.²

² The number of participants who obtain a distribution to their Plan accounts may be less than the number of Class members owing to the *de minimis* provision in the Plan of Allocation. While the proposed Plan of Allocation of the net Settlement Amount proposes to allocate the Settlement Fund to Class members in accordance with their losses, it is notable that if the Court approves the requested compensation for Class Counsel and Class Representatives, as well as reimburses them for their expenses, the mean recovery would be approximately \$1,557.56 per Class member, assuming a class size of 12,470 members. Of course, because the Plan-wide Settlement will be allocated on *pro rata* basis in proportion to Class members' losses, some participants will recovery significantly more than the mean, and others significantly less. This data is presented, however, to demonstrate, that the recovery will result in meaningful and substantial relief to current and former Plan participants.

2. The Risks, Expense And Delay Of Further Litigation Favors Final Approval.

“The obvious costs and uncertainty of such lengthy and complex litigation weigh in favor of settlement.” *UAW*, 2006 U.S. Dist. LEXIS 14890, at *54. Notably, several courts have noted the high degree of complexity of ERISA class actions of this type. Compensation Memorandum at 14 (citing cases). As fully explained in the Compensation Memorandum, this case was similarly complex for the following reasons:

- The complex and novel legal theories involved;
- The lack of established case values;
- The potential difficulty of establishing liability and losses;
- The risk of unforeseen change in the law;
- The vigorous defense lodged by the Defendants;
- The risk of delay and outcome on appeal; and
- A decision tree analysis based upon the numerous independent defenses Defendants asserted, any one of which, if successful, could have resulted in judgment in Defendants’ favor.

Compensation Memorandum at 14-16; *see also* Preliminary Approval Memorandum at 16-17, 20-21 (describing complexity of this action and citing cases in support).

This factor, thus, favors final approval of the Settlement Agreement because it ensures substantial and prompt payment to the Plan of substantial Plan-wide relief.

3. & 4. The Judgment Of Experienced Trial Counsel And The Amount And Character Of Discovery Weigh In Favor Of Approval.

“[T]he court should defer to the judgment of experienced counsel who has competently evaluated the strength of his proofs. Significantly, however, the deference afforded counsel should correspond to the amount of the discovery completed and the character of the evidence uncovered.” *In re Cardizem*, 218 F.R.D. at 525 (quoting *Vukovich*, 720 F.2d at 922-23 (internal citations omitted)).

Here, the law firms representing the Class in this case have significant expertise in class action litigation and ERISA cases of this type. *See* Preliminary Approval Memorandum at 17-18; Compensation Memorandum at 16-18. It is their considered view that the relief obtained for Class members – both the \$28 million monetary component and the important injunctive relief that addresses concerns identified about effective Plan administration – warrant approval of the Settlement, rather than continuing with litigation and the attendant costs and risks associated with that effort.

Moreover, this settlement was reached after the parties had engaged in significant formal discovery that began in July 2004 and continued full tilt into December 2005 (and was scheduled to continue beyond that) when an agreement was tentatively reached. The discovery included:

- multiple requests for production to the corporate and individual defendants, including electronic records and discovery, as well as subpoenas to Arthur Andersen (the auditor) and other third parties, which efforts yielded tens of thousands of documents that were reviewed by Class Counsel, and extensive motions practice regarding the same;
- twenty depositions by the time an agreement was reached (with more on the schedule), including CMS executives, corporate directors, persons responsible for Plan administration and management, and third parties; and
- the retention of and consultation with expert witnesses in several disparate disciplines, in anticipation of the need to present expert reports and to move into expert discovery right after the fact discovery.

In short, these factors support final approval because Class Counsel's decision to support settlement of the litigation on the terms set forth in the Settlement Agreement was reached after extensive consideration of the facts obtained through discovery and an evaluation of this information in light of the current state of the law.

5. & 6. The Lack Of Objections Asserted By Unnamed Class Members Supports The Fairness Of The Settlement Agreement To The Class As A Whole.

Here, despite having received notice and opportunity to be heard as provided for in the Preliminary Approval Order, Class Counsel have received no objections to date from the approximately 12,470 members of the Class to the Settlement Agreement, Plan of Allocation or

Compensation Motion. As noted in the Preliminary Approval Memorandum, the absence of any objections is strong evidence of the high regard of the Class for the results achieved in this case. *See* Preliminary Approval Memorandum at 19 (citing *In re Cardizem*, 218 F.R.D. at 527). Even if a vociferous opposition should later be lodged by a vocal minority of class members, however, a reviewing court has the obligation to “protect the interests of the silent class majority” in approving a settlement that it deems to be fair, reasonable, adequate and in the public interest. *UAW*, 2006 U.S. Dist. LEXIS 14890, at *61 (citation omitted). Class Counsel note that they have provided the Independent Fiduciary identified in the Settlement Agreement with all documents requested, and the Independent Fiduciary has likewise not filed an objection to the Settlement Agreement, Plan of Allocation or the Compensation Motion.

As to the fairness of the Settlement Agreement to the Class as a whole, we note that the Class as a whole will benefit from the substantial monetary and equitable relief afforded by the Settlement. The Plan of Allocation seeks to ensure fairness among Class members by allocating the Net Settlement Fund on a *pro rata* basis among Class members based on each Class member’s loss relative to the Plan’s total loss. Through this process, Class members will obtain a recovery that is reasonably and fairly related to their respective losses. The same general approach has been approved in numerous similar ERISA breach of fiduciary company stock class actions. *See, e.g., In re AOL Time Warner, Inc. Secs. & ERISA Litig.*, No. 02-5575, MDL No. 1500, 2006 U.S. Dist. LEXIS 17588, at *59 (S.D.N.Y. April 6, 2006) (finding that the plan of allocation provided “recovery to damaged investors on a pro rata basis according to their recognized claims of damages”); *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 463 (S.D.N.Y. 2004) (finding that the proposed plan of allocation was fair and reasonable where it allocated “the settlement amount among plan participants based on their losses”); *In re WorldCom, Inc. ERISA Litig.*, No. 02-4816, 2004 U.S. Dist. LEXIS 20671, at *29 (S.D.N.Y. Oct. 18, 2004) (approving plan of allocation as fair, adequate and reasonable where it was based on the “proportional share of the loss of each participant”), *vacated in part on other grounds*,

2004 U.S. Dist. LEXIS 22952 (S.D.N.Y. Nov. 15, 2004). The absence of any objection to the Plan of Allocation by any Class member, or the Independent Fiduciary retained by CMS to evaluate the fairness of the Settlement, is, as above, strong evidence of the fairness of the Plan of Allocation proposed by Class Counsel in this case.

In the event that any objections are lodged prior to the Fairness Hearing, Class Counsel will address such objections in a supplemental approval memorandum, time permitting, and address the objections at the Final Hearing. We are proud of our accomplishment in this case, and are prepared to explain the benefits achieved to the Court, and any other interested party at the Fairness Hearing.

7. The Settlement Agreement Is The Product Of Arm's Length Negotiations, Which Weigh In Favor Of Approval.

In the absence of evidence to the contrary, a Court should presume that settlement negotiations were conducted in good faith and that the resulting agreement was reached without collusion. *In re Rio Hair Naturalizer Prods. Liab. Litig.*, No. 1055, 1996 U.S. Dist. LEXIS 20440, at *43 (E.D. Mich. Dec. 20, 1996).

Here, the parties engaged in serious settlement negotiations at various points in the litigation, drawing upon their experience in other ERISA cases, data obtained from fact discovery, and expert analyses. *See* Preliminary Approval Memorandum at 1-3, 20; Compensation Memorandum at 7-12. As a result, counsel were able to assess the relative strengths and weaknesses of their positions and the range of potential damage awards. Moreover, the parties were assisted in several mediation attempts by two skilled mediators (former U.S. District Judge Nicholas H. Politan and Professor Eric D. Green). The final Settlement was itself the product of extensive and hard-fought negotiations. As a further check, pursuant to the terms of the Settlement Agreement, the Settlement has been presented to and approved as fair to the Plan by U.S. Trust N.A., which has been retained by the Defendants to

serve as an independent fiduciary to the Plan. U.S. Trust's independent evaluation, preliminary approval, and lack of objection to the Settlement weighs strongly in favor of final approval.

8. The Public Interest Warrants Approval Of This Agreement.

The Settlement Agreement in this action serves the public interest by bringing to a close – and a very favorable close – a lawsuit that affects the retirement security of thousands of employees of CMS and its affiliates. “Encouraging qualified counsel to bring inherently difficult and risky but beneficial class actions like this case benefits society.” *In re Cardizem*, 218 F.R.D. at 534. “[T]here is a strong public interest in encouraging settlement of complex litigation and class action suits because they are ‘notoriously difficult and unpredictable’ and settlement conserves judicial resources.” *Id.* at 530 (quoting *Granada*, 962 F.2d at 1205). As explained in the Preliminary Approval Memorandum, this comment is particularly apt with respect to ERISA cases, and this ERISA case in particular, which involves a complex and rapidly developing area of law, and was by all accounts, hard-fought. *See* Preliminary Approval Memorandum at 20-21. The Settlement Agreement also serves the public interest more broadly by educating plan fiduciaries and the public regarding the strict fiduciary duties imposed by ERISA, and the consequences of disregarding such duties. *See Id.* at 21 (noting that settlements are particularly desirable when they include remedial measures to be implemented over time); *see also* Compensation Motion at 14 (noting the importance of protecting employee’s retirement savings through the vigorous enforcement of ERISA’s fiduciary standards).

No contravening public interest justifies deviating from the strong public interest in the final approval of the Settlement Agreement in this complex ERISA class action, which provides significant monetary relief to the Class now and important non-monetary equitable relief in the future. Accordingly, the Settlement is fully consistent with the public interest.

Thus, taken together, each of the factors applied in the 6th Circuit to evaluate the fairness of a class action settlement support final approval of the settlement achieved in this case.

IV. CONCLUSION

After several years of hard-fought litigation in a difficult and complex case, a Settlement has been achieved that will provide substantial and meaningful relief to the Class. Class Counsel respectfully submit that the Settlement should be approved so that this relief may be provided to the Class. Accordingly, Plaintiffs' motion for final approval should be granted. In addition, for the reasons previously set forth separately in the respective motions, Class Counsel ask that the pending Plan of Allocation and Compensation Motions should be granted as well, thus, concluding this litigation.

Respectfully submitted this 8th day of June 2006.

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EASTERN DISTRICT OF MICHIGAN

In re CMS ENERGY ERISA LITIGATION

Master File No. 02-72834

Judge George Caram Steeh

This Document Relates To:

Class Action

ALL ACTIONS

**PLAINTIFFS' MOTION FOR FINAL APPROVAL
OF ERISA CLASS ACTION SETTLEMENT AGREEMENT**

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June 8, 2006

1. Pursuant to Fed. R. Civ. P. 23 and the requirements of due process, Plaintiffs hereby move the Court to enter an order and judgment that grants final approval to the Class Action Settlement Agreement (“Settlement Agreement”) between all parties and the certified Class. The Settlement Agreement appears in the record as Exhibit 1 to Plaintiffs’ Motion for Preliminary Approval of the Settlement, filed on March 15, 2006 (Docket No. 204) (“Preliminary Approval Mot.”) and is incorporated herein by reference.

2. By an order dated March 23, 2006, this Court preliminarily approved the Settlement and directed that notice be provided to Class members in the manner prescribed in the Order Granting Preliminary Approval of Settlement (“Preliminary Approval Order”) (Docket No. 206). The Court-ordered notice to the Class included sending the Notice of Class Action Settlement to Class members by mail as well as publishing it on the website designated in that Notice. It also included publishing the Court-Ordered Legal Notice (Summary) in *USA Today*, and the *Detroit Free Press*. Class Counsel provided the requisite notice to class members, as is demonstrated by the Declaration of Lynn L. Sarko ¶¶ 75-78, filed in support of Class Counsel’s Motion for Award of Attorneys’ Fees, Reimbursement of Expenses, and Award of Compensation to Class Representatives (“Compensation Motion”) (Docket No. 208). Pursuant to the Preliminary Approval Order, Class Counsel also posted the Compensation Motion on the websites designated in the Notice of Class Action Settlement. Declaration of Amy N. L. Hanson Regarding Compliance With Class Notice Requirements ¶ 4 (Docket No. 212).

3. The Court provided an opportunity for members of the certified class to file objections and to appear at a fairness hearing, which the Court has set for June 15, 2006. As of this date, no objections have been filed out of a class of approximately 12,470 members.

4. As explained more fully in the memorandum accompanying this motion, final approval of the proposed Settlement should now be granted. Class Counsel have satisfied the procedural requirements set by the Court for giving class members notice and an opportunity to

object to the proposed Settlement. Nothing has come to light since entry of the Preliminary Approval Order that calls into question the Court's preliminary finding that the Settlement should be approved.

5. Class Counsel note that in addition to this motion, there are separate motions pending that seek Court approval for (a) a Plan of Allocation for the funds to be made available pursuant to the Settlement Agreement; and (b) an award of compensation to Class Counsel and the Class Representatives. *See* Plaintiffs' Motion and Memorandum for Approval of Plan of Allocation ("Plan of Allocation Motion") (Docket No. 213) and the Compensation Motion. As part of a final resolution of this litigation, Plaintiffs respectfully request that the Court grant those motions as well.

WHEREFORE, for the foregoing reasons and those stated in the supporting memorandum, Plaintiffs respectfully request that the Court enter an order granting final approval to the Settlement, as well as granting the pending Plan of Allocation Motion and Compensation Motion. A proposed form of order is being submitted herewith.

Respectfully submitted this 8th day of June 2006.

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CERTIFICATE OF SERVICE

I hereby certify that on June 8, 2006, the foregoing PLAINTIFFS' MOTION FOR FINAL APPROVAL OF ERISA CLASS ACTION SETTLEMENT, PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR FINAL APPROVAL OF ERISA CLASS ACTION SETTLEMENT, and the [PROPOSED] ORDER AND FINAL JUDGMENT were electronically filed with the Clerk of the United States District Court, Eastern District of Michigan, using the CM/ECF system, which automatically serves notification of filing via email transmission on ECF registered counsel of record listed below. Non-ECF registered counsel will receive notice via U.S. Mail and via email.

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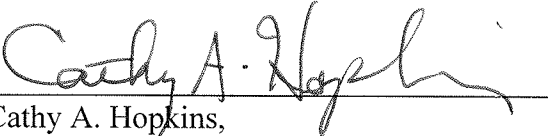
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In re CMS ENERGY ERISA LITIGATION

This Document Relates To:

ALL ACTIONS

Master File No. 02-72834

Judge George Caram Steeh

Class Action

**PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR
FINAL APPROVAL OF ERISA CLASS ACTION SETTLEMENT**

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STATEMENT OF ISSUE PRESENTED

Whether the Settlement Agreement between the parties in this ERISA class action is “fair, adequate, and reasonable to those it affects” and “in the public interest,” such that it warrants this Court’s final approval.

**STATEMENT OF MOST
APPROPRIATE AUTHORITY FOR RELIEF SOUGHT**

Pursuant to Local Rule 7.1(c)(2), Plaintiffs list the following cases as the most appropriate authorities for the relief sought in their motion:

- *Granada Invs., Inc. v. DW Corp.*, 962 F.2d 1203 (6th Cir. 1992)
- *In re Cardizem CD Antitrust Litig.*, 218 F.R.D. 508 (E.D. Mich. 2003)
- *In re Rio Hair Naturalizer Prods. Liab. Litig.*, No. 1055, 1996 U.S. Dist. LEXIS 20440 (E.D. Mich. Dec. 20, 1996)
- *Lessard v. City of Allen Park*, 372 F. Supp. 2d 1007 (E.D. Mich. 2005)
- *UAW v. Gen. Motors Corp.*, No. 05-73991, 2006 U.S. Dist. LEXIS 14890 (E.D. Mich. Mar. 31, 2006)
- *Williams v. Vukovich*, 720 F.2d 909 (6th Cir. 1983)

I. INTRODUCTION

The Named Plaintiffs in this ERISA class action, as Class Representatives of the Class that the Court previously certified in this case, seek final approval of a proposed Settlement of this litigation pursuant to a Settlement Agreement that the Court preliminarily approved by order dated March 23, 2006 (“Preliminary Approval Order”).

In granting preliminary approval to the Settlement Agreement, the Court found that the Settlement “appears to be the product of serious, informed and noncollusive negotiations,” that “there are no obvious deficiencies that appeared from the description of the proposed settlement, which does not improperly grant preferential treatment to class representatives or segments of the class,” and that the Settlement appears “to fall within the range of possible approval.” Transcript of Proceedings at 18 (Mar. 23, 2006); *see also* Preliminary Approval Order at ¶ 1.

Since the time that the Court preliminarily approved the Settlement Agreement, Class Counsel have provided notice to the approximately 12,470 members of the Class pursuant to the Court’s Preliminary Approval Order. While this method of notice informed Class members of their right to object, Class Counsel have received no objections to the Settlement Agreement, the Plan of Allocation, or the request of Class Counsel and Class Representatives for compensation and reimbursement of their expenses as of the date of this filing.

As set forth herein, and previously in Plaintiffs’ preliminary approval papers, the Settlement is in all respects fair, adequate, reasonable and in the public interest. Class Counsel accordingly respectfully ask the Court grant final approval to the Settlement at this time.

In addition, in connection with the final approval proceedings, Class Counsel request that the Court grant Plaintiffs’ Motion and Memorandum for Approval of Plan of Allocation (“Plan of Allocation Motion”) (Docket No. 213) and Class Counsel’s Motion for Attorneys’ Fees, Reimbursement of Expenses, and Award of Compensation to Class Representatives (“Compensation Motion”) (Docket No. 208). For the reasons stated therein, the Plan of Allocation Motion should be granted because the proposed Plan of Allocation will distribute the

Net Settlement Fund in a fair, adequate, and reasonable manner among the Class members.

Likewise, for the reasons stated therein, the Compensation Motion should be granted because the compensation sought is in all respects fair, reasonable, and justified based on the work performed and the successful results achieved by Class Counsel and the Class Representatives in this complex and hard-fought case.

II. SETTLEMENT TERMS AND COMPLIANCE WITH NOTICE REQUIREMENTS

Plaintiffs previously set forth a summary of the principal terms of the Settlement Agreement in Plaintiffs' Memorandum in Support of Motion for Order Granting Preliminary Approval of the Settlement Agreement, Approving Form and Method of Notice, and Setting a Date and Time for a Fairness Hearing (Docket No. 206) ("Preliminary Approval Memorandum") at 3-7. They also provided the Court with a copy of the Settlement Agreement in conjunction with that motion. Preliminary Approval Motion, Exhibit 1.

In summary, the Settlement Agreement covers all claims, parties, and defenses asserted in this action and provides relief to the Class previously certified by this Court by order dated December 27, 2004 in the form of a cash payment of \$28 million, plus interest, and substantial non-monetary equitable relief in the form of Company covenants not to restrict the sale of its stock in the Plan, and to provide specified information to Plan fiduciaries, participants and beneficiaries.

Pursuant to the terms of the Settlement Agreement, Class Counsel have filed a separate Plan of Allocation Motion, which is to be considered by the Court at the final approval hearing in this action. As described to the Class in the Notice of Class Action Settlement, in general terms, the Plan of Allocation provides that the Net Proceeds of the Settlement will be allocated to Class members on a *pro rata* basis such that the amount received by each Class member will depend on his or her calculated loss, relative to the losses of other Class members, related to Plan investments in Company stock.

In exchange for this substantial relief to the Class, the Settlement Agreement releases claims against the Defendants and the applicable fiduciary liability insurance policy that would (a) be barred by *res judicata* if the claims actually asserted had been fully litigated and resulted in a final judgment; or (b) that pertain to any decision made by and of the Parties to enter into or approve the Settlement Agreement or that pertain to any conduct related to the direction to calculate, the calculation of, and/or the allocation of the Settlement Amount to the Plan or any participant or beneficiary of the Plan pursuant to the Plan of Allocation. The Settlement Agreement, however, does not release, bar, waive, or otherwise affect any claim that has been asserted in *In re CMS Securities Litigation*, Master File No. 02-CV-72004 (E.D. Mich.).

As required by Fed. R. Civ. P. 23, the requirements of due process, and the Preliminary Approval Order, the Class received proper and adequate notice of the Settlement Agreement, the Fairness Hearing, the Compensation Motion, and the Plan of Allocation Motion. Pursuant to the Preliminary Approval Order, the Notice of Class Action Settlement was mailed to the last known address of Class members, as provided by the Company, as well as published on the website designated in that Notice. Likewise, the Court-Ordered Legal Notice (Summary) was published in *USA Today* and the *Detroit Free Press*. See Declaration of Lynn Sarko in Support of Class Counsel's Motion for Award of Attorney's Fees, Reimbursement of Expenses and Award of Compensation to Class Members ("Sarko Dec.") ¶¶ 75-78 (Docket No. 208). In addition, the Class received notice of the Compensation Motion by the method provided for in the Court's Preliminary Approval Order.¹ See Hanson Decl. ¶ 4. While not expressly required by the Preliminary Approval Order, the Plan of Allocation also was posted on the website described in this Notice as a source of information regarding the Settlement. Moreover, the Settlement

¹ Pursuant to the Court's preliminary approval order, the Compensation Motion was timely posted on <http://www.kellersettlements.com> and <http://www.mctiguelaw.com> at least 30 days before the Fairness Hearing. Declaration of Amy N.L. Hanson Regarding Compliance with Class Notice Requirements (Docket No. 212) ("Hanson Decl.") ¶ 4. There was a slight delay in posting this Motion on <http://www.mdfpc.com> due to technical difficulties, but the motion was posted on <http://www.mdfpc.com> on May 17, 2006 by 1:00 pm Eastern Daylight Time, which is 29 days prior to the Fairness Hearing in this action. *Id.*

Agreement and the Plan of Allocation have been provided to the Independent Fiduciary designated in the Settlement Agreement for its review.

III. THE SETTLEMENT WARRANTS FINAL APPROVAL

The Settlement Agreement in this action warrants final approval because it is “fair, adequate, and reasonable to those it affects” and “in the public interest.” *Lessard v. City of Allen Park*, 372 F. Supp. 2d 1007, 1009 (E.D. Mich. 2005) (citing *Williams v. Vukovich*, 720 F.2d 909, 921-23 (6th Cir. 1983)).

As noted in the Preliminary Approval Memorandum, courts in the Sixth Circuit have found eight factors relevant in considering whether the settlement is fair, adequate, reasonable, and consistent with the public interest: (1) the likelihood of success on the merits weighed against the amount and form of relief offered in the settlement; (2) the risks, expense, and delay of further litigation; (3) the judgment of experienced counsel who have competently evaluated the strength of their proofs; (4) the amount of discovery completed and the character of the evidence uncovered; (5) whether the settlement is fair to the unnamed class members; (6) objections raised by class members; (7) whether the settlement is the product of arm’s length negotiations as opposed to collusive bargaining; and (8) whether the settlement is consistent with the public interest. Preliminary Approval Memorandum at 9 (citing *In re Cardizem CD Antitrust Litig.*, 218 F.R.D. 508, 522 (E.D. Mich. 2003) (citing *Granada Invs., Inc. v. DWG Corp.*, 962 F.2d 1203, 1205 (6th Cir. 1992); *Vukovich*, 720 F.2d at 922-23)).

Plaintiffs previously detailed the factual and legal bases for finding that the Settlement Agreement satisfied the eight final approval considerations, noting that the final approval criteria lent further support to preliminary approval of the Settlement. Preliminary Approval Memorandum at 8-21. Two of those considerations (fairness to the Class and objections by Class members) could not be fully assessed until the requirements of Rule 23 and due process had been satisfied. Plaintiffs have now complied with those requirements, as specified in the Preliminary Approval Order.

Class Counsel will thus provide a brief summary of the reasons previously detailed in the Preliminary Approval Memorandum, as well as relevant information detailed in other pleadings that have been filed since the Court entered its Preliminary Approval Order, that supported six of the eight final approval factors. Class Counsel also will provide a full explanation of the reasons that the remaining two final approval factors (fairness to the Class and objections by Class members) also weigh in favor of granting final approval to the Settlement Agreement.

1. The Likelihood Of Plaintiffs' Success On The Merits Weighed Against The Amount And Form Of The Relief Offered In The Settlement Agreement Favors Final Approval.

As a court in this District has recently recognized, the ultimate question to be answered in evaluating this factor is “whether the interests of the class as a whole are better served if the litigation is resolved by the settlement rather than pursued.” *UAW v. Gen. Motors Corp.*, No. 05-73991, 2006 U.S. Dist. LEXIS 14890, at *46 (E.D. Mich. Mar. 31, 2006) (quoting *In re Cardizem*, 218 F.R.D. at 522 (quoting Manual for Complex Litig. § 30.42 at 238 (3d ed. 1995))).

The reasons that this consideration supports final approval of the Settlement Agreement were fully detailed in the Preliminary Approval Memorandum. Preliminary Approval Memorandum at 10-15. The litigation strengths and successes of Plaintiffs' case can be summarized as follows:

- The Court denied Defendants' extensively briefed and vigorously advocated motions to dismiss on three of Plaintiffs' four ERISA claims in an opinion that has been followed by courts in this and other Circuits grappling with virtually identical issues in similar ERISA company stock cases;
- The Court granted Plaintiffs' motion for Class Certification, which was likewise extensively briefed and vigorously advocated, in an opinion that has been followed by courts in other Circuits grappling with these issues in similar ERISA company stock cases; and
- Plaintiffs conducted extensive document and deposition discovery that set the Class well on its way to proving the allegations in the Complaint.

Despite these litigation strengths and successes, Plaintiffs recognize that they faced risks in bringing this case to trial. For example:

- Plaintiffs' claims are based upon complex and rapidly developing law; and
- Few decisions to date have been rendered at the summary judgment stage or at trial to provide guidance regarding burdens of proof that Plaintiffs face.

In addition, there is a significant risk that the dollar amount of any potential recovery could have been reduced between the date of the Settlement and the date the case would ultimately be tried to a verdict:

- CMS stock could continue to increase in value, thus decreasing the Plan's losses;
- General conditions in the market could change and the benchmark ultimately adopted by the Court may bear a lower rate of interest, thus decreasing the Plan's losses; and
- The parties vigorously dispute the appropriate measure of losses in this case, and, thus, the measure of losses ultimately accepted could have resulted in a recovery that was smaller than the recovery achieved by the Settlement - even if liability were established on all counts of Complaint. At bottom, the case law is sparse on the proper measure of damages in ERISA cases, which presented risks going forward in this case.

Weighing the strengths of Plaintiffs' claims against the risks of litigating those claims to a verdict at trial warrants the conclusion that interests of the Class as a whole are better served if the litigation is resolved by the settlement rather than pursued. As such, the \$28 million cash relief and additional specified equitable relief that Class Counsel achieved is of substantial benefit to the approximately 12,470 members of Class and is well within the range of settlements approved by courts in other cases. *See* Preliminary Approval Memorandum at 14-15.²

² The number of participants who obtain a distribution to their Plan accounts may be less than the number of Class members owing to the *de minimis* provision in the Plan of Allocation. While the proposed Plan of Allocation of the net Settlement Amount proposes to allocate the Settlement Fund to Class members in accordance with their losses, it is notable that if the Court approves the requested compensation for Class Counsel and Class Representatives, as well as reimburses them for their expenses, the mean recovery would be approximately \$1,557.56 per Class member, assuming a class size of 12,470 members. Of course, because the Plan-wide Settlement will be allocated on *pro rata* basis in proportion to Class members' losses, some participants will recovery significantly more than the mean, and others significantly less. This data is presented, however, to demonstrate, that the recovery will result in meaningful and substantial relief to current and former Plan participants.

2. The Risks, Expense And Delay Of Further Litigation Favors Final Approval.

“The obvious costs and uncertainty of such lengthy and complex litigation weigh in favor of settlement.” *UAW*, 2006 U.S. Dist. LEXIS 14890, at *54. Notably, several courts have noted the high degree of complexity of ERISA class actions of this type. Compensation Memorandum at 14 (citing cases). As fully explained in the Compensation Memorandum, this case was similarly complex for the following reasons:

- The complex and novel legal theories involved;
- The lack of established case values;
- The potential difficulty of establishing liability and losses;
- The risk of unforeseen change in the law;
- The vigorous defense lodged by the Defendants;
- The risk of delay and outcome on appeal; and
- A decision tree analysis based upon the numerous independent defenses Defendants asserted, any one of which, if successful, could have resulted in judgment in Defendants’ favor.

Compensation Memorandum at 14-16; *see also* Preliminary Approval Memorandum at 16-17, 20-21 (describing complexity of this action and citing cases in support).

This factor, thus, favors final approval of the Settlement Agreement because it ensures substantial and prompt payment to the Plan of substantial Plan-wide relief.

3. & 4. The Judgment Of Experienced Trial Counsel And The Amount And Character Of Discovery Weigh In Favor Of Approval.

“[T]he court should defer to the judgment of experienced counsel who has competently evaluated the strength of his proofs. Significantly, however, the deference afforded counsel should correspond to the amount of the discovery completed and the character of the evidence uncovered.” *In re Cardizem*, 218 F.R.D. at 525 (quoting *Vukovich*, 720 F.2d at 922-23 (internal citations omitted)).

Here, the law firms representing the Class in this case have significant expertise in class action litigation and ERISA cases of this type. *See* Preliminary Approval Memorandum at 17-18; Compensation Memorandum at 16-18. It is their considered view that the relief obtained for Class members – both the \$28 million monetary component and the important injunctive relief that addresses concerns identified about effective Plan administration – warrant approval of the Settlement, rather than continuing with litigation and the attendant costs and risks associated with that effort.

Moreover, this settlement was reached after the parties had engaged in significant formal discovery that began in July 2004 and continued full tilt into December 2005 (and was scheduled to continue beyond that) when an agreement was tentatively reached. The discovery included:

- multiple requests for production to the corporate and individual defendants, including electronic records and discovery, as well as subpoenas to Arthur Andersen (the auditor) and other third parties, which efforts yielded tens of thousands of documents that were reviewed by Class Counsel, and extensive motions practice regarding the same;
- twenty depositions by the time an agreement was reached (with more on the schedule), including CMS executives, corporate directors, persons responsible for Plan administration and management, and third parties; and
- the retention of and consultation with expert witnesses in several disparate disciplines, in anticipation of the need to present expert reports and to move into expert discovery right after the fact discovery.

In short, these factors support final approval because Class Counsel's decision to support settlement of the litigation on the terms set forth in the Settlement Agreement was reached after extensive consideration of the facts obtained through discovery and an evaluation of this information in light of the current state of the law.

5. & 6. The Lack Of Objections Asserted By Unnamed Class Members Supports The Fairness Of The Settlement Agreement To The Class As A Whole.

Here, despite having received notice and opportunity to be heard as provided for in the Preliminary Approval Order, Class Counsel have received no objections to date from the approximately 12,470 members of the Class to the Settlement Agreement, Plan of Allocation or

Compensation Motion. As noted in the Preliminary Approval Memorandum, the absence of any objections is strong evidence of the high regard of the Class for the results achieved in this case. *See* Preliminary Approval Memorandum at 19 (citing *In re Cardizem*, 218 F.R.D. at 527). Even if a vociferous opposition should later be lodged by a vocal minority of class members, however, a reviewing court has the obligation to “protect the interests of the silent class majority” in approving a settlement that it deems to be fair, reasonable, adequate and in the public interest. *UAW*, 2006 U.S. Dist. LEXIS 14890, at *61 (citation omitted). Class Counsel note that they have provided the Independent Fiduciary identified in the Settlement Agreement with all documents requested, and the Independent Fiduciary has likewise not filed an objection to the Settlement Agreement, Plan of Allocation or the Compensation Motion.

As to the fairness of the Settlement Agreement to the Class as a whole, we note that the Class as a whole will benefit from the substantial monetary and equitable relief afforded by the Settlement. The Plan of Allocation seeks to ensure fairness among Class members by allocating the Net Settlement Fund on a *pro rata* basis among Class members based on each Class member’s loss relative to the Plan’s total loss. Through this process, Class members will obtain a recovery that is reasonably and fairly related to their respective losses. The same general approach has been approved in numerous similar ERISA breach of fiduciary company stock class actions. *See, e.g., In re AOL Time Warner, Inc. Secs. & ERISA Litig.*, No. 02-5575, MDL No. 1500, 2006 U.S. Dist. LEXIS 17588, at *59 (S.D.N.Y. April 6, 2006) (finding that the plan of allocation provided “recovery to damaged investors on a pro rata basis according to their recognized claims of damages”); *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 463 (S.D.N.Y. 2004) (finding that the proposed plan of allocation was fair and reasonable where it allocated “the settlement amount among plan participants based on their losses”); *In re WorldCom, Inc. ERISA Litig.*, No. 02-4816, 2004 U.S. Dist. LEXIS 20671, at *29 (S.D.N.Y. Oct. 18, 2004) (approving plan of allocation as fair, adequate and reasonable where it was based on the “proportional share of the loss of each participant”), *vacated in part on other grounds*,

2004 U.S. Dist. LEXIS 22952 (S.D.N.Y. Nov. 15, 2004). The absence of any objection to the Plan of Allocation by any Class member, or the Independent Fiduciary retained by CMS to evaluate the fairness of the Settlement, is, as above, strong evidence of the fairness of the Plan of Allocation proposed by Class Counsel in this case.

In the event that any objections are lodged prior to the Fairness Hearing, Class Counsel will address such objections in a supplemental approval memorandum, time permitting, and address the objections at the Final Hearing. We are proud of our accomplishment in this case, and are prepared to explain the benefits achieved to the Court, and any other interested party at the Fairness Hearing.

7. The Settlement Agreement Is The Product Of Arm's Length Negotiations, Which Weigh In Favor Of Approval.

In the absence of evidence to the contrary, a Court should presume that settlement negotiations were conducted in good faith and that the resulting agreement was reached without collusion. *In re Rio Hair Naturalizer Prods. Liab. Litig.*, No. 1055, 1996 U.S. Dist. LEXIS 20440, at *43 (E.D. Mich. Dec. 20, 1996).

Here, the parties engaged in serious settlement negotiations at various points in the litigation, drawing upon their experience in other ERISA cases, data obtained from fact discovery, and expert analyses. *See* Preliminary Approval Memorandum at 1-3, 20; Compensation Memorandum at 7-12. As a result, counsel were able to assess the relative strengths and weaknesses of their positions and the range of potential damage awards. Moreover, the parties were assisted in several mediation attempts by two skilled mediators (former U.S. District Judge Nicholas H. Politan and Professor Eric D. Green). The final Settlement was itself the product of extensive and hard-fought negotiations. As a further check, pursuant to the terms of the Settlement Agreement, the Settlement has been presented to and approved as fair to the Plan by U.S. Trust N.A., which has been retained by the Defendants to

serve as an independent fiduciary to the Plan. U.S. Trust's independent evaluation, preliminary approval, and lack of objection to the Settlement weighs strongly in favor of final approval.

8. The Public Interest Warrants Approval Of This Agreement.

The Settlement Agreement in this action serves the public interest by bringing to a close – and a very favorable close – a lawsuit that affects the retirement security of thousands of employees of CMS and its affiliates. “Encouraging qualified counsel to bring inherently difficult and risky but beneficial class actions like this case benefits society.” *In re Cardizem*, 218 F.R.D. at 534. “[T]here is a strong public interest in encouraging settlement of complex litigation and class action suits because they are ‘notoriously difficult and unpredictable’ and settlement conserves judicial resources.” *Id.* at 530 (quoting *Granada*, 962 F.2d at 1205). As explained in the Preliminary Approval Memorandum, this comment is particularly apt with respect to ERISA cases, and this ERISA case in particular, which involves a complex and rapidly developing area of law, and was by all accounts, hard-fought. *See* Preliminary Approval Memorandum at 20-21. The Settlement Agreement also serves the public interest more broadly by educating plan fiduciaries and the public regarding the strict fiduciary duties imposed by ERISA, and the consequences of disregarding such duties. *See Id.* at 21 (noting that settlements are particularly desirable when they include remedial measures to be implemented over time); *see also* Compensation Motion at 14 (noting the importance of protecting employee’s retirement savings through the vigorous enforcement of ERISA’s fiduciary standards).

No contravening public interest justifies deviating from the strong public interest in the final approval of the Settlement Agreement in this complex ERISA class action, which provides significant monetary relief to the Class now and important non-monetary equitable relief in the future. Accordingly, the Settlement is fully consistent with the public interest.

Thus, taken together, each of the factors applied in the 6th Circuit to evaluate the fairness of a class action settlement support final approval of the settlement achieved in this case.

IV. CONCLUSION

After several years of hard-fought litigation in a difficult and complex case, a Settlement has been achieved that will provide substantial and meaningful relief to the Class. Class Counsel respectfully submit that the Settlement should be approved so that this relief may be provided to the Class. Accordingly, Plaintiffs' motion for final approval should be granted. In addition, for the reasons previously set forth separately in the respective motions, Class Counsel ask that the pending Plan of Allocation and Compensation Motions should be granted as well, thus, concluding this litigation.

Respectfully submitted this 8th day of June 2006.

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