UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
WESTERN DIVISION

MICHAEL G. MARCHANT, et al.	)	7:01-CV-01962-LSC
	)	(Lead Case) Consolidated with:
Plaintiffs,	)	7:01-CV-2025-LSC
	)	7:01-CV-2042-LSC
v.	)	7:01-CV-2081-LSC
	)	7:01-CV-2082-LSC
LASALLE BANK, N.A.,	)	7:01-CV-2083-LSC
	)	7:01-CV-2117-LSC
Defendant.	)	7:01-CV-2118-LSC
	)	7:01-CV-2119-LSC
	)	7:01-CV-2120-LSC
	)	7:01-CV-2121-LSC
	)	7:01-CV-2122-LSC
	)	7:01-CV-2123-LSC
	)	7:01-CV-2124-LSC
	)	
	)	Judge L. Scott Coogler
_____	)	

MEMORANDUM IN SUPPORT OF UNOPPOSED MOTION FOR FINAL APPROVAL OF PROPOSED SETTLEMENT AND PLAN OF ALLOCATION

I. INTRODUCTION

Plaintiffs respectfully submit this memorandum in support of their Motion for Final Approval of Proposed Settlement and Plan of Allocation ("Final Approval Motion"). [1] As further support for the Final Approval Motion, and as support for the facts set forth herein, *Plaintiffs* submit the following Exhibits: (1) *Settlement Agreement*; (2) *Plan of Allocation*; (3) *Notice*; (4) Declaration of Pamela B. Slate; (5) Declaration of Norman P. Goldberg, on behalf of Evercore Trust Company, N.A., the *Independent Fiduciary* (attached to which is a copy of Evercore's February 2, 2011, opinion letter); (6) Declaration of Mona Flowers, on behalf of Regions Morgan Keegan Trust, the *Settlement Administrator*; and (7) Proposed *Final Order and Judgment*. By separate filing, *Plaintiffs' Counsel* submit an application for attorneys' fees, litigation expense reimbursement, and for *Plaintiffs*' incentive awards.

II. PRELIMINARY STATEMENT

The *Settlement* will conclude the *Action*, which *Plaintiffs* commenced nearly ten years ago. *Plaintiffs* claim that *Defendant* violated fiduciary duties imposed by the Employee Retirement Income Security Act of 1974, as amended ("*ERISA*"). As strongly as *Plaintiffs* believe in the strength of their claims, *Defendant* is just as

[1] Unless otherwise noted, italicized words used herein have the meaning given them in the *Settlement Agreement*, which was attached as Exhibit 1 to the December 6, 2010, Motion for Preliminary Approval, and which the *Court* preliminarily approved on December 20, 2010.

adamant that *Plaintiffs'* claims have weaknesses. *Defendant* has asserted aggressive defenses to *Plaintiffs*' claims at every stage of the *Action*. As a result, *Plaintiffs* have been forced to litigate a number of novel and complex issues before the district courts, the Judicial Panel on Multidistrict Litigation ("JPML"), and the Seventh Circuit Court of Appeals.

The *Settlement* provides for the payment of $13.5 million in cash for the benefit of the *Class Members*. The *Settlement* was achieved only after *Plaintiffs' Counsel* conducted extensive discovery relating to the claims, defenses, and underlying events and transactions alleged in the *Action*; analyzed the evidence adduced through discovery and consultation with expert witnesses; researched the law applicable to *Plaintiffs*' claims and *Defendant*'s defenses; successfully litigated two appeals to the United States Court of Appeals for the Seventh Circuit; obtained a suggestion of remand from the United States District Court for the Northern District of Illinois, Eastern Division, (the "*MDL Court*") and remand from the *MDL Court* to this *Court* by the JPML; and participated in court-ordered mediation sessions with the Honorable Magistrate Judge Morton Denlow in Chicago, Illinois, a FRAP 33 Mediation Conference in the United States Court of Appeals for the Seventh Circuit in Chicago, and, ultimately, two separate mediation sessions with United States Magistrate Judge John E. Ott in Birmingham, Alabama.

The *Settlement* is an excellent result, and has been reviewed and approved by an *Independent Fiduciary*. *See* Goldberg Decl. and Report (Ex. 2 hereto and Ex. A thereto). Based on *Plaintiffs' Counsel*'s thorough investigation and analysis of the evidence, their experience in prosecuting the *Action* for some ten years, their past experience in other complex class actions, and their analysis of the current posture of the *Action*, they believe the *Settlement* is fair, adequate, and reasonable, and that the Court should grant final approval.

Accordingly, on behalf of *Plaintiffs* and the *Class*, *Plaintiffs' Counsel* respectfully request that the Court grant final approval to the *Settlement*, the *Plan of Allocation*, and the form and manner of *Notice* given in accordance with the *Court*'s December 20, 2010, Order preliminarily approving the *Settlement* and directing that *Notice* be given. They also ask that the Court name the *Independent Fiduciary* as a fiduciary of the Amsted Industries Incorporated Employees' Stock Ownership Plan and Trust (the "*ESOP*") for the purposes of the *Settlement Agreement*, find that the opinion of the *Independent Fiduciary* is thorough, complete, and well-taken, and name the *Settlement Administrator* as a fiduciary of the *ESOP* for the purposes of the *Settlement Agreement*.

Additionally, *Plaintiffs' Counsel* request that the Court expressly find that the *Action* comes within the provisions of the United States Department of Labor's Prohibited Transaction Exemption ("PTE") 2003-39 and that payments and

distributions made in accordance with the *Plan of Allocation* are "restorative payments" as defined in Internal Revenue Service Revenue Ruling 2002-45.

Finally, *Plaintiffs' Counsel* ask that the Court enter the *Final Order and Judgment*, in the form attached to the Final Approval Motion as Ex. 7, and dismiss the *Action* with prejudice.

III. STATEMENT OF FACTS

A. Procedural and Litigation History

In 2001, *Plaintiffs* commenced the *Action* against Amsted Industries, Inc. ("*Amsted*") and a number of individual defendants who were employees of *Amsted* (collectively, the "*Amsted Defendants*") in the United States District Court for the Northern District of Alabama. These cases were transferred to MDL 1417, which was pending in the *MDL Court* in Chicago. On September 17, 2002, after initial discovery, and prior to class certification, *Plaintiffs* filed the First Consolidated Class Action Complaint, which added *Defendant*. On December 13, 2002, the *MDL Court* certified the *Class* under FRCP 23(b)(1)(A).

Generally, *Plaintiffs* alleged that *Defendant* and the *Amsted Defendants* breached fiduciary duties under *ERISA* associated with the valuation of *Amsted* stock, all of which was held by the *ESOP*. The *Amsted* stock was not publically traded. As the trustee of the *ESOP*, *Defendant* was required to value the stock. *Plaintiffs* allege that, as of September 30, 1999, *Defendant* overvalued the stock,

resulting in overpayments. *Plaintiffs* also allege that the overpayments caused the price of the stock to decline, reducing the value of *Class* members' *ESOP* accounts, which consisted solely of *Amsted* stock.

Years of discovery culminated in cross-motions for summary judgment. On July 29, 2004, the *MDL Court* granted summary judgment against *Plaintiffs* on all of their claims and denied summary judgment against *Defendant* and the *Amsted Defendants*. *Plaintiffs* appealed the summary judgment to the United States Court of Appeals for the Seventh Circuit. On May 4, 2006, the Seventh Circuit reversed and remanded in favor of *Plaintiffs*. *See Armstrong v. LaSalle Bank, N.A.*, 446 F.3d 728 (7th Cir. 2006)("*Armstrong I*"). However, during the pendency of *Armstrong I*, *Plaintiffs* settled with the *Amsted Defendants*, leaving *Defendant* as the only remaining adverse party in the *Action*.

Upon remand by the Seventh Circuit, *Plaintiffs* and *Defendant* exchanged updated expert reports and conducted expert discovery, including the production of documents and supplemental depositions of experts. At the conclusion of the expert discovery, *Plaintiffs* moved the *MDL Cou*rt for a suggestion of remand. Following additional motion practice, and objections by *Defendant*, the *MDL Court* issued an order suggesting remand. In response, *Defendant* moved for reconsideration and petitioned for interlocutory appeal to the Seventh Circuit, which ultimately accepted the appeal over *Plaintiffs*' objection. On January 13,

2009, the Seventh Circuit issued its decision on the interlocutory appeal affirming the *MDL Court*'s order suggesting remand. *See Armstrong v. LaSalle Bank, N.A.*, 552 F.3d 613 (7th Cir. 2009) ("*Armstrong II*").

Plaintiffs filed the *MDL Court*'s suggestion of remand with the JPML, requesting that the JPML remand the *Action* to the Northern District of Alabama. The JPML granted *Plaintiffs*' request and, on August 10, 2009, issued a remand order transferring the *Action* to the Northern District of Alabama. *Defendant* then moved to transfer the *Action* back to the *MDL Court* for further discovery and trial. The *Parties* reached the *Settlement* before the Court decided *Defendant*'s motion to transfer.

B. *Settlement* Negotiations and Related Proceedings

Upon remand to the Northern District of Alabama, the Court referred the matter for mediation by United States Magistrate Judge John E. Ott. The *Parties* provided mediation statements to Magistrate Judge Ott, who then conducted mediation in Birmingham, Alabama, on December 15 and 16, 2009. The mediation failed to produce a settlement, but resulted in the parties agreeing to continue the process and to exchange additional information that could lead to resolution. This primarily included a substantial amount of data from *Amsted* about *ESOP* transactions by *Class Members* covering a period of approximately seven (7) years. Ex. 4 ¶ 9.

While the *Parties* were analyzing the additional information from *Amsted*, Judge Ott continued to confer and meet with the *Parties* privately over the next few months. Following these conferences and meetings, Magistrate Judge Ott decided to conduct another formal mediation. He held this second session in Birmingham, Alabama, on July 15 and 16, 2010. At the end of this session, the *Parties* reached a settlement in principle, subject to the negotiation and execution of a final settlement agreement. *Id.* ¶ 10.

C. The *Settlement Agreement* and the Court's Preliminary Approval

In the months following the second mediation, Magistrate Judge Ott continued to work with the *Parties* to assist them with the drafting and execution of the *Settlement Agreement*. With Magistrate Judge Ott's guidance, the *Parties* ultimately executed the *Settlement Agreement*, which they attached as an exhibit to the unopposed motion for preliminary approval of the proposed settlement.

Plaintiffs' Counsel filed the unopposed motion December 6, 2010, and amended the motion December 13, 2010. The Court granted the unopposed motion by written order dated December 20, 2010. In the Order, the Court determined that the proposed *Settlement* and the *Plan of Allocation* were sufficiently fair, reasonable, and adequate to warrant sending *Notice* to the *Class*. The Court also determined that the terms of the proposed *Settlement* and the *Plan of Allocation* fell

within the range of reasonable approval and, therefore, the Court preliminarily approved the proposed *Settlement*.

D. The *Notice* Program and the Absence of Objections

In its December 20 Order, the Court reviewed *Plaintiffs' Counsel's* proposed *Notice* program. The Court acknowledged that the proposed program was similar to that used in relation to the partial settlement between *Plaintiffs* and the *Amsted Defendants*. The earlier program, approved by the *MDL Court*, involved direct mailing a copy of the notice to each class member at that member's last-known address. Continuing with the success of that program, *Plaintiffs' Counsel* proposed direct mailing a copy of the form of *Notice* not only to each *Class* member, but also to all *ESOP* participants as at September 30, 1999 (the date of the alleged imprudent valuation by *Defendant*), at the last known address of each, to be obtained from a list *Amsted* created of the names and addresses of each participant in the *ESOP* as at September 30, 1999.

The Court concluded that the proposed *Notice* program was reasonable and adequate under the circumstances, and constituted the best notice practicable, thus satisfying the requirements of FRCP 23(e) and due process. The Court also reviewed and approved for dissemination the form of *Notice* that *Plaintiffs' Counsel* proposed to mail.

The Court then ordered that, by January 5, 2011, *Plaintiffs' Counsel* cause the *Notice* to be mailed by first class-mail, postage prepaid, to all September 30, 1999 *ESOP* participants, including *Class* members, at each participant's last known address as it appeared on the list obtained from *Amsted*. Consistent with the Court's order, *Plaintiffs' Counsel* caused a copy of the approved form of *Notice* to be mailed in the manner the *Court* directed. Ex. 4 ¶ 12.

On December 5, 2010, 6,627 *Notices* were mailed to the persons and at the addresses provided by *Amsted*. Of the *Notices* mailed, 2,941 were to members of the *Class*. Of the *Notices* mailed to members of the *Class*, 82 were returned, and of those *Notices* returned, 57 were mailed to new addresses obtained by *Plaintiffs' Counsel* through various address-updating services. Most of the *Notices* were re-mailed within one day of being returned. Ultimately, there were only 25 members of the *Class* for which *Notice* was returned and for which more recent addresses could not be obtained. Therefore, it appears that the direct-mail notice program caused the *Notice* to actually reach 99.15% of the *Class*. *Id.*

Pursuant to the *Court*'s Order, the *Notice* contained contact information for both *Plaintiffs' Counsel* and the *Settlement Administrator* and a website address (www.amstedesopsettlement.com). Approximately 125 persons contacted the *Settlement Administrator* and *Plaintiffs' Counsel* with inquiries about the *Notice*, *Settlement Agreement* and/or *Plan of Allocation*. Ex. 4 ¶ 13; Ex. 6 ¶ 7.

In its December 20, 2010, Order, the *Court* also provided that any person wishing to object to the *Settlement*, the *Plan of Allocation*, the proposed attorneys' fee or expenses, the proposed incentive awards, or otherwise to be heard, or to appear at the *Fairness Hearing*, must first send an *Objection* and Notice of Intention to Appear and a Summary Statement, via first-class mail, postage prepaid, to the office of the clerk of the Court, with copies to *Plaintiffs' Counsel*, *Defendant's Counsel*, and *Amsted's Counsel*, no later than February 14, 2011. To *Plaintiffs' Counsel's* knowledge, no *Objections* or Notices of Intention to Appear have been received by anyone to date.

E. Appointment and Activities of the *Settlement Administrator*

Pursuant to the Settlement Agreement, *Plaintiffs' Counsel* retained Regions Bank, d/b/a Morgan Keegan Trust ("Regions") to serve as *Settlement Administrator*. Ex. 6 ¶ 2. Regions has extensive experience in providing services to various types of retirement plans, including, but not limited to ESOPs and 401(k)'s. This experience includes retaining and analyzing massive amounts of account data, facilitating payments to participants pursuant to ERISA, and assisting participants in understanding the implications of and procedures to be followed when receiving funds from an ERISA-governed account. *Id.* ¶ 4.

Mona Flowers, Assistant Vice President and Trust Officer, has been designated by Regions to direct the administration of the *Settlement*. *Id.* ¶ 2. To

date, Regions has reviewed all relevant documents related to the *Settlement*, including the *Settlement Agreement*, the *Notice*, the *Plan of Allocation*, *Plaintiffs'* Motion for Preliminary Approval and the Supporting Memorandum, and obtained and analyzed the *Amsted ESOP* transaction history for all *ESOP* participants between October 2000 and March 2005. *Id.* ¶ 5. From this information and from numerous communications with *Plaintiffs' Counsel*, Regions has determined the following: (1) there were 6,627 persons that were participants in the *ESOP* with shares of *Amsted* allocated to their accounts as of September 30, 1999; and (2) of those persons, 2,941 received a distribution of benefits calculated with a share value lower than $184.41 between October 1, 2000, and March 29, 2005, excluding those persons who were once defendants in this *Action*. *Id.* ¶ 6.

To facilitate inquiries from members of the *Class*, Regions has a designated phone line for this *Settlement. Id.* ¶ 7. Since December 5, 2010, when *Notice* was mailed, Regions has received approximately 120 inquiries from persons who had received *Notice*, promptly responded to all inquiries, and encountered no person who expressed dissatisfaction with the *Settlement*. *Id.* Regions will continue to field calls from members of the *Class*, and will maintain the designated phone line until its services as *Settlement Administrator* are complete. *Id.* ¶ 8. In accordance with its engagement by *Plaintiffs' Counsel*, Regions has agreed and is prepared to undertake all the remaining duties and responsibilities necessary to carry out its

role as *Settlement Administrator*, as set forth in the *Settlement Agreement* and the *Plan of Allocation*. *Id.* ¶ 9.

F. Review and Approval by the *Independent Fiduciary*

In its December 20, 2010, Order, the Court approved Norman Goldberg/Evercore Trust Company N.A. to serve as *Independent Fiduciary* for the purposes and on the terms set forth in the *Settlement Agreement*. The Court also ordered that the *Independent Fiduciary* provide to *Parties' Counsel* its opinion with respect to the *Settlement* as provided in the *Settlement Agreement* no later than thirty (30) days from the date the *Independent Fiduciary* is retained by the *Parties*, or five (5) days before the deadline for *Plaintiff's Counsel* to submit the motion for final approval of the proposed *Settlement*, whichever is later.

Consistent with the Court's order, the *Independent Fiduciary* provided to *Parties' Counsel* its opinion with respect to the *Settlement* by letter dated February 2, 2011. Ex. 5 ¶ and Ex. A thereto). The opinion is timely as *Parties' Counsel* received it more than five (5) days before February 21, 2011, the deadline for *Plaintiffs' Counsel* to submit the motion for final approval.

In its opinion letter, the *Independent Fiduciary* described the scope of its retention, its extensive experience in serving in the capacity of an independent fiduciary to employee benefit plans, the standards that guided it in arriving at its opinion, the factors and facts that it considered in arriving at its opinion, and its

opinion that *Settlement* should be approved. *Id*. The *Independent Fiduciary* observed that, in deciding whether to accept or reject the *Settlement* on behalf of the *Plan*, it was required to act in accordance with the fiduciary responsibility standards of ERISA. *Id*. It explained that it was allowed to authorize the *Settlement* on behalf of the Plan if, after review of the *Settlement*, it concluded that the chances of obtaining any further relief for the Plan from the settling defendants were not justified by the expense and risk involved in pursuing such relief. *Id*. Furthermore, it explained that in determining whether the *Settlement* is reasonable in light of the Plan's likelihood of recovery, the risks and costs of litigation, and the value of claims foregone, it was obligated to weigh these factors pursuant to a prudent decision-making process, given the facts and circumstances of litigation. *Id*.

In fulfilling its responsibilities and evaluating the reasonableness of the *Settlement*, the *Independent Fiduciary* took the following actions: (1) reviewed court documents and other information and documents in the litigation that it deemed relevant; (2) interviewed counsel for the parties; (3) evaluated the strengths and weaknesses of the legal and factual arguments on which the litigation was based; (4) reviewed and analyzed the scope of the *Settlement* release; (5) reviewed *Plaintiffs' Counsel's* requested attorneys' fees; and (6) reviewed the *Plan of Allocation* proposed by the parties. *Id*.

With respect to the reasonableness of the *Settlement*, the *Independent Fiduciary* opined, in pertinent part, as follows:

> Based on its evaluation of the relevant documents and information associated with the class action and the Settlement, and taking into account the fiduciary obligations imposed by ERISA, Evercore has concluded that: (i) the $13,500,000 million [sic] cash Settlement Amount is reasonable, in light of the Plan's likelihood of full recovery, the risks and costs of litigation, and the value of the claims foregone; (ii) the terms and conditions of the settlement are no less favorable to the Plan than comparable arms-length terms and conditions that would have been agreed to by unrelated parties under similar circumstances; and (iii) the settlement is not part of an agreement, arrangement, or understanding designed to benefit a party in interest.
>
> As a result, Evercore has determined that the Plan should not object to the Proposed Litigation Settlement.

Id.

Plaintiffs' Counsel respectfully submit that the *Independent Fiduciary*'s evaluation of the fairness of the *Settlement* is thorough, complete, and well-taken, and request that the *Court* expressly so find. Additionally, *Plaintiffs' Counsel* requests that the Court expressly finds, as set forth in the Report of the *Independent Fiduciary*, that the *Action* comes within the United States Department of Labor's PTE 2003-39.

IV. TERMS OF THE *SETTLEMENT*

The *Settlement Agreement* was entered into by and among *Plaintiffs*, for themselves and on behalf of the *ESOP*, *Defendant*, and *Amsted*. The *Settlement*

provides for a cash payment of $13.5 million for the common benefit of the *Class*. Ex. 1 ¶ 3.1. The *Settlement Agreement* provides that the cash will be allocated to the individual members of the *Class* in the manner prescribed by the *Plan of Allocation*. *Id.* ¶ 8.2; Ex. 2.

In return for the cash payment, the *Settlement Agreement* provides for certain *Releases* from each *Plaintiff*, the *ESOP*, and the *Class*. The *Settlement Agreement* also contemplates that the *Judgment* issued by the *Court* will include a *Bar Order*, which will prohibit the filing or pursuit of certain claims.

The *Settlement Agreement* contains the following key terms:

A. The *Defendant* and *Amsted*

Defendant is Bank of America, N.A., successor-by-merger to LaSalle Bank, N.A. *Amsted* is Amsted Industries Incorporated. Ex. 1 ¶ 1.7.

B. The *Plaintiffs* and the *Class*

*Plaintiff*s are Michael G. Marchant, Jack D. LeCroy, Charles McQueen, Juan Armstrong, Joe Lee Mason, Jr., Roderick Gillespie, Noel G. Sanders, III, James E. Duckett, Darwyn Lightsey, Larry Holder, Daniel L. Wheeler, John E. Smith, Gerard Walker, Dwight Smith and Miguel Zepeda, Jr. *Id.* ¶ 1.18.

The *Class* is comprised of (a) *all* participants in the *ESOP* with accounts to which shares of stock in *Amsted* were allocated as of September 30, 1999, and who received a distribution of benefits calculated with a share value lower than $184.41

between October 1, 2000, and March 29, 2005, but excluding those *ESOP* participants who were ever a defendant in the *Action* and (b) the beneficiaries of the persons described in subsection (a). *Id.* ¶ 1.3.

C. The *ESOP*

The *ESOP* is the Amsted Industries Incorporated Employees' Stock Ownership Plan and Trust, and any of its predecessor plans or amendments. *Id.* ¶ 1.11.

D. *Parties*

The *Parties* are the *Plaintiffs*, the *Defendant*, and *Amsted*, collectively. *Id.* ¶ 1.16.

E. The *Settlement* Consideration, the *Settlement Fund*, and Payments from the *Settlement Fund*

The *Parties* settled all claims they brought, or could have brought, against one another in relation to *Amsted* or the *ESOP* or the *Defendant*'s acts or omissions as Trustee of the *ESOP* for the aggregate cash sum of $13,500,000.00, plus *Interest*. *Id.* ¶ 3.1. *Interest* is defined to mean 0.26% compounded annually beginning on July 16, 2010, and ending on the day before the settlement consideration is paid into the *Settlement Fund*. *Id.* Of this $13.5 million, $11.5 million, plus *Interest*, will be paid by *Defendant* and $2,000,000, plus *Interest*, will be paid by *Amsted*. *Id.* Additionally, *Defendant* committed to contribute one-half the amount of the *Settlement Costs* incurred prior to the date the *Judgment*

becomes *Final* (more specifically, the costs, not including attorneys' fees or litigation expenses, associated with the *Notice* and administration of the *Settlement* and the fees and costs incidental to the services provided by the *Independent Fiduciary*). *Id.* ¶¶ 3.2, 3.3. All other *Settlement Costs* shall be paid from the *Settlement Fund*. *Id.* ¶ 3.2. To that end, *Defendant* deposited $125,000 in the trust account of *Plaintiffs' Counsel* Slate Carter Comer PLLC on December 13, 2010. Of that amount, the following has been or is due to be paid: $12,755.09 for *Notice* and the creation and maintenance of the settlement website, and $60,000 for the services of the *Independent Fiduciary*. Any amount due the *Settlement Administrator* (which amount will be known upon receipt from *Amsted* of the number of members of the *Class* who are not *ESOP* or *Amsted* 401(k) participants, upon which the *Settlement Administrator*'s fee is based), and other reasonable expenses related to *Notice* and settlement administration incurred prior to *Defendant*'s payment into the *Settlement Fund* will also be paid from this amount. Ex. 1 ¶ 3.3; Ex. 4 ¶ 19.

Within five days after the date the *Judgment* becomes *Final*, *Defendant* shall pay $11,500,000, less one-half of the *Settlement Costs* incurred prior to the date the *Judgment* becomes *Final*, plus *Interest* on the net sum, and *Amsted* shall pay $2,000,000, plus *Interest*, into the *Settlement Fund* at the *Financial Institution*. Ex. 1 ¶ 3.1.

The funds on deposit in the *Settlement Fund* shall be invested only in United States Treasury securities and/or securities of United States agencies backed by the full faith and credit of the United States Treasury, and mutual funds or money market accounts that invest exclusively in the foregoing securities. *Id.* ¶ 7.2. The *Settlement Fund*, together with net earnings thereon, shall be considered a common fund created as a result of the *Action*. *Id.* ¶ 7.1. The *Financial Institution* shall make distributions from the *Settlement Fund* only in accordance with the terms of the *Settlement Agreement*. *Id.* ¶ 7.1.

The *Settlement Fund* shall be structured and managed to qualify as a "qualified settlement fund" described in the Treasury regulations promulgated under Section 468B of the Internal Revenue Code and no *Party* or *Party's Representative* shall take any position in any filing or before any tax authority that is inconsistent with such treatment. *Id.* ¶ 7.2. All taxes on the income of the *Settlement Fund* and tax-related expenses, including the expenses, if any, of a certified public accounting firm, incurred in connection with the administration of the *Settlement Fund* shall be paid solely out of the *Settlement Fund*, shall be considered a cost of administration of the *Settlement*, and shall be timely paid without further order of the *Court*. *Id.*

Following the *Settlement* becoming *Final*, all fees and expenses of the *Settlement Administrator* or the *Financial Institution*, and of professional advisors

engaged by the *Settlement Administrator* or the *Financial Institution* in connection with the *Settlement Fund*, shall be paid solely from the *Settlement Fund*. *Id.* The *Settlement Fund* and payments therefrom shall be structured to preserve, to the maximum extent allowed by law, the tax benefits attributable to amounts held under an Internal Revenue Code Section 401(a) qualified retirement plan. *Id.*

No funds shall be distributed from the *Settlement Fund* except in accordance with the terms of the *Settlement Agreement*. In addition to distributions to members of the *Class*, as provided in the *Plan of Allocation*, funds shall be distributed for the following purposes: (1) to provide for the attorneys' fees and expenses of *Plaintiffs' Counsel* awarded by the *Court*; (2) to provide for *Plaintiffs* incentive awards; (3) to pay the taxes and expenses of the *Settlement Fund*; and (4) to pay *Settlement Costs*. *Id.* ¶ 8.

The *Settlement Administrator* will calculate and supply to *Plaintiffs' Counsel* a report of the exact *pro rata* amount due each member of the *Class* from the *New Proceeds*, in accordance with the *Plan of Allocation*, and will determine, based on a list of *ESOP* and *Amsted* 401(k) participants to be supplied by *Amsted*, the total amount due those members of the *Class* who are *ESOP* or 401(k) participants. *Plaintiffs' Counsel* will then submit the *Settlement Administrator*'s report to the *Court* for an Order directing the distribution of these amounts in accordance with the *Settlement Agreement* and *Plan of Allocation*. Ex 2.

After the date the *Judgment* becomes *Final* and the *Court* has ordered distribution, *Plaintiffs' Counsel* shall direct the *Financial Institution* to disburse the *Net Proceeds* allocated to those persons who are still *ESOP* or *Amsted* 401(k) participants to the *ESOP* for allocation in accordance with the terms of the *Plan of Allocation* and the *Court's* distribution order, which will include a specific dollar amount to be allocated to each member of the *Class* who is still a participant in the *ESOP* or *Amsted* 401(k) plan. Ex. 1 ¶ 8.2; Ex. 2.

With respect to *Class Members* who are not participants in the *ESOP* or the *Amsted* 401(k) plan, and who will be entitled to receive a portion of the *Net Proceeds* under the *Plan of Allocation*, the *Settlement Administrator* and *Plaintiff's Counsel* shall cause the *Financial Institution* to deposit the total amount of such *Net Proceeds* in a subtrust account established by the *Settlement Administrator* under the Federal EIN of the *ESOP*'s trust for the purpose of holding such amount pending distribution to former participants. Ex. 1 ¶ 8.2; Ex 2. The *Settlement Administrator* shall prepare and deliver to all *Class* members who are not participants in the *ESOP* or *Amsted*'s 401(k) plan and who are entitled to receive a portion of the *Net Proceeds* pursuant to the *Plan of Allocation* a notice explaining their options with respect to the portion of the subtrust to which they are entitled, and such notice shall be provided in accordance with the timing requirements of, and shall be accompanied by the tax and rollover disclosure for distributions from

qualified retirement plans required under, Internal Revenue Code Section 402(f). Ex. 1 ¶ 8.2; Ex 2. The *Settlement Administrator* shall be assigned all fiduciary responsibility for the subtrust account, and shall distribute the subtrust account in accordance with the *Plan of Allocation* and as directed by the *Court*. Ex. 1 ¶ 8.2; Ex 2.

In the event that a Non-*ESOP* or 401(k) *Class Member* fails to provide direction to the *Settlement Administrator* within the deadline provided by Internal Revenue Code Section 402(f), the *Settlement Administrator* will, in accordance with Internal Revenue Code Section 401(a)(31)(B), either (i) mail a check to that *Class* Member (if the address of the *Class Member* is verified) accompanied by a letter explaining the tax consequences of cashing the check and the option to rollover the check to an eligible retirement plan within the 60-day period for indirect rollovers or (ii) establish an automatic rollover IRA for the benefit of such *Class Member*. In the event that a Non-*ESOP* or 401(k) *Class Member* cannot be found, the *Settlement Administrator* will follow an *ERISA*-compliant policy for handling distributions to missing participants in the normal course. Ex. 1 ¶ 8.2; Ex 2.

F. The *Releases*

The *Settlement Agreement* provides for mutual releases among the *Parties*. The *Release* that will be given by the *Class* to *Defendant Releasees* provides as follows:

> 4.1 Effective upon the *Judgment* becoming *Final*, each *Plaintiff*, the *ESOP*, *the Class* and the respective *Representatives* of each of the *Plaintiffs*, the *ESOP*, and the *Class*, absolutely and unconditionally release and forever discharge each of the *Defendant Releasees*, from all claims of any nature whatsoever arising from or relating to *Amsted* or the *ESOP* or the *Defendant*'s acts or omissions as Trustee of the *ESOP* (including but not limited to all claims relating to the valuation of *Amsted* stock or the repurchase obligation, all claims which were or could have been brought in the *Action*, and all claims for any and all losses, damages, unjust enrichment, attorneys' fees, disgorgement of fees, litigation costs, injunction, declaration, contribution, indemnification or any other type or nature of legal or equitable relief), whether accrued or not, whether known, unknown, or unsuspected, in law or equity, other than claims under this Release, this Settlement *Agreement*, or the *Judgment* ("*Released Claims*").
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> . . .
>
> 4.7 To further effectuate the foregoing releases, it is acknowledged and agreed that the *Judgment* shall provide for the dismissal with prejudice of the *Action* and shall include the *Bar Order*. **WITH RESPECT TO THE *RELEASED CLAIMS* AND THE *DEFENDANT*'S *RELEASED CLAIMS*, IT IS THE INTENTION OF THE *PARTIES* TO WAIVE TO THE FULLEST EXTENT OF THE LAW: (A) THE PROVISIONS, RIGHTS AND BENEFITS OF SECTION 1542 OF THE CALIFORNIA CIVIL CODE, WHICH PROVIDES THAT "A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR"; AND (B) THE PROVISIONS, RIGHTS AND BENEFITS OF ANY SIMILAR STATUTE OR COMMON LAW OF ANY OTHER JURISDICTION THAT MAY BE, OR**

> **MAY BE ASSERTED TO BE, APPLICABLE.** All claims against any person or entity that are not specifically released herein are specifically reserved and not waived by *Plaintiffs*, the *ESOP*, the *Class*, *Amsted*, the respective *Representatives* of each of the *Plaintiffs*, the *ESOP*, the *Class*, and *Amsted*, and the *Defendant Releasees*.

Ex. 1 ¶¶ 4.1, 4.7. Complete copies of these *Releases* were included with the *Notice* mailed to the members of the *Class.* Ex. 3 at 6-7. In addition, the *Settlement Agreement* provides mutual releases to *Class Members* by *Defendant* and *Amsted*. Ex. 1 ¶ 4.2, 4.4.

G. The *Bar Order*

The *Bar Order*, which is contained in the proposed *Final Order and Judgment*, provides that "*Plaintiffs*, the *Class* and their *Representatives* are forever barred and enjoined from prosecuting any *Released Claims* against the *Defendant* or the *Defendant Releasees*," and "[t]he *Defendant* and *Defendant Releasees* are forever barred and enjoined from prosecuting any *Defendant's Released Claims* against any of the *Plaintiffs*, the *Class*, the *ESOP*, or any of their respective *Representatives*." Ex. 7 ¶¶ 11-12. The *Bar Order* related to *Released Claims* was included in the *Notice.* Ex. 3 at 7.

V. DISCUSSION

A. The *Settlement* Satisfies the Standards for Final Approval

1. The Law Favors and Encourages Settlements

The Federal Rules of Civil Procedure authorize district courts to facilitate settlements in all types of litigation, including class actions. Fed. R. Civ. P. 16(a), (c); *see also* Rule 16(c) Advisory Committee Note. Class action settlements are particularly favored by the courts. In this respect, the United States Supreme Court has written that such settlements are "highly favored in the law and will be upheld whenever possible because they are a means of amicably resolving doubts and preventing lawsuits." *United Airlines, Inc. v. McDonald*, 432 U.S. 385, 401 (1977) (citations omitted).

The Eleventh Circuit explicitly favors class action settlements. *See, e.g.*, *In re United States Oil & Gas Litig.*, 967 F.2d 489, 493 (11th Cir. 1992) (writing that "public policy strongly favors the pretrial settlement of class action lawsuits"); *accord Cotton v. Hinton*, 559 F.2d 1326, 1331 (5th Cir. 1977). And, with respect to settlement of complex class litigation, such as this *Action*, the Eleventh Circuit has explained the policy as follows: "[c]omplex litigation…can occupy a court's docket for years on end, depleting the resources of the parties and the taxpayers while rendering meaningful relief increasingly elusive." *Id*. at 493.

2. The *Settlement* Meets the Standard for Final Approval

Approval of a class action settlement "is committed to the sound discretion of the district court." *In re U.S. Oil & Gas Litig.*, 967 F.2d at 493; *cf. U.S. v. Allegheny-Ludlum Indus., Inc.*, 517 F.2d 826, 850 (5th Cir. 1975) (writing that "great weight is accorded the trial judge's views"). "The Court's exercise of discretion in this regard should be 'informed by the strong judicial policy favoring settlement as well as by the realization that compromise is the essence of settlement.'" *Perez v. Asurion Corp.*, 501 F. Supp. 2d 1360, 1379 (S.D. Fla. 2007)(citing *Bennett v. Behring Corp.*, 737 F.2d 982, 986 (11th Cir. 1984)).

In approving a settlement under FRCP 23(e), the Court "must find that it 'is fair, adequate, and reasonable and is not the product of collusion between the parties.'" *Bennett*, 737 F.2d at 986 (quoting *Cotton*, 559 F.2d at 1330). Stated another way, "[t]he Court is required to make a two-part determination that: 1) there is no fraud or collusion in reaching the settlement, and 2) the settlement is fair, adequate, and reasonable." *Warren v. Tampa*, 693 F. Supp. 1051, 1054 (M.D.Fla. 1988), *aff'd without op.*, 893 F.2d 347 (11th Cir. 1989) (citing *Bennett*, 737 F.2d 982; *Ruiz v. McKaskle*, 724 F.2d 1149 (5th Cir. 1984); *Cotton*, 559 F.2d 1326; *In re Dennis Greenman Securities Litig.*, 622 F. Supp. 1430 (S.D. Fla. 1985)).

Additionally, courts generally find that approval is appropriate where the proposed settlement is the result of the parties' good faith negotiations. In this regard, courts consider whether the settlement was reached with the assistance of a mediator. *See, e.g., In re Toys "R" Us Antitrust Litig.*, 191 F.R.D. 347, 352 (E.D.N.Y. 2000) (writing that "[m]ost significantly, the settlements were reached only after arduous settlement discussions conducted in a good faith, non-collusive manner, over a lengthy period of time, and with the assistance of a highly experienced neutral mediator"). Participation in mediation creates a highly indicative presumption of fairness in the negotiation process. *See In re Immune Response Sec. Litig.*, 497 F. Supp. 2d 1166, 1171 (S.D. Cal. 2007).

Courts also recognize that the opinion of experienced and informed counsel supporting settlement is entitled to considerable weight. *See, e.g., Leonhardt v. ArvinMeritor, Inc.*, 581 F. Supp. 2d 818, 837 (E.D. Mich. 2008) ("The judgment of the parties' counsel that the settlement is in the best interests of the settling parties 'is entitled to significant weight, and supports the fairness of the class settlement.'" (citations omitted)); *Turner v. Murphy Oil USA, Inc.*, 472 F. Supp. 2d 830, 852 (E.D. La. 2007) ("Court will give weight to class counsel's opinion regarding the fairness of settlement. . . . Class counsel's opinion should be presumed reasonable because they are in the best position to evaluate fairness due to an intimate familiarity with the lawsuit."); *In re General Instrument Secs. Litig.*, 209 F. Supp.

2d 423, 431 (E.D. Pa. 2001) ("Significant weight should be attributed to the belief of experienced counsel that the settlement is in the best interests of the class.").

Furthermore, there is an initial presumption that a proposed settlement is fair and reasonable when it is the result of arm's-length negotiations between experienced counsel following sufficient discovery. *In re Compact Disc Minimum Advertised Price Antitrust Litig.*, 216 F.R.D. 197, 207 (D. Maine 2003) (citing *City P'ship Co. v. Atlantic Acquisition Ltd. P'ship*, 100 F.3d 1041, 1043 (1st Cir. 1996); *New York v. Reebok, Int'l Ltd.*, 903 F. Supp. 532, 535 (S.D.N.Y. 1995), *aff'd*, 96 F.3d 44 (2d Cir. 1996); *accord M. Berenson Co. v. Faneuil Hall Market Place, Inc.*, 671 F. Supp. 819, 822 (D. Mass. 1987) ("Where, as here, a proposed settlement has been reached after meaningful discovery, after arm's length negotiation, conducted by capable counsel, it is presumptively fair." (footnote omitted)); *Ellis v. Naval Air Rework Facility*, 87 F.R.D. 15, 18 (N.D. Cal. 1980) ("[T]he fact that experienced counsel involved in the case approved the settlement after hard-fought negotiations is entitled to considerable weight."), *aff'd*, 661 F.2d 939 (9th Cir. 1981).

3. The *Settlement* is not the Product of Fraud or Collusion

The *Settlement* is the result of good-faith arm's length negotiations; it is not the product of fraud or collusion. "[Courts] presume the absence of fraud or collusion in negotiating the settlement, unless evidence to the contrary is offered."

4 Alba Conte, Herbert B. Newberg, *Newberg on Class Actions* sec. 11.51, at 158 (4th ed. 2002). Not only is there no evidence of fraud or collusion of any type at any stage of the *Action*, the record affirmatively shows that the *Settlement* is the product of good faith, hard-fought litigation and arms-length negotiation over the course of years among informed and experienced counsel, under the guidance of highly-skilled, neutral mediators, and in particular Magistrate Judge John E. Ott.

Magistrate Judge Ott not only oversaw two days of mediation in December 2009 and two days in June 2010, he spent substantial time supervising the *Parties*' negotiations during the period between the mediations, and was directly engaged in resolving numerous disputes during the drafting of the *Settlement Agreement*. That the *Parties* could not resolve these numerous issues without Magistrate Judge Ott's intervention is a testament alone to the lack of fraud or collusion.

4. The *Settlement* also Satisfies the Criteria the Eleventh Circuit Considers for Approval

In determining whether a class action settlement is fair, reasonable, and adequate, the Eleventh Circuit requires a district court to consider six factors: (1) the likelihood of success at trial; (2) the range of possible recovery; (3) the point on or below the range of possible recovery at which a settlement is fair, adequate and reasonable; (4) the complexity, expense and duration of litigation; (5) the substance and amount of opposition to the settlement; and (6) the stage of proceedings at which the settlement was achieved. *Bennett*, 737 F.2d at 986. As

previously established in Plaintiffs' preliminary approval papers, and as established again below, each of these factors weighs in favor of the Court's approval of the *Settlement*.

a. Factor One: The Likelihood of Success at Trial

In evaluating the fairness and adequacy of the settlement, the *Court* "should compare the benefits of the settlement 'with the likely rewards the class would have received following a successful trial of the case.'" *Beavers v. American Cast Iron Pipe Co.*, 164 F. Supp. 2d 1290, 1298 (N.D. Ala. 2001) (quoting *Cotton*, 559 F.2d at 1330). It is important to remain mindful that the *Court* is not to decide the merits of the *Parties*' claims and defenses. *Ressler v. Jacobsen*, 822 F. Supp. 1551, 1553 (M.D. Fla. 1992). Instead, the *Court* should make a "limited inquiry into whether the possible rewards of continued litigation with its risks and costs are outweighed by the benefits of the settlement." *Id.* (citing *Mashburn v. Nat'l Healthcare, Inc.*, 684 F. Supp. 660 (M.D. Ala. 1988)).

As demonstrated by the vigor with which *Plaintiffs' Counsel* have prosecuted the *Action*, as well as the amount of time and resources they have committed to that end, it is clear that they strongly believe in its merits. *Plaintiffs' Counsel* submit that the evidence they would offer at trial would establish, among other things, that *Defendant* breached the fiduciary duties it owed to *Plaintiffs* and

the *Plan*. On the other hand, *Defendant* believes that *Plaintiffs* will not prevail at trial.

Despite *Plaintiffs' Counsel's* belief in the strength of their case, *Plaintiffs* face numerous hurdles to establish *Defendant*'s liability and to prove the existence of any damages to the *ESOP* and the *Class*. To prevail on their claims, *Plaintiffs* must show that *Defendant* failed to comply with its duties under ERISA, an imposing undertaking considering the uncertainty in this evolving area of the law. *Defendant* has and likely will continue to present a number of defenses that have been upheld by some courts to diminish or prevent recovery under ERISA. And, even if *Plaintiffs* manage to overcome these defenses, they still face significant uncertainty as to *Defendant's* ability to defeat their recovery by enforcing an indemnification clause with *Amsted*.

Courts have recognized the unique complexity in proving ERISA damages. *See, e.g., In re Global Crossing Securities & ERISA Litig.*, 225 F.R.D. 436, 460 (S.D.N.Y. 2004) (concluding that "the legal and factual complexities and uncertainties of proving ERISA damages also militate in favor of settlement"). Moreover, the damages proof in this *Action* is heavily dependent upon expert testimony, with the uncertainty attendant to competing damages experts. *See*, *e.g.*, *Milken & Assoc. Sec. Lit.*, 150 F.R.D. 46, 54 (S.D.N.Y. 1993) (approving settlement and noting that damages calculations often are a "battle of the experts,

with no guarantees of the outcome")); *In re Warner Communications Sec. Litig.*, 618 F.Supp. 735, 744-45 (S.D.N.Y. 1985) (writing that "[i]n this battle of experts, it is virtually impossible to predict with any certainty which testimony would be credited, and ultimately, which damages would be found to have been caused by actionable factors, rather than the myriad of nonactionable factors such as market conditions").

This *Action* involved issues that made it even more complex than many ERISA cases. A summary of facts relevant to liability are contained in the Seventh Circuit's opinion reversing summary judgment, *Armstrong I*, 446 F.3d at 730-32, and more detail about the complexity of this *Action* is contained in *Plaintiffs' Counsel's* motion for attorneys' fees and supporting declarations filed this date. Essentially, however, *Plaintiffs* allege that *Defendant* breached its fiduciary duties when, following an acquisition by *Amsted* that left *Amsted* $1 billion in debt and without the cash flow to meet a foreseeable repurchase obligation to its *ESOP* participants, *Defendant* failed to consider and apply a discount for lack of marketability when valuing *Amsted*'s stock as of September 30, 1999, 100% of which was held by the *ESOP*. If the Court were to determine that *Defendant* breached its fiduciary duties and that a discount for lack of marketability should have been applied to the stock value, then the Court would have to decide the level of that discount. *Plaintiffs* and their expert witnesses allege that a 20% discount

should have been applied, and that the damages caused to the *Class* due to the lack of the discount were $66 million. *Defendant* maintains that no discount was required, although one of its experts testified that he would have applied a 5% discount. *Defendant* also maintains that, even if a discount should have been applied, the failure to apply it was not the cause of *Amsted* stock's drop in value, and that in fact, the value ultimately rose to over $500 per share before splitting 10-to-1 and rising to an equivalent of over $700 per share. Ex. 4 ¶ 6.

Therefore, under *Defendant*'s version of the case, even if it breached its fiduciary duties, *Plaintiffs* were not damaged. *Plaintiffs* would argue that even *Defendant*'s expert admitted to one-fourth *Plaintiffs*' discount, and therefore one-fourth of the damages, or $16.5 million. The amount of damages the *Court* may award to the *Class* are far from certain.

Moreover, if *Plaintiffs* prevailed at trial and this Court entered a judgment in their favor, then another round of litigation would begin with respect to whether some or all of the judgment could be collected. This is because *Defendant* maintains that it is covered by an indemnification provision in the *Amsted* trust document that would require *Amsted* to pay all or part of any judgment against it here, or at least provide insurance coverage for its exposure for breach of fiduciary duty. *Plaintiffs* maintain that the indemnification provision is void under ERISA, and that *Amsted* could never be required to pay any part of a judgment against

Defendant. In fact, when settling with the *Amsted Defendants* while on appeal to the Seventh Circuit in 2005, *Plaintiffs* agreed to defend *Amsted* against any attempt by *Defendant* to seek indemnification, and agreed not to collect on any judgment against *Defendant* until a determination was made with respect to what part, if any of the judgment could be sought from *Amsted* through indemnification. To the extent *Amsted* would have to pay the judgment, *Plaintiffs* would not collect it. Ex. 4 ¶ 7.

Although *Plaintiffs' Counsel* remain confident in their chances to prevail at trial, they believe that the risks of losing at trial, on post-trial motions, on appeal, or in the ultimate outcome of the indemnification issue, when weighed against the immediate benefits of settlement, indicate that the *Settlement* is in the best interests of the *Class*. The *Independent Fiduciary's* review, and its ultimate opinion in favor of the *Settlement*, supports their view. "[W]here a substantial question exists regarding the likelihood of success at trial, this factor weighs in favor of approving a proposed class action settlement." *Asurion Corp.*, 501 F. Supp. 2d at 1380. Accordingly, this factor supports final approval.

b. Factors Two and Three: The Range of Possible Recovery and the Point on or Below the Range of Possible Recovery at which a Settlement is Fair, Reasonable, and Adequate

"[I]t is well-settled law that a proposed settlement may be acceptable even though it amounts to only a fraction of the potential recovery that might be

available to the class members at trial." *National Rural Telecom. Coop. v DIRECTV, Inc.*, 221 F.R.D. 523, 527 (C.D. Cal. 2004) (citing *Linney v. Cellular Alaska P'ship*, 151 F.3d 1234, 1242 (9th Cir. 1998)). Moreover, a settlement should not be judged against a "speculative measure" of what could have happened in negotiation. *Linney*, 151 F.3d at 1242; *see also Williams v. Vukovich*, 720 F.2d 909, 922 (6th Cir. 1983) ("A court may not withhold approval simply because the benefits accrued from the decree are not what a successful plaintiff would have received in a fully litigated case.").

Here, there is a broad range of potential recovery. At one end of the spectrum is the possibility that *Plaintiffs* will prevail on all of their claims and recover the full amount that they contend *Defendant* should return to the *Plan* for the benefit of the *Class* ($66,000,000), and at the other end of the spectrum is the possibility that *Defendant* prevails and defeats liability entirely, or loses on liability but prevails on damages ($0). Other scenarios, of course, include that *Plaintiffs* prevail on liability, but the Court finds a much smaller level of damages. For instance, the Court could find that each *Class* member should be made whole for the losses they sustained when they sold at below $184.41 (a major factor in being part of the *Class* in the first instance), which would result in approximately $40 million in damages. This *Settlement* represents 34% of those damages. Indeed, if the Court found the discount for lack of marketability could have been less than

5%, then the damages to the *Class* could be less than the amount of this $13.5 million *Settlement*. Ex. 4 ¶ 8.

Given this broad range of possible recovery, the *Settlement* provides a substantial benefit to the *Class*. Not only will a substantial aggregate cash amount be available to compensate members of the *Class*, but in addition, *Defendant* has agreed to share one-half of the *Settlement Costs*, as well as to help pay one-half of the fees and costs of the *Independent Fiduciary*. Accordingly, the *Settlement* provides significant monetary relief to the *Class* and is a reasonable compromise of the *Class*'s claims when compared to the total amount *Plaintiffs* seek for the *Class*. *See, e.g., In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 459 (9th Cir. 2000) (approving a settlement amounting to one-sixth of plaintiffs' potential recovery); *Columbus Drywall & Insulation, Inc. v. Masco Corp.*, 258 F.R.D. 545, 559 (N.D. Ga. 2007) (discussing class settlements of 10-15% of claimed damages).

c. Factor Four: The Complexity, Risk, and Duration of Litigation

Courts have recognized the complexity inherent in ERISA breach of fiduciary duty company stock claims. For example, in *In re Global Crossing Sec. & ERISA Litig*., the district court wrote as follows:

> The ERISA cases would pose additional factual and legal issues. Fiduciary status, the scope of fiduciary responsibility, the appropriate fiduciary response to the Plans' concentration in company stock and [company] business practices would be issues for proof, and numerous legal issues concerning

> fiduciary liability in connection with company stock in 401(k) plans remain unresolved. These uncertainties would substantially increase the ERISA cases' complexity, duration, and expense—and this militates in favor of settlement approval.

225 F.R.D. 436, 456 (S.D.N.Y. 2004). *See also In re Enron Corp. Sec. Derivative & "ERISA" Litig.*, 228 F.R.D. 541, 565 (S.D. Tex. 2005) (finding that the "complexity, expense and likely duration of the litigation are…self-evident and exceptional…."); *In re Ikon Office Solutions, Inc. Sec. Litig.*, 209 F.R.D. 94, 104-07 (E.D. Pa. 2002) (finding that the complexity and duration of litigation of breach of fiduciary claims, as well as the expense and risks of the litigation, weighed heavily in favor of approval).

The *Action* involves even significantly greater complexity than the ordinary ERISA company stock case. It presents unique, not just unusual, issues of the scope of a directed fiduciary's duty, causation, damages, indemnification, and contribution. Indeed, the complexity inherent in this *Action* is evident in the fact that, even though there has not yet been a trial, there already have been two appeals. *See Armstrong I*, 446 F.3d 728 (7th Cir. 2006); and *Armstrong II*, 552 F.3d 613 (7th Cir. 2009).

Even if *Plaintiffs* ultimately would succeed at trial, and prevail on the resulting post-trial motions and appeals, the delay attendant to the continued litigation could deny the *Class* any actual recovery for years, further reducing its value. *See Strongo ex rel. Brazilian Equity Fund, Inc. v. Bassini*, 258 F. Supp. 254,

261 (S.D.N.Y. 2003) (writing that "[e]ven if a shareholder or class member was willing to assume all the risks of pursuing the actions through further litigation…the passage of time would introduce yet more risks…and would in light of the time value of money, make future recoveries less valuable than this current recovery"). And, even if *Plaintiffs* prevail at trial, there is no guarantee they would prevail in the resulting appeals.

d. Factor Five: The Substance and Amount of Opposition to the Settlement

Representative *Plaintiffs* have been involved in the settlement process, and *Plaintiffs' Counsel* has informed the named *Plaintiffs* of the *Settlement*. The named *Plaintiffs* are in agreement with the *Settlement*. Ex. 4 ¶ 18. Consistent with the Court's December 20, 2010, Order, *Plaintiffs' Counsel* caused the *Notice* to be mailed by first-class mail, postage pre-paid, to all participants in the *ESOP* as of September 30, 1999, at each participant's last known address as it appears on the list obtained from *Amsted*. *Id.* ¶ 12. To date, there have been no *Objections* to the *Settlement*. The deadline for *Objections* was February 14, 2011.

"The fact that there are no objections to the settlement is excellent evidence of the settlement's fairness and adequacy." *Ressler v. Jacobson*, 822 F. Supp. 1551, 1556 (M.D. Fla. 1992); *see also Hill v. Art Rice Realty Co.*, 66 F.R.D. 449, 456 (N.D. Ala. 1974) (the court viewed the fact that there was only one objection to be compelling evidence that the attitude of the overwhelming percentage of the

class supports the reasonableness and appropriateness of the settlement), *aff'd without op.*, 511 F.2d 1400 (5th Cir. 1975).

e. Factor Six: The Stage of the Proceedings at which Settlement was Reached

The *Action* has been ongoing for nearly ten years. The *Settlement* occurred only after the *Parties* had completed discovery, the *MDL Court* had certified that the pretrial proceedings were substantially complete, and the JPML had remanded the *Action* back to the *Court* for a bench trial. During the course of discovery, the *Parties* deposed 39 witnesses, including seven experts, and *Plaintiffs' Counsel* reviewed hundreds of thousands of pages of documents. Ex. 4 ¶ 4. At this point, after the extensive fact and expert discovery, the voluminous motion practice, and the refinement of several key issues by the Seventh Circuit, the *Parties* have "a clear view of the strengths and weaknesses of their cases," *In re Warner Comm. Sec. Litig.*, 618 F. Supp. 735, 745 (S.D.N.Y. 1985), *aff'd*, 798 F.2d 35 (2d Cir. 1986), and are well aware of the possible outcomes at trial, on appeal and in later filed declaratory judgment actions relating to alleged indemnification rights and obligations.

B. The *Notice* and Notice Program Satisfied the Court's Preliminary Approval Order, as well as FRCP 23 and Due Process

Under FRCP 23(e), "notice of a class settlement under any category is required in such manner as the court directs." 4 *Newberg on Class Actions* sec.

11:53, p. 160 (4th 2002). More specifically, FRCP 23(e)(1) states that "[t]he court must direct notice in a reasonable manner to all class members who would be bound by the proposal."

To satisfy due process, notice to the *Class* 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. *See Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). The nature and extent of a notice program are left to the discretion of the trial court. 4 *Newberg on Class Actions* sec. 11:53, p. 164 (4th 2002).

In its December 20, 2011, Order, the Court approved the form of *Notice* and prescribed a direct-mailing notice procedure. The approved notice procedure required that *Plaintiffs' Counsel* cause, by January 5, 2011, a copy of the *Notice* to be sent by first-class mail, postage pre-paid, to all *ESOP* participants at each participant's last known address as it appears on a list obtained from *Amsted* of each participant's name and address as at September 30, 1999. Ex. 4 ¶ 12.

Consistent with this Order, *Plaintiffs' Counsel* caused a copy of the form of *Notice* to be mailed January 5, 2011. The form of *Notice* directed those with questions to a website, www.amstedesopsettlement.com, on which the relevant court documents were posted. Additionally, it provided contact information for the

Settlement Administrator and *Plaintiffs' Counsel*. Ex. 4 ¶ 13. Thus, *Plaintiffs' Counsel* complied in all material respects with the terms of the Court's Order.

The manner that notice is disseminated satisfies FRCP 23(e) and due process if it is reasonably calculated, under all of the circumstances, to apprise interested parties of the pendency of the settlement and to afford them an opportunity to present their objections. *See* 4 *Newberg on Class Actions* sec. 11:53, p. 164 (4th 2002). Actual notice is not required, rather only a good faith effort to provide such notice. *Id*.

Even to the extent that some class members failed to receive a copy of the *Notice*, the methodology is not thereby indicted, since the method of providing notice is not unreasonable merely because it is not perfect. "Courts have consistently recognized that due process does not require that every class member receive actual notice so long as the court reasonably selected a means likely to apprise interested parties." *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 177 F.R.D. 216, 231 (D.N.J. 1997); *see, e.g.*, *Weigner v. New York*, 852 F.2d 646, 651 (2d Cir. 1988) ("Due process does not require that notice sent by first-class mail be proven to have been received."); *Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1375 (9th Cir. 1993).

Likewise, "Rule 23 does not require the parties to exhaust every conceivable method of identifying the individual class members." *In re Prudential Ins. Co.*, 177

F.R.D. at 232. Instead, "the notice of the Proposed Settlement, to satisfy both Rule 23 requirements and constitutional due process protections, need only be reasonably calculated, under all of the circumstances, to apprise interested parties of the pendency of the settlement proposed and to afford them an opportunity to present their objections." *Id*. at 231.

Notice by direct mail satisfies due process, even when it is not combined with publication notice. *See, e.g., Tulsa Prof'l Collection Servs., Inc. v. Pope*, 485 U.S. 478, 489 (1988) ("We have repeatedly recognized that mail service is an inexpensive and efficient mechanism that is reasonably calculated to provide actual notice"); *Weigner*, 852 F.2d at 650 ("The Supreme Court has consistently held that mailed notice satisfies the requirements of due process.") (citing cases). That a small fraction of the total class may have not received mailed notice does not indicate any problem with the parties' notice methodology. *See, e.g., Weigner*, 852 F.2d at 651; *Torrisi*, 8 F.3d at 1375.

The proposed notice procedure, which involved direct mail to *ESOP* participants who are *Class* members was the same procedure that was successfully used in the partial *Class* settlement between *Plaintiffs* and *Amsted Defendants*, and which was authorized and approved by the *MDL Court* in 2005. It also is similar to the procedure adopted and approved in other class action settlements. *See, e.g., Horton v. USAA Cas. Ins. Co.*, 266 F.R.D. 360, 367-68 (D. Ariz. 2009) (directing

that notice be given by mail). In fact, of the *Notices* mailed to almost 3,000 *Class* members, only 82 were returned, and of those, there were only 25 for whom a more recent address could not be found. Therefore, over 99% of the *Class* appears to have actually received the *Notice*. Ex. 4 ¶ 12.

While publication of the *Notice* would have been possible, the associated cost, half of which would be borne by the *Settlement Fund*, would have been unreasonable, particularly given the high level of confidence in the current and updated list of addresses available from *Amsted* and the *ESOP*. Members of the *Class* were scattered all over the country, so if addresses had not been available, and publication notice had been necessary, it would have been national in scope. Indeed, the addresses *Plaintiffs' Counsel* received from *Amtsed* for the 25 persons identified as probably not receiving *Notice* were in 11 different states. Ex. 4 ¶ 15. A cursory review of the cost of national publication notice to consumers in other recent class settlements shows that the cost would have far exceeded the benefit of reaching the 25 members of the *Class* who may not have received the *Notice*. For instance, in *In re Bextra and Celebrex Marketing, Sales Practices & Product Liability Litigation*, No. 3:05-MD-01699-CRB, Dkt. 3442 (N.D. Cal. Nov. 16, 2010) (*Decl. of Steve Berman in Support of Distribution of Settlement Fund* (attaching accounting of settlement fund showing $2.2 million spent on publication notice to national consumer class). In any event, the *Settlement Administrator* or

ESOP Trustee will also attempt to locate these members during administration of the *Settlement*, and follow the ERISA-compliant procedures for distributing the funds for those members who cannot be found. Ex. 2; Ex. 6 ¶ 9. Therefore, even if a *Class* member did not receive notice, they may still benefit from the *Settlement*, unlike class members in other types of settlements.

In short, the notice program was not only reasonable, which is all that is required under FRCP 23(e)(1), but it also was the best notice practicable under the circumstances.

C. The *Plan of Allocation* is Fair, Reasonable, and Adequate

In addition to approval of the *Settlement* and the form and manner of *Notice*, *Plaintiffs* also ask the *Court* to approve the *Plan of Allocation*, the methodology by which the proceeds from the *Settlement* will be distributed among the members of the *Class*. The manner in which the proceeds will be distributed is described in detail in the *Plan of Allocation*, Ex. 2. Essentially, the *Plan of Allocation* calls for *Net Proceeds* to be allocated to *Class Members pro rata*, according to the number of shares they sold during the *Class Period* and the value at which they sold. *Id.*

Assessment of a plan of allocation in a class action is governed by the same standard applicable to the settlement as a whole—that is, the plan must be fair, adequate, and reasonable. *See In re Ikon Office Solutions*, 194 F.R.D. 166, 184 (E.D. Pa. 2000). Courts enjoy "broad supervisory powers over the administration

of class-action settlements to allocate the proceeds among the claiming class members…equitably." *Beecher v. Able*, 575 F.2d 1010, 1016 (2d Cir. 1978); *accord In re Chicken Antitrust Litig. Am. Poultry*, 669 F.2d 228, 238 (5th Cir. 1982).

An allocation formula need only have a reasonable, rational basis, particularly if recommended by "experienced and competent" counsel. *See White v. NFL*, 822 F. Supp. 1389, 1420 (D. Minn. 1993); *In re Gulf Oil/Cities Serv. Tender Offer Litig.*, 142 F.R.D. 588, 596 (S.D.N.Y. 1992). A reasonable plan may also consider the relative strength and values of different categories of claims. *See In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 462 (S.D.N.Y. 2004).

The *Plan of Allocation* was created through a lengthy, time-consuming process involving the analysis of substantial amounts of data supplied by *Amsted* regarding *Class* members' stock transactions during the *Class Period*. During this process, *Plaintiffs' Counsel* devoted significant time and effort to analyze the *ESOP* population and stock ownership data in order to construct a series of proprietary databases that were intended to ensure a fair distribution of the *Net Proceeds* among differently situated categories of *Class* members. Ex. 4 ¶ 16.

The *Plan of Allocation* is designed such that payments and distributions made in accordance with it qualify as "restorative payments" as defined in Revenue Ruling 2002-45. In this regard, the *Settlement* consideration constitutes a

payment made based upon a reasonable determination that there is a reasonable risk of liability for breach of fiduciary duties under ERISA and in order to restore losses to the *ESOP*. And, under the terms of the *Plan of Allocation*, the *Net Proceeds* will be allocated among the *Class* members' individual accounts in proportion to each member's investment so that similarly situated members are treated similarly. *Id.* ¶ 17.

Finally, there have been no objections to the *Plan of Allocation*. As part of the Court-approved notice procedure, the form of *Notice* described the *Plan of Allocation* and directed members of the *Class* with questions to a website on which the complete *Plan of Allocation* was posted. It also provided a telephone number for the *Settlement Administrator*, who has responded to 120 inquiries about the *Settlement* and *Plan of Allocation* without one complaint about the *Plan of Allocation*. Ex. 6 ¶ 7.

VI. CONCLUSION

For the reasons discussed herein, the *Settlement* is not the product of fraud or collusion and it is a fair, adequate, and reasonable resolution of the claims against *Defendant* in this complex, protracted ERISA class action. Thus, *Plaintiffs* and *Plaintiffs' Counsel* respectfully request that the *Court* grant the Final Approval Motion and enter the *Final Order and Judgment*, the form of which is attached as Exhibit 7 to the Final Approval Motion. As part of the *Final Order and Judgment*,

they ask that the Court make findings or conclusions (a) finally approving the *Settlement* of the *Action* under the terms set out in the *Settlement Agreement*, (b) finally approving the *Plan of Allocation*, (c) finally approving the form and manner of the *Notice* as being appropriate and reasonable and consistent with due, adequate, and sufficient notice to all persons entitled to notice, (d) determining that the *Notice* met all applicable requirements of the Federal Rules of Civil Procedure and other applicable law, (e) determining that the *Notice* was provided as ordered in the Court's December 20, 2010, Order granting preliminary approval, (f) naming the *Independent Fiduciary* as a fiduciary of the *ESOP* for the purposes set forth in the *Settlement Agreement*, (g) finding that the evaluation by the *Independent Fiduciary* is thorough, complete, and well-taken, (h) naming the *Settlement Administrator* as a fiduciary of the *ESOP* for the purposes set forth in the *Settlement Agreement*, (i) determining that the *Bar Order* should be entered, (j) finding that the *Action* comes within the provisions of the United States Department of Labor's Prohibited Transaction Exemption ("PTE") 2003-39, (k) finding that payments and distributions made in accordance with the *Plan of Allocation* are "restorative payments" as defined in Internal Revenue Service Revenue Ruling 2002-45, and (l) dismissing the *Action* with prejudice pursuant to the terms of the *Settlement Agreement*, while retaining jurisdiction to implement and enforce the terms of the *Settlement*.

Respectfully submitted,

s/ Pamela B. Slate
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CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of February, 2011, I caused the foregoing document to be electronically filed with the Clerk of the Court using the ECF system, which will send notification of such filing to all ECF participants.

s/ Pamela B. Slate
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