IN THE UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

JOHN G. KLING, personally and in a representative capacity for the Joy Global Retirement Savings Plan f/k/a the Harnischfeger Industries Employees' Savings Plan, Plaintiff v. **FIDELITY MANAGEMENT TRUST COMPANY**, a Massachusetts corporation; **et al.**, Defendants	CIVIL ACTION **No. 01-11939-MEL**

PLAINTIFF'S MEMORANDUM IN SUPPORT OF MOTION FOR ORDER PRELIMINARILY APPROVING SETTLEMENT, APPROVING AMENDMENT OF COMPLAINT AND CERTIFYING CLASS FOR PURPOSES OF SETTLEMENT, APPROVING FORM AND MANNER OF NOTICE, AND SCHEDULING HEARING ON THE FAIRNESS OF SETTLEMENT

Plaintiff, John G. Kling, respectfully submits this memorandum in support of his motion for an order: (1) preliminarily approving the settlement of the parties; (2) approving the amendment of the complaint and certifying a class for settlement purposes; (3) approving the form and manner of a notice to class members; and (4) scheduling a hearing on the fairness of the settlement.

I. INTRODUCTION

This action involves allegations that defendants breached their fiduciary duties under the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. § 1001, *et seq.* ("ERISA") to the Joy Global Retirement Savings Plan and its predecessor plans (collectively, the "Plans") and the Plans' participants and beneficiaries. Specifically, the action alleges that the defendants breached their duties under ERISA by permitting the Plans to offer funds (the "Stock Funds") consisting primarily of Harnischfeger Industries, Inc. common stock ("Harnischfeger

Stock") when they knew or should have known that Harnischfeger Stock was an imprudent retirement investment.

After more than four years of litigation, the parties have reached an agreement to settle this action for a monetary fund equal to $10.85 million plus interest (the "Settlement Fund"). The negotiated settlement provides that the case is to be converted to a class action. As explained herein, claims alleging breach of fiduciary duty under ERISA are particularly well-suited for class treatment. If the settlement is approved by the Court, the balance of the Settlement Fund (after the payment of attorney's fees, expenses and any incentive payment awarded to Plaintiff) shall be distributed to the eligible members of the class according to the Plan of Allocation set forth in the Stipulation of Settlement. The Settlement Fund constitutes extraordinary relief to the class.

The settlement, moreover, removes the risk and delay of further litigation. This action involves numerous unresolved complex issues of law and fact which, if resolved against Plaintiff, could materially minimize or preclude any recovery. Among these issues is the question of precisely when Harnischfeger Stock became an improper investment for the Plans. Plaintiff asserts that this date was in 1997 when Harnischfeger began misstating its earnings. Defendants contend, however, that, if investment in Harnischfeger Stock was ever imprudent, this did not occur until May of 1999 when Harnischfeger began to consider filing for Chapter 11 reorganization under the U.S. Bankruptcy Code. This difference of opinion is crucial to the proper calculation of recoverable losses. Among other things, the settlement is a compromise of this issue.

The settlement was reached after discovery and extensive arm's-length negotiations, which included a mediation with Jonathan B. Marks, a well-known and experienced mediator. The settlement that has resulted from these negotiations is fair, adequate and reasonable, and will

provide the best opportunity to bring a final, orderly resolution to this action. Therefore, Plaintiff respectfully requests that the Court enter an order: (1) preliminarily approving the settlement of the parties; (2) approving the amendment of the complaint and certifying a class for settlement purposes; (3) approving the form and manner of a notice to class members; and (4) scheduling a hearing on the fairness of the settlement.

II. BACKGROUND

A. The Parties and the Complaint

At all relevant times, Plaintiff was employed by Harnischfeger Corporation, a subsidiary of Joy Global Inc. f/k/a/ Harnischfeger Industries, Inc. ("Harnischfeger"), and a participant in the Harnischfeger Industries, Inc. Employees' Savings Plan (the "Harnischfeger Plan"), a predecessor plan to the Joy Global Retirement Savings Plan. On November 9, 2001, Plaintiff filed the initial complaint in this action to recover losses to the Plans.[1]

Each participant in the Plans has an individual account, the balance of which can be allocated by the participant among various investment options. During the class period, the investment options offered by the Plans included several types of mutual funds and the Stock Funds, which were invested almost entirely in Harnischfeger Stock. Prior to 1995, Harnischfeger Corporation made discretionary profit sharing contributions to certain employees which had to be invested in the Stock Fund and could not be transferred out. The administration of the Plans and their investment options were controlled by the Harnischfeger Pension and

[1] The Complaint has been amended, by a First Amended Complaint filed on December 19, 2001, a Second Amended Complaint filed on October 31, 2003, and a proposed Third Amended Complaint filed on March 17, 2006 as part of the instant motion.

Investment Committee (the "PIC").[2] A committee of Harnischfeger's Board of Directors, the Pension Committee, recommended appointments to the PIC and was responsible for monitoring the PIC's activities.[3] Fidelity Management Trust Company ("Fidelity") was the trustee of the Harnischfeger Plan.

Harnischfeger was in business for more than 100 years before the events giving rise to this action. After trading mostly in the $15-20 range from 1987-1993, Harnischfeger Stock rose sharply and was trading near $40 per share in late 1997. At that time, the Harnischfeger Plan held Harnischfeger Stock with an aggregate value of approximately $31 million, and the Joy Technologies savings plans held Harnischfeger Stock worth approximately $500,000. Thereafter, Harnischfeger suffered a severe business reversal, relating primarily to cost overruns experienced by its largest subsidiary, Beloit Corporation. Because of these cost overruns, Harnischfeger engaged in accounting irregularities which, in the Spring of 1998, required it to restate two prior quarters of reported earnings, and take a $100 million charge, to reflect a $155 million cost overrun on a contract of its Beloit subsidiary. In June of 1999, Harnischfeger filed for reorganization in bankruptcy. Plan fiduciaries did not act to sell the Plans' holdings of Harnischfeger Stock, however, until months later and only *after* Harnischfeger Stock was de-listed from the New York Stock Exchange in December, 1999.

Plaintiff alleges that the defendants breached their fiduciary duties under ERISA by failing to protect the Plans and their participants from the decline in Harnischfeger Stock from November 1, 1997 to December of 1999. The breaches alleged are: (i) that the defendants failed to disclose before April 27, 1998 that Harnischfeger's prior annual and quarterly reports

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[2] Defendants Francis Corby, James Benjamin, Somerset Waters, Stephen Skatrud, Gene Fuhrmann, Joseph Podawiltz, Jeralyn Meyer, Kim Kodousek and Kenneth Hiltz were all Harnischfeger officers and/or employees, and served as members of the PIC for part of the time period at issue.

[3] Defendants Donna Alvarado, Donald Latorre, Leonard Redon, Jean-Pierre LaBruyere, Ralph Joynes and Stephen Peck (now deceased), were members of the Harnischfeger Board of Directors and served on the Board's Pension Committee during at least part of the time period in dispute.

misstated Harnischfeger's financial condition; and (ii) that the defendants violated their fiduciary duties of prudence by continuing to offer the Stock Funds, and to hold Harnischfeger Stock, after October of 1997.

B. Discovery

The discovery in this action has been extensive. The parties have exchanged interrogatories and requests for productions. Defendants' production has included the minutes and materials from the meetings of the PIC, the Pension Committee and the Board of Directors of Harnischfeger. Plaintiff's counsel, moreover, has reviewed more than 28,000 pages of documents produced by Harnischfeger, including documents produced in a prior securities lawsuit, its bankruptcy proceedings, and other litigation related to the alleged mismanagement and accounting irregularities with respect to the Beloit cost overruns disclosed in April 1999. These documents included internal documents from Beloit and Harnischfeger, documents to and from Harnischfeger management (including defendants) regarding (i) reports of the cost overruns, (ii) evaluation of the cost overruns, (iii) public disclosures, (iv) internal investigation regarding the possibility of accounting irregularities, and (v) correspondence with the Securities and Exchange Commission regarding the issue. Plaintiff's counsel also traveled to a warehouse in Beloit, Wisconsin to review and preserve corporate records from Harnischfeger's Beloit subsidiary, which were scheduled to be destroyed as part of Beloit's liquidation proceedings.

From these documents, Plaintiff's counsel has been able to evaluate, *inter alia*, what fiduciary authority was conferred upon each defendant; what information was available to each defendant regarding the financial condition of Harnischfeger; and what decisions were considered and made by each defendant concerning the Plans' investment in Harnischfeger Stock.

C. Settlement Negotiations

This action was settled only after extensive discussions which lasted almost a year. Every aspect of the settlement was extensively negotiated at arm's-length. Initial discussions related to the parties' amenability to mediation and who would serve as the mediator. Plaintiff and the Harnischfeger Defendants agreed to a mediation session to be facilitated by Jonathan B. Marks of Marks ADR, LLC. This mediation session lasted for two days (June 27-28, 2005); it resulted in an agreement in principle. Fidelity did not attend this mediation and did not agree to a settlement in principle until many months later. The mediation was followed by more than eight months of negotiations over the terms of the settlement which were not concluded until March 15, 2006. The Stipulation of Settlement resulting from these negotiations is free of any collusion. All the parties to this action believe that it provides the best possibility for providing all class members with fair, adequate and reasonable compensation for their claims and ending, once and for all, litigation over the administration of the Plans during the class period.

III. TERMS OF THE PROPOSED SETTLEMENT

The Settlement confers a significant benefit upon the Plans and the class. The terms of the settlement are set forth in the Stipulation of Settlement filed with the Court on March 17, 2006. Pursuant to the Stipulation of Settlement, insurance carriers for the Harnischfeger Defendants (i.e., all defendants except Fidelity) shall contribute the Settlement Fund ($10,850,000) which, after certain deductions for any attorneys' fees, incentive awards and expenses approved by the Court, shall be allocated among the class members in accordance with the Plan of Allocation set forth in the Stipulation of Settlement.

To assist the Court in determining if the settlement is fair, adequate and reasonable and to ensure that the Plans' interests are fully protected, the parties have agreed to the appointment of an independent fiduciary for the Plans pursuant to the Department of Labor's Class Exemption

for the Release of Claims and Extension of Credit in Connection with Litigation, PTE 2003-29. The parties have agreed to the appointment of U.S. Trust Company, N.A. as the independent fiduciary, and they have agreed that U.S. Trust Company, N.A. shall be empowered to determine whether the settlement should be authorized for the Plans. U.S. Trust Company, N.A has issued a written preliminary statement approving the terms of the settlement.[4] A copy of this preliminary statement is attached hereto as Exhibit A.

IV. ARGUMENT

A. Preliminary Approval of the Stipulation of Settlement Is Appropriate Because It Was Negotiated at Arm's Length and Is Fair, Reasonable and Adequate

This Court should preliminarily approve the Stipulation of Settlement because there is no reason to doubt its fairness; it was the culmination of lengthy, arm's-length, and complex negotiations, and it falls easily within the range of possible approval. Federal Rule of Civil Procedure 23(e) provides that "[a] class action shall not be dismissed or compromised without the approval of the Court . . . ." In determining whether to grant preliminary approval to the Stipulation of Settlement, this Court must make a preliminary determination as to the fairness, reasonableness, and adequacy of the settlement terms. See Manual for Complex Litigation (Fourth) ("MCL"), § 21.632 (4th ed. 2004); see also *Rand v. M/A-Com, Inc.*, 1993 WL 410874, *3 (D. Mass. 1993); *M. Berenson Co., Inc. v. Fanueuil Hall Marketplace, Inc.*, 671 F. Supp. 819, 821 (D. Mass. 1987); *In re Inter-op Hip Prosthesis Liab. Litig.*, 204 F.R.D. 330, 349-50 (N.D. Ohio 2001).

[4] The independent fiduciary has reserved judgment on Plaintiff's attorneys' fee request until the fee application has been filed with the Court.

If the preliminary evaluation of the proposed settlement does not disclose grounds to doubt its fairness, such as unduly preferential treatment of class representatives or segments of the class, or excessive compensation for attorneys, and appears to "fall[] within the range of possible approval,"[5] the court should direct that notice under Fed. R.Civ.P. 23(e) be given to class members of a formal fairness hearing, at which arguments and evidence may be presented in support of, and in opposition to, the settlement. See *In re Nasdaq Market-Makers Antitrust Litig.*, 176 F.R.D. 99,102 (S.D.N.Y. 1997); see also *Rand*, 1993 WL 410874, *3; *In re Masters Mates & Pilots Pension Plan and IRAP Litig.*, 957 F.2d 1020, 1026 n.3 (2d Cir. 1992); MCL at § 21.632.

In preliminarily evaluating whether the Stipulation of Settlement is fair and reasonable and thus falls within the range of possible approval, the Court should evaluate several factors, including: (1) whether the Settlement is the result of arm's-length negotiations; (2) the strength of plaintiff's case on the merits balanced against the amount offered in settlement; (3) reaction of members of the class to the settlement, and the opinions of counsel for the class and defendants; and (4) the complexity of the litigation, the stage of the proceedings, and the amount of discovery completed. See, e.g., *In re Inter-op Hip Prosthesis Liab. Litig.*, 204 F.R.D. at 351; *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 962 F.Supp. 450, 534 (D.N.J. 1997); *Lake v. First Nationwide Bank*, 900 F. Supp. 726, 732 (E.D. Pa. 1995); *Manchaca v. Charter*, 927 F. Supp. 962, 966 (E.D. Tex. 1996). It has been observed that "'when the court finds that: (1) the negotiations occurred at arm's length; (2) there was sufficient discovery; (3) the proponents of the settlement are experienced in similar litigation; and (4) only a small fraction of the class objected,' a presumption of fairness attaches to the court's determination." *In re Lupron*

[5] See *Rand*, 1993 WL 410874, at *3; *Armstrong v. Board of School Directors*, 616 F.2d 305, 314 (7th Cir. 1980), overruled on other grounds by 134 F.3d 873 (7th Cir. 1998).

Marketing and Sales Practices Litigation, 345 F.Supp.2d 135 (D. Mass., 2004)(Stearns) (quoting *In re Gen. Motors Corp. Pick-Up Truck Fuel Tanks Products Liab. Litig.*, 55 F.3d 768, 785 (3d Cir.1995)(Becker)); see also *City Partnership Co. v. Atlantic Acquisition Ltd. Partnership*, 100 F.3d 1041, 1043 (1st Cir. 1996); *Rolland v. Cellucci*, 191 F.R.D. 3, 6 (D. Mass 2000).

As part of this evaluation, however, the Court should not second-guess the settlement terms, and need not reach ultimate conclusions on contested issues of law and fact. See *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 625 (9th Cir. 1982); *Armstrong*, 616 F.2d at 315; see also MCL at § 21.632; *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1027 (9th Cir. 1998). Given the relevant standard and factors considered, Plaintiff submits that the proposed class settlement here is fair, reasonable, and adequate, and well within the range of possible approval.

1. The Stipulation of Settlement Is the Result of Arm's-Length Negotiations

In approving class settlements, this Court and others have given enormous weight to the opinion and judgment of experienced counsel who have conducted arm's-length negotiations. See *Rolland*, 191 F.R.D. at 6; *Stewart v. Rubin*, 948 F. Supp. 1077, 1099 (D.D.C. 1996); see also NEWBERG ON CLASS ACTIONS, § 11.41 (4th Ed. 2002). Plaintiff submits that the Stipulation of Settlement is the result of extensive arm's-length negotiations by experienced counsel who undertook such negotiations in good faith and only after they had completed substantial legal analysis and a factual investigation.

This action has been pending for more than four years. In that time, the parties have entered into extensive motion practice and discovery. As part of the motion practice, the parties have fully briefed and argued, *inter alia*, two separate motions to dismiss Plaintiff's claims as well as a motion to compel discovery. Such motion practice, moreover, has resulted in two extensive opinions of the Court as to the sufficiency of Plaintiff's claims. Similarly, as a part of discovery, the parties have reviewed more than 28,000 pages of documents related to the factual

allegations of the complaint. This legal and factual analysis has provided the parties with the best information available to judge the strengths and weaknesses of their respective claims and defenses and to determine the costs and benefits of continued litigation as compared to a compromise.

Only after more than three years of this legal and factual analysis did some of the parties agree to attend a mediation session in June of 2005. While this two day mediation session produced an agreement in principle among some of the parties on June 28th, it took many more months of continuous, hard-fought negotiations, for all of the parties to agree to a memorandum of understanding of the terms of the settlement which was not signed until October 12, 2005. The memorandum of understanding, moreover, was followed by five more months of discussion and drafting, which included the retention of an independent fiduciary and the drafting of the Stipulation of Settlement and ancillary documents such as a Third Amended Complaint and Notice to the Class. It was not until March 15, 2006 that the definite Stipulation of Settlement was executed by all the parties. The protracted and arm's-length nature of the negotiations in this case strongly support the conclusion that a presumption of fairness should attach to the resulting settlement.

2. The Terms of the Stipulation of Settlement in Relation to the Strength of Plaintiff's Claims Demonstrate that this Settlement is Fair, Adequate, and Reasonable

In evaluating a proposed class settlement, courts are to consider the strength of plaintiff's case on the merits balanced against the amount offered in the class settlement. See *M. Berenson Co., Inc.*, 671 F. Supp. at 823; *Plummer v. Chemical Bank*, 579 F. Supp. 1364, 1370, 1372-74 (S.D.N.Y. 1984). In this evaluation, however, a court must "avoid deciding or trying to decide the likely outcome of a trial on the merits." *In re National Student Marketing Litig.*, 68 F.R.D. 151, 155 (D.D.C. 1974). In light of the substantial recovery provided by the Stipulation of

Settlement and the risks involved in continued litigation, this Court should submit the Stipulation of Settlement to the members of the Class and thereafter hold a hearing on its fairness.

Recovery by the Plaintiff in this action is anything but certain. Defendants have mounted a vigorous defense to the legal and factual sufficiency of Plaintiff's claims. Among the defenses to liability presented by the defendants are: (1) that ERISA neither compels plan fiduciaries to disclose information regarding corporate affairs to plan participants nor requires plan fiduciaries to act on insider information; (2) that, because a central purposes of the Plans was to permit employee ownership of Harnischfeger Stock and because the Plans permitted participants to reallocate their non-profit sharing contributions to the Plan to other investments, allowing the Plans to continue to offer investment in Harnischfeger Stock was prudent; (3) that under the circumstances investment in Harnischfeger Stock could not have been imprudent until May of 1999 when it became apparent to members of the PIC that Harnischfeger was having serious cash-flow difficulties that could necessitate a bankruptcy; (4) that insider trading rules would have prohibited the defendants from selling the Plans' holdings of Harnischfeger Stock prior to the disclosure of the potential accounting irregularities; (5) that, due to the impact of the efficiency of the market on the price of Harnischfeger Stock, an earlier public disclosure of Harnischfeger's cost overruns would not have prevented the loss to the Plans resulting from the drop in the price of Harnischfeger Stock; (6) that a liquidation of the Stock Funds' holdings of Harnischfeger Stock would have accelerated the devaluation of the stock and caused additional losses to the Plans, beyond the fiduciaries' control, thereby greatly reducing the recoverable losses; and (7) the defendants would be completely absolved of liability as a result of the affirmative defense provided by section 404(c) of ERISA. In addition, the legal landscape with respect to directed trustees has shifted significantly since the filing of this case, with several recent decisions either dismissing or granting summary judgment to trustees on the basis of the

Department of Labor's Field Assistance Bulletin 2004-03. See *In re WorldCom, Inc. ERISA Litig.*, 354 F. Supp. 2d 423 (S.D.N.Y. 2005) (granting summary judgment to directed trustee); *DiFelice v. US Airways, Inc.*, 397 F. Supp. 2d 735 (E.D.Va. 2005) (dismissing claim against directed trustee). More broadly, as the evidence concerning financial losses developed in this action, the parties' analyses revealed widely divergent views as to the amount of losses that could be calculated under various theories of liability and loss causation advanced by the parties.

Despite these formidable defenses, Plaintiff has confidence in the merits of his claims. Nevertheless, Plaintiff realizes that continued litigation would require significant effort and expense with no guarantee of success. A finding for Plaintiff, moreover, does not guarantee a recovery to the Plans of an amount greater than the Settlement Fund. For instance, a finding by the Court that investment in Harnischfeger Stock was imprudent *only* after May 1999, when Harnischfeger began to consider bankruptcy, could result in a recover to the Plan of less than $10.85 million. Thus, regardless of his confidence in his claims for relief, Plaintiff has agreed to enter into the Stipulation of Settlement to avoid the risks and further expense of burdensome and protracted litigation.

3. The Opinions of Experienced Counsel and an Independent Fiduciary Demonstrate that the Stipulation of Settlement Should be Preliminarily Approved

In evaluating class action settlements, courts recognize that the opinion of experienced and informed counsel in favor of settlement should be afforded substantial consideration. See *Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977); *In re MicroStrategy Inc. Sec. Litig.*, 148 F. Supp.2d 654, 665 (E.D.Va. 2001); *Ellis v. Naval Air Rework Facility*, 87 F.R.D. 15, 18 (N.D. Cal. 1980), aff'd, 661 F.2d 939 (9th Cir. 1981). It is the opinion of Plaintiff's counsel that the settlement is fair, adequate and reasonable, and in the best interests of the Plan and the participant class members. Plaintiff's counsel possess extensive experience in evaluating claims

and negotiating settlements, having negotiated at least a dozen ERISA class actions settlements during the past decade. Their agreement to the terms of the Stipulation of Settlement follows more than four years of litigation involving extensive disputes over both legal and factual issues, and should be afforded substantial consideration by this Court.

Similarly, the Stipulation of Settlement has been reviewed by an independent fiduciary, U.S. Trust Company, N.A. ('US Trust"), which has extensive experience in serving in the capacity of an independent fiduciary to retirement plans in connection with the settlement of ERISA and securities class action law suits. U.S. Trust has conducted a thorough analysis of this action and has reviewed a draft of the Stipulation of Settlement. Based on this investigation, U.S. Trust has preliminarily concluded that: "(i) the Settlement is reasonable, in light of the Plan's likelihood of full recovery, the risks and costs of litigation, and the value of claims foregone; (ii) the terms and conditions of the transaction 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 transaction is not part of an agreement, arrangement, or understanding designed to benefit a party in interest." See Letter of U.S. Trust dated March 7, 2006 (attached hereto as Exhibit A).

The approval of the Stipulation of Settlement by experienced Plaintiff's counsel and the independent fiduciary weighs heavily in favor of a finding that the Stipulation of Settlement is within the range of reasonableness and adequacy justifying preliminary approval.

4. Settlement at this Stage in the Litigation Will Benefit All of the Parties and the Judicial System

This case has been pending for more than four years. The parties have had sufficient opportunity to test their legal theories through extensive motion practice, which has included two separate rounds of motions to dismiss and two opinions of this Court. Similarly, the parties have conducted enough discovery to accurately assess their positions and to make informed decisions

concerning the strengths and weaknesses of their respective claims and defenses. Now is an appropriate time for this case to settle.

While a tremendous amount of time and effort has been expended on this case to date, if it was to proceed to trial, much more work would be necessary. A trial on the merits of this action would entail considerable expense and would not necessarily end the litigation, given the right of appeal. Avoiding such expense and potential delay will save both the parties and the Court significant time, money, and precious judicial resources, and is a further appropriate reason for the Court to approve preliminarily the Stipulation of Settlement. See *Slomovics v. All For A Dollar, Inc.*, 906 F. Supp. 146, 149 (E.D.N.Y. 1995) ("The potential for this litigation to result in great expense and to continue for a long time suggest that the settlement is in the best interests of the Class."); see also *Weinberger v. Kendrick*, 698 F.2d 61, 73 (2d Cir. 1982) ("There are weighty justifications, such as the reduction of litigation and related expenses, for the general policy favoring the settlement of litigation.").

B. The Certification of a Settlement Class Is Desirable and Appropriate in this Case

A participant may bring a representative action on behalf of an ERISA plan without doing so as a class action under Rule 23, or as a shareholder derivative action under Rule 23.1. See *Behling v. Russell*, 293 F.Supp.2d 1178, 1180 (D.Mont. 2003); *Thompson v. Avondale Industries, Inc.*, No. 99-3439, 2001 WL 1543497, at *2 (E.D.La. Nov. 30, 2001). Nevertheless, class certification has been recognized as beneficial in ERISA actions for the following reasons: (1) it assures the defendant that claims from all potential plaintiffs will be adjudicated at the same time and thus encourages pretrial settlement; (2) the appointment of class counsel insures adequate representation of absent class members, conserves resources and facilitates judicial administration of the case; (3) the ability to approve and recognize only qualified individuals as class representatives helps to ensure adequate representation of absent class members; and

(4) the requirement of court approval of any settlement, voluntary dismissal or compromise of the claims asserted also helps to protect the interests of absent class members. *In re Electronic Data Systems Corp. ERISA Litig.*, 224 F.R.D. 613, 633 (E.D.Tex. 2004) ("*EDS*").

The conversion of this action to a class action is a negotiated term of the Stipulation of Settlement. Plaintiff seeks certification of the following class:

> All participants (excluding the Defendants) in the Joy Global Retirement Savings Plan, the Harnischfeger Industries Employee Savings Plan, the Joy Technologies, Inc. Savings Plan, the Joy Technologies, Inc. Savings Plan for Salaried and Hourly Non-Bargaining Unit Employees (collectively, the "Plans"), and their beneficiaries, for whose benefit any of the Plans acquired or held units in a fund consisting wholly or primarily of Harnischfeger Industries, Inc. stock during the period November 1, 1997 to March 31, 2000.

ERISA cases in general, and those presenting breach of fiduciary duty claims in particular, are regularly certified as class actions. Numerous courts have certified ERISA claims alleging that fiduciaries breached their duties in connection with investments in employer securities. As demonstrated below, this action clearly meets the requirements for class certification.

1. Rule 23(a)

The requirements of Rule 23(a) are easily satisfied in this case. Based on the Plans' records, Plaintiff estimates that there are approximately 3,500 to 6,000 class members. Thus, the class is "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1).

There are also "questions of law and fact common to the class." Fed. R. Civ. P. 23(a)(2). The commonality requirement is something of a foregone conclusion in this context, as "the question of defendants' liability for ERISA violations is common to all class members because a breach of fiduciary duty affects all participants and beneficiaries." *Banyai v. Mazur*, 205 F.R.D. 160, 163 (S.D.N.Y. 2002). Common questions in this case include, among others: (i) whether Harnischfeger Stock was an imprudent investment for the Plans, and if so, the date of the onset

of such imprudence; (ii) whether the defendants breached their respective fiduciary duties which they owed to the participants of the Plans; and (iii) whether the Plans and their participants suffered losses as a result of the defendants' fiduciary breaches.

Rule 23(a)(3) requires that "the claims . . . of the representative parties [be] typical of the claims . . . of the class." Fed. R. Civ. P. 23(a)(3). In this case, Plaintiff's claims clearly arise from the same course of events as the claims of the class – Harnischfeger's accounting irregularities and financial decline, and the alleged fiduciary breaches with respect to the Plans' investments in Harnischfeger Stock – and thus each class member will make similar, if not identical, arguments to prove the defendants' liability. Plaintiff's claims are therefore typical of the class.

The final prong of Rule 23(a) requires that the plaintiff demonstrate that he will "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). This requirement "serves to uncover conflicts of interest between named parties and the class they seek to represent." *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 625 (1997). Plaintiff is an employee of Harnischfeger and a participant in the Joy Global Retirement Savings Plan. He has no interest that is antagonistic to the claims of the class. Indeed, as noted above, Plaintiff's claims are identical to the legal claims belonging to all class members, and they (or any other plaintiff) would present proof of Harnischfeger's liability on the basis of common facts underlying those claims.

Plaintiff has also retained counsel that are qualified, experienced and able to conduct the litigation. Courts will assume that members of the bar are skilled at their profession until the contrary is demonstrated, *Peil v. Nat'l SemiConductor Corp.*, 86 F.R.D. 357 (E.D.Pa. 1980), and they may infer the attorneys' adequacy from the pleadings, briefs, and other materials presented in the case, *Krommick v. State Farm Ins. Co.*, 112 F.R.D. 124, 127 (E.D.Pa. 1986). The

adequacy of Plaintiff's counsel in this class is clearly apparent from their vigorous representation of the Plans and their participants in this case for more than four years, with such representation including protecting the interests of the Plans in the bankruptcy proceedings and the securities litigation, surviving multiple motions to dismiss, conducting extensive discovery, and negotiating an extraordinary recovery on behalf of the Plans and their participants.

Moreover, the firm of Malakoff Doyle & Finberg, P.C. limits its practice almost exclusively to class actions and has extensive experience in ERISA class actions involving alleged breaches of fiduciary duty. Examples of cases in which the firm has successfully represented plaintiff classes in cases involving pension investments in employer securities include: *Presley v. Carter Hawley Hale Profit Sharing Plan*, No. 97-CV-04316 (N.D.Cal.) ($36 million recovery); *Blyler v. Agee*, No. CV97-0332 (D.Idaho) ($21 million recovery); *Koch v. Dwyer*, 98-cv-5519 (RPP) (S.D.N.Y.) ($6.3 million recovery); *In re Computer Associates ERISA Litigation*, No. CV-02-6281 (S.D.N.Y.) ($5 million recovery); *In re McKesson HBOC, Inc. ERISA Litig.*, No. C00-20030 RMW (N.D.Cal.) ($18.2 million recovery on behalf of HBOC participant subclass).

2. Rule 23(b)

The requirements of Rule 23(b)(1)(A)&(B) and (b)(2) are also satisfied. Under Rule 23(b)(1), a class may be certified if the prosecution of separate actions by or against individual members of the class would create a risk of:

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

Fed.R.Civ.P. 23(b)(1). Rule 23(b)(1)(A) "considers possible prejudice to defendants, while 23(b)(1)(B) looks to possible prejudice to the putative class members." *In re Ikon Office Solutions, Inc. Securities Litig.*, 191 F.R.D. 457, 466 (E.D.Pa. 2000).

Subsection (b)(1)(B) is addressed first because it is the provision upon which many courts have relied in certifying a class in similar cases, and which is tailor-made for allegations of a breach of the defendants' fiduciary obligations to the plaintiff. Indeed, because of ERISA's distinctive "representative capacity" and remedial provisions, "ERISA litigation of this nature presents a paradigmatic example of a (b)(1) class." *In re Global Crossing Ltd. Sec. & ERISA Litig.*, 225 F.R.D. 436, 453 (S.D.N.Y. 2004) (quoting *Kolar v. Rite Aid Corp.*, No. 01-1229, 2003 WL 1257272, *3 (E.D.Pa. March 11, 2003)). As stated in the Advisory Committee Notes accompanying the 1966 amendments to Rule 23:

> [Section (b)(1)(B)] takes in situations where the judgment in a nonclass action by or against an individual member of the class, while not technically concluding the other members, might do so as a practical matter. The vice of an individual action would lie in the fact that the other members of the class, thus practically concluded, would have had no representation in the lawsuit. . . . *[This] reasoning applies to an action which charges a breach of trust by an indenture trustee or other fiduciary similarly affecting the members of a large class of security holders or other beneficiaries, and which requires an accounting or like measures to restore the subject of the trust.*

Fed.R.Civ.P. 23(b)(1)(B) Advisory Committee's Note (1966 Amendment) (emphasis added).

Most courts have accepted this reasoning in deciding to certify a class in ERISA suits alleging a breach of defendants' fiduciary obligations. See *Ikon*, 191 F.R.D. at 466 ("given the nature of an ERISA claim which authorizes plan-wide relief, there is a risk that failure to certify the class would leave future plaintiffs without relief"); *Koch v. Dwyer*, No. 98 Civ. 5519 (RPP), 2001 WL 289972, *5 (S.D.N.Y. March 23, 2001) ("Since Plaintiff is seeking relief on behalf of both Plans as a whole, prosecution of separate actions by individual members would create a risk of adjudications which would be dispositive of the interests of the other members not parties to such adjudications."); *EDS*, 224 F.R.D. at 628 ("As Plaintiffs are asserting claims on the Plan's

behalf, Defendants are obligated to treat class members alike via their treatment of the Plan itself. . . . Separate adjudication of these issues would be dispositive of other class members' interests."); *In re Williams Co. ERISA Litig.*, No. 02-CV-153-TCK (FHM), 2005 WL 2439185, *9 (N.D.Okla. August 22, 2005) ("due to ERISA's distinctive 'representative capacity' and remedial provisions, class treatment under Rule 23(b)(1)(B) is appropriate in this case"). Accordingly, certification under Rule 23(b)(1)(B) is appropriate here.

The nature of the case, which challenges the defendants' uniform Plan-wide conduct, also makes (b)(1)(A) certification appropriate, as recognized by many courts. See *Kolar*, 2003 WL 1257272, at *3; *Ikon*, 191 F.R.D. at 466-467; *Rankin v. Rots*, 220 F.R.D. 511, 521-523 (E.D.Mich. 2004); *EDS*, 224 F.R.D. at 628; *Global Crossing*, 225 F.R.D. at 453; *In re CMS Energy ERISA Litig.*, 225 F.R.D. 539, 545-546 (E.D. Mich. 2004); *Summers v. UAL Corp. ESOP Committee*, No. 03 C 1537, 2005 WL 1323262, *5 (N.D.Ill. Feb. 17, 2005); *Williams*, 2005 WL 2439185, at *9. As the court noted in *Kolar*, "Palpably, 'inconsistent or varying adjudications' would be intolerable for the employees of the same employee benefit plans." *Kolar*, 2003 WL 1257272, at *3. Thus, the requirements for certification under Rule 23(b)(1)(A) are clearly satisfied here.

Finally, a class may be certified under Rule 23(b)(2) if:

> the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole . . . .

Fed.R.Civ.P. 23(b)(2). As several courts have recognized in certifying similar claims under Rule 23(b)(2), Plaintiff's claims here are all based on conduct by a plan fiduciary that is generally applicable to the class. See *EDS*, 224 F.R.D. at 628-629; *Global Crossing*, 225 F.R.D. at 453; *Williams*, 2005 WL 2439185, at *9-10. Plaintiff alleges that defendants breached their fiduciary duties to the class through conduct that affected all participants and beneficiaries. Moreover, by

the very nature of Plaintiff's claims on behalf of the Plan, defendants have acted on grounds applicable to the class as a whole. See *EDS*, 224 F.R.D. at 629. Accordingly, Plaintiff's claims are properly certified under Rule 23(b)(2).

C. The Proposed Notice to the Class Satisfies Rule 23 and Due Process

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." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). Notice should also provide a "very general description[] of the proposed settlement." *Weinberger*, 698 F.2d at 70.

The proposed form of Class Notice, attached to the Stipulation of Settlement as Exhibit 6, is patterned after the illustrative forms of notice created and promulgated by the Federal Judicial Center. The Class Notice describes in plain English (i) the terms and operation of the settlement agreement, including the nature and extent of the release; (ii) the considerations that caused plaintiff's counsel to conclude that the settlement is fair and adequate; (iii) the counsel fees and named plaintiff's compensation that will be sought; (iv) the procedure for objecting to the settlement; and (v) the date and place of the fairness hearing. As such, the proposed form of Class Notice satisfies the requirements of due process. See NEWBERG ON CLASS ACTIONS, § 8.34 (4th Ed. 2002).

With the Court's approval, the Class Notice will be mailed to each member of the class able to be identified from the Plans' records, no later than 30 days from the date of preliminary approval. In addition, the Class Notice will be placed on the corporate website of Defendant Joy Global Inc. and the participant website maintained by Defendant Fidelity, the present trustee and recordkeeper for the Joy Global Retirement Savings Plan. These proposed forms of notice will fairly apprise class members of the settlement and their options with respect thereto, and fully

satisfy due process requirements. Indeed, in a non-opt out class, the form and purpose of the notice need only be such as to bring the proposed settlement to the attention of the representative class members who may alert the Court to inadequacies in representation, or conflicts of interest among subclasses, which might bear upon the fairness of the settlement. See *Walsh v. Great Atlantic & Pacific Tea Co. Inc.*, 726 F.2d 956, 963 (3d Cir. 1983); see also *Frank v. United Airlines, Inc.*, 216 F.3d 845, 851 (9th Cir. 2000) (noting that in a non-opt out action, there is no requirement for individualized notice beyond that required by due process).

V. CONCLUSION

For all the foregoing reasons, this Court should preliminarily approve the settlement, certify the class for purposes of settlement, approve the form and manner of notice, and schedule a hearing on the fairness of the settlement.

Plaintiff:

By /s/ Peter J. Walsh

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U.S. TRUST

March 7, 2006

VIA FEDERAL EXPRESS

Joy Global Inc.
4400 W. National Avenue
Milwaukee, WI 53214

Attention: Kim R. Kodousek

Re: Preliminary Statement of Independent Fiduciary

Dear Sir or Madam:

This preliminary statement is made by U.S. Trust Company, NA ("U.S. Trust") in its capacity as independent fiduciary and investment manager for the Joy Global Retirement Savings Plan (the "Plan") in connection with the proposed settlement (the "Settlement") of a class action lawsuit captioned *Kling v. Fidelity Management Trust Co., et al*, No. 01-11939MEL (D. Mass.). U.S. Trust has been engaged, in accordance with Prohibited Transaction Class Exemption 2003-39 (the "Class Exemption"), to serve as the independent fiduciary of the Plan. U.S. Trust has extensive experience in serving in the capacity as independent fiduciary to retirement plans, including in connection with ERISA and securities class action lawsuits, and is closely familiar with the fiduciary obligations imposed by ERISA.

Consistent with the requirements of the Class Exemption, (i) U.S. Trust has no relationship to, or interest in, any of the parties involved in the litigation that might affect the exercise of its best judgment as an independent fiduciary, (ii) the terms of the Settlement are specifically described in a written settlement agreement or consent decree, (iii) U.S. Trust has acknowledged in writing that it is a fiduciary with respect to the Settlement on behalf the Plans, and (iv) U.S. Trust will maintain or cause to be maintained for a period of six years the records described in the Class Exemption.

In accordance with the conditions of the Class Exemption, U.S. Trust is required to make determinations as to whether: (i) the Settlement is reasonable in light of the Plans' likelihood of full recovery, the risks and costs of litigation, and the value of claims foregone; (ii) the terms and conditions of the transaction are no less favorable to the Plans than comparable arms-length terms and conditions that would have been agreed to by unrelated parties under similar circumstances; and (iii) the transaction is part of an agreement, arrangement, or understanding designed to benefit a party in interest.

U.S. TRUST COMPANY, N.A.
600 Fourteenth Street, NW Suite 400 Washington DC 20005-3314
Telephone 202 585 4100 Facsimile 202 783 7161

In making such determinations and deciding whether to accept or reject the Settlement on behalf of the Plans, U.S. Trust is required to act in accordance with the fiduciary responsibility standards of ERISA. Consistent with the Class Exemption, U.S. Trust can authorize the Settlement on behalf of the Plans if, after a review of the Settlement, U.S. Trust concludes that the chances of obtaining any further relief for the Plans are not justified by the expense and risk involved in pursuing such relief. In determining whether the Settlement is reasonable in light of the Plans' likelihood of full recovery, the risks and costs of litigation, and the value of claims foregone, U.S. Trust is obligated to weigh these factors (e.g., by determining to what extent to rely on particular attorneys or experts involved in the litigation) pursuant to a prudent decision-making process, given the facts and circumstances of the litigation.

In fulfilling its responsibilities and in evaluating the reasonableness of the Settlement, U.S. Trust, together with its counsel, Thelen Reid & Priest LLP, has taken the following actions:

1. Reviewed court documents, including but not limited to the operative Complaint, filings in connection with the Motion to Dismiss, the parties' mediation statements, certain discovery, and other information and documents in the class action that it deemed relevant;

2. Interviewed counsel for the plaintiffs and defendants in the class action, as well as the mediator;

3. Evaluated the strengths and weaknesses of the legal and factual arguments on which the class action was based, and independently reviewed the relevant case law;

4. Conducted a comparative analysis of recent settlements in similar ERISA class action lawsuits and analogous securities lawsuits;

5. Reviewed and analyzed the scope of the Settlement release; and

6. Engaged in such other actions that it deemed necessary to make a determination with respect to the Settlement.

Based on its evaluation of all of the relevant documents and information associated with the class action and the Settlement, and taking into account the fiduciary obligations imposed by ERISA, U.S. Trust has preliminarily concluded that, subject to our review of the outstanding items noted below, (i) the Settlement is reasonable, in light of the Plan's likelihood of full recovery, the risks and costs of litigation, and the value of claims foregone; (ii) the terms and conditions of the transaction 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 transaction is not part of an agreement, arrangement, or understanding designed to benefit a party in interest.

March 7, 2006
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We note that our conclusion as to the reasonableness of the Settlement is preliminary in nature. Among other items: (i) we have reviewed only draft Settlement materials, including but not limited to the Stipulation of Settlement and the plan of allocation, and (ii) we are unable to evaluate the appropriateness of plaintiff's attorneys' fee request until we have reviewed the fee application, which application has yet to be filed with the Court. We will provide a Final Statement after we have had an opportunity to address these outstanding items, as well as any other additional items we deem necessary in making a final determination with respect to the Settlement.

Very truly yours,

U.S. TRUST COMPANY,
NATIONAL ASSOCIATION

By: Norman P. Goldberg
Name: Norman P. Goldberg
Title: Managing Director