FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

Becky Kirk, Perry Ayoob, and Dawn Karzenoski, as representatives of a class of similarly situated persons, and on behalf of the CHS/Community Health Systems, Inc. Retirement Savings Plan, Plaintiffs, v. Retirement Committee of CHS/Community Health Systems, Inc., CHS/Community Health Systems, Inc., John and Jane Does 1-20, Principal Life Insurance Company, Principal Management Corporation, and Principal Global Investors, LLC, Defendants.	Case No. 3:19-cv-00689 Judge William L. Campbell, Jr. Magistrate Judge Barbara D. Holmes

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY APPROVAL OF PARTIAL CLASS ACTION SETTLEMENT

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INTRODUCTION

Plaintiffs Becky Kirk, Perry Ayoob, and Dawn Karzenoski ("Plaintiffs") submit this Memorandum in support of their Motion for Preliminary Approval of Partial Class Action Settlement. A copy of the Class Action Settlement Agreement ("Settlement" or "Settlement Agreement") is attached as **Exhibit 1** to the accompanying Declaration of Kai Richter ("*Richter Decl.*").[1] This partial Settlement resolves Plaintiffs' class action claims against the Retirement Committee of CHS/Community Health Systems, Inc. and CHS/Community Health Systems, Inc. (together, the "CHS/ Defendants" or "the Settling Defendants") concerning their management of the CHS/Community Health Systems, Inc. Retirement Savings Plan ("Plan").[2]

Under the terms of the proposed Settlement, the CHS/ Defendants will pay a gross settlement amount of $580,000 into a common fund for the benefit of Settlement Class Members who invested in the standalone Principal index funds in the Plan.[3] This is a fair and reasonable recovery that represents approximately 50% of the damages (and 94% of the excess fees) that Plaintiffs calculate to be associated with those standalone funds that were the focus of Plaintiffs' claim against the CHS/ Defendants. Further, the CHS/ Defendants have agreed to provide certain further discovery related to the remaining claim against the Principal Defendants relating to the management of the target-date separate accounts ("TDSAs") in the Plan, which was asserted primarily against the Principal Defendants.[4] Accordingly, Plaintiffs request that the Court grant

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[1] Capitalized terms have the meaning assigned to them in Article 1 of the Settlement Agreement, unless otherwise specified herein.

[2] Plaintiffs' claims against Principal Life Insurance Company, Principal Management Corporation, and Principal Global Investors, LLC (the "Principal Defendants") are not released by the Settlement, and will continue to proceed.

[3] The standalone Principal index funds in the Plan are the Principal Large Cap S&P 500 Index fund, Principal MidCap S&P 400 Index fund, and Principal SmallCap S&P 600 Index. *See Settlement Agreement § 1.14.1.*

[4] Although Plaintiffs asserted that the CHS/ Defendants failed to monitor the Principal Defendants with respect to the Principal Defendants' management of the TDSAs (which claim, against the

preliminary approval of the Settlement so that the proposed Notices can be sent to the Settlement Class.

Among other things supporting preliminary approval:

- The Settlement was negotiated at arm's length by experienced and capable counsel, after significant discovery;
- The proposed Settlement Class is consistent with classes approved in other comparable ERISA cases;
- The Settlement Class has been vigorously represented by the Class Representatives and Class Counsel throughout the litigation;
- The Settlement provides for significant monetary relief that will be distributed fairly and equitably pursuant to a common Plan of Allocation, and will prevent a potential double recovery by those Settlement Class members who preserve their claims against the Principal Defendants relating to the TDSAs;
- The Settlement Agreement also provides valuable non-monetary benefits, as the CHS/ Defendants will participate in additional, agreed-upon discovery in this Action relating to Plaintiffs' ongoing claims against the Principal Defendants;
- The release is tailored to the specific investments that were the subject of Plaintiffs' claims in this Action, and preserves Plaintiffs' claims against the Principal Defendants; and
- The proposed Notice provides easy-to-understand information to Settlement Class Members about the Settlement and their right to be heard regarding the Settlement, and will be distributed via first-class mail; and

For these reasons and the other reasons set forth below, Plaintiffs respectfully request that the Court enter an order: (1) preliminarily approving the Settlement; (2) approving and authorizing distribution of the proposed Notice; (3) certifying the proposed Settlement Class for purposes of settlement; (4) scheduling a final Fairness Hearing; and (5) granting such other relief as set forth in the proposed Preliminary Approval Order submitted herewith.

The CHS/ Defendants do not oppose the ultimate relief sought in this motion but do dispute many of the averments and contentions found in Plaintiffs' moving papers and exhibits.

CHS/ Defendants, is being released as part of this Settlement), that claim is derivative of Plaintiffs' claim against the Principal Defendants. Plaintiffs are not releasing their claim against the Principal Defendants under the Settlement.

BACKGROUND

I. PROCEDURAL HISTORY

A. Pleadings and Court Proceedings

Plaintiffs Becky Kirk, Perry Ayoob, and Dawn Karzenoski filed this Action on August 8, 2019, alleging that the CHS/ Defendants and Principal Defendants breached their fiduciary duties of prudence and loyalty under ERISA by selecting and retaining certain investment options for the Plan affiliated with the Principal Defendants. *See ECF No. 1*. Plaintiffs pled that the CHS/ Defendants imprudently retained three Principal-affiliated index funds as standalone investment options in the Plan that Plaintiffs alleged to be excessively expensive and poorly performing compared to available alternatives. *Id. ¶¶ 68-82*. Plaintiffs also alleged that the Principal Defendants breached their fiduciary duties as the investment manager of certain TDSAs in the Plan by selecting Principal-affiliated index funds and certain other Principal-affiliated investments as underlying investments for the TDSAs. *See id. ¶¶ 83-99*. Finally, Plaintiffs asserted a derivative claim that the CHS/ Defendants failed to adequately monitor the Principal Defendants in their management of the Plan's TDSAs. *See id. ¶ 132*. The CHS/ Defendants and Principal Defendants both moved to dismiss Plaintiffs' Complaint. *ECF Nos. 49, 51*. Those motions remained pending at the time the Court stayed the litigation pending negotiation of the present partial Settlement. The CHS/ Defendants deny all of the claims made in the Complaint and contend that they have no liability in this Action.

B. Discovery, Mediation, and Settlement

Prior to reaching the present partial Settlement, the Parties engaged in extensive discovery. The CHS/ Defendants produced more than 240,000 pages of documents, the Principal Defendants produced more than 84,000 pages of documents, and the Class Representatives produced more

than 2,800 pages. *Richter Decl. ¶ 10.* Plaintiffs also subpoenaed two third parties and received over 200 pages of documents in response. *Id. ¶ 11.*[5]

As required by the Initial Case Management Order entered in this action (*ECF No. 58 ¶ F*), Plaintiffs made a demand on the CHS/ Defendants to settle this matter on June 24, 2020. *Richter Decl. ¶ 12.* Settlement discussions continued, and the CHS/ Defendants and Plaintiffs eventually reached a settlement, the terms of which are memorialized in the Settlement Agreement that is the subject of this motion.

II. Overview of Settlement Terms

A. The Settlement Class

The Settlement Agreement applies to the following Settlement Class:

> [A]ll current and former participants in the Plan who had an account balance greater than $0.00 in the Disputed Investments at any point during the Class Period and their beneficiaries.

See Settlement Agreement ¶ 1.46. "Disputed Investments" are defined as the standalone Principal index funds and the Principal TDSAs in the Plan. *Id. ¶ 1.14.* Based on information provided by the Plan's recordkeeper, there are approximately 20,128 Settlement Class members who invested in the standalone index funds, and approximately 195,303 class members who invested exclusively in the TDSAs. *Richter Decl. ¶ 3.*

B. Settlement Benefits

Under the Settlement, the CHS/ Defendants will contribute a Settlement Amount of $580,000 to a common settlement fund ("Settlement Fund"). *Settlement Agreement ¶¶ 1.25, 8.1.2.* Subject to any allowable deductions for Administrative Expenses (*see infra at pp. 6-7*), the

[5] While the Parties were engaged in settlement discussions, Plaintiffs served a Notice of Deposition for a witness affiliated with CHS/, to be conducted July 9, 2020. *See ECF No. 91 ¶ 4.* That deposition was postponed and was in the process of being rescheduled at the time the Settling Parties reached a settlement-in-principle. *Id.*

Settlement Fund will be allocated to Settlement Class Members in proportion to their investment in the standalone Principal index funds in the Plan during the Class Period. *Id. ¶¶ 8.3.2-8.3.3.* Settlement Class members who invested in the TDSAs will preserve their claim against the Principal Defendants relating to the TDSAs (which is *not* subject to a judgment reduction based on this Settlement), but will not be separately compensated by the CHS/ Defendants based on their investment in the TDSAs to avoid a double recovery.[6] Instead, CHS has agreed to provide certain further discovery related to the ongoing claim against the Principal Defendants relating to the management of the TDSAs. *Id. ¶ 9.1.*

Eligible Current Participants' accounts in the Plan will be automatically credited with their share of the Settlement Fund. *Settlement Agreement ¶ 8.4.* Eligible Former Participants, who do not have an account in the Plan, will receive their distributions by check. *Id. ¶ 8.5.*[7] Any checks that remain uncashed after the distribution of funds will revert to the Qualified Settlement Fund and will be paid to the Plan for the purpose of defraying administrative expenses. *Id. ¶ 8.8.*

C. Release of Claims

In exchange for this relief, the Settlement Class will release the CHS/ Defendants and affiliated persons and entities (the "Settling Defendants' Releasees" as defined in the Settlement) from "any and all actual or potential Claims related to the Disputed Investments that were brought or could have been brought as of the date of the Settlement Agreement by any Settlement Class Member against the Settling Defendants' Releasees . . . ." *Id. ¶ 1.37.* As noted above, claims

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[6] The Settlement Agreement does not resolve, and specifically excludes, Plaintiffs' ongoing claims against the Principal Defendants related to their management of the TDSAs in the Plan. *Settlement Agreement ¶ 4.5.* Moreover, any judgment obtained against the Principal Defendants would not be subject to a judgment reduction based on this Settlement. *Id. ¶ 3.3.4.*

[7] To minimize Administrative Costs, disbursements to Former Participants will be subject to a $5 *de minimis* threshold. *Id. ¶ 8.3.3.* Any funds that do not meet this threshold will be reallocated among eligible Settlement Class members prior to distribution.

against the Principal Defendants are not released. *Id. ¶ 4.5.*

D. Class Notice and Settlement Administration

Settlement Class Members will be sent a notice of the settlement ("Notice") via U.S. Mail. *Id. ¶ 1.11.* These Notices provide information to the Settlement Class regarding, among other things: (1) the nature of the claims; (2) the scope of the Settlement Class; (3) the terms of the Settlement; (4) Settlement Class Members' right to object to the Settlement and the deadline for doing so; (5) the class release; (6) the identity of Class Counsel; (7) the date, time, and location of the Fairness Hearing; and (8) Settlement Class Members' right to appear at the Fairness Hearing. *Id. Ex. A.*

To the extent that Settlement Class Members would like more information about the Settlement, the Settlement Administrator will establish a Settlement Website on which it will post the Settlement Agreement and Notice and any other documents mutually agreed to by the Settling Parties. *Id. ¶ 3.3.3.* In addition, the Settlement Administrator will establish a toll-free telephone line that will provide callers the option of speaking with a live operator if they have questions. *Id.*

E. Administrative Expenses

As an additional benefit under the Settlement, the CHS/ Defendants have agreed to pay $127,642.47 toward settlement administration expenses, representing the portion of the administrative expenses associated with Settlement Class members who invested only in the TDSAs. *Id. ¶ 8.2.2.1.* The only administrative expenses that will be paid out of the Settlement Fund are those expenses associated with Settlement Class Members who invested in the standalone accounts and are eligible for a distribution.[8] There will be no other deductions from the Settlement

[8] Administrative expenses associated with Settlement Class Members who invested in the standalone accounts include expenses for notice, the independent fiduciary required under DOL regulations and escrow fees and taxes associated with the maintenance of the Settlement Fund. *Settlement Agreement ¶ 8.2.*

Fund (other than tax withholdings for eligible Settlement Class members who receive their distribution by check). Class Counsel do not intend to seek recovery of any attorneys' fees or litigation costs in connection with the Settlement.

F. Independent Fiduciary Review

Finally, as required under DOL regulations, the Settlement will be subject to review by an Independent Fiduciary acting on behalf of the Plan. *Id. ¶ 3.4*; *see also* Prohibited Transaction Exemption 2003-39, 68 Fed. Reg. 75632, as amended, 75 Fed. Reg. 33830 ("PTE 2003-39"). The Independent Fiduciary will issue its report at least 30 days before the final Fairness Hearing so that the Court may consider it. *Id.*

ARGUMENT

I. STANDARD OF REVIEW

Federal Rule of Civil Procedure 23(e) requires judicial approval of any settlement agreement that will bind absent class members. The standard for approval is whether the settlement is "fair, reasonable, and adequate." *People First of Tenn. v. Clover Bottom Developmental Ctr.*, 2015 WL 404077, at *2 (M.D. Tenn. Jan. 29, 2015) (quoting Fed. R. Civ. P. 23(e)(2)). The district court has discretion in determining whether this standard has been met. *See Johnson v. W2007 Grace Acquisition I, Inc.*, 2015 WL 12001268, at *4 (W.D. Tenn. Apr. 30, 2015) ("Preliminary approval of a proposed settlement to a class action lies within the sound discretion of the Court.") (quoting *In re Vitamins Antitrust Litig.*, 2001 WL 856292, at *4 (D.D.C. July 25, 2001)). However, the Sixth Circuit has recognized that "federal policy favor[s] settlement of class actions'" such as this. *Int'l Union, United Auto., Aerospace, & Agr. Implement Workers of Am. v. Gen. Motors Corp.*, 497 F.3d 615, 632 (6th Cir. 2007).

The process for settlement approval involves three stages: (1) preliminary approval; (2) notice to the Class; and, (3) a fairness hearing and final approval. *Tenn. Assoc. of Health*

Maintenance Orgs., Inc. v. Grier, 262 F.3d 559, 565-66 (6th Cir. 2001). At the preliminary approval stage, courts examine the proposed settlement for "obvious deficiencies" before determining whether it is in the "range of possible approval." *W2007 Grace Acquisition I, Inc.*, 2015 WL 12001268, at *4. "A court should base its preliminary approval of the proposed settlement agreement 'upon its familiarity with the issues and evidence of the case as well as the arms-length nature of the negotiations prior to the settlement.'" *Kizer v. Summit Partners, L.P.*, 2012 WL 1598066, at *7 (E.D. Tenn. May 7, 2012) (quoting *Brotherton v. Cleveland*, 141 F.Supp.2d 894, 903 (S.D. Ohio 2001)). The ultimate fairness determination is left for final approval, after class members receive notice of the settlement and have an opportunity to be heard.

In 2018, Rule 23(e) was amended to specify uniform standards for settlement approval. *See* Fed. R. Civ. P. 23(e) advisory committee note (2018). The amended rule states that, at the preliminary approval stage, the court must determine whether it "will likely be able to: (i) approve the proposal under Rule 23(e)(2); and (ii) certify the class for purposes of judgment on the proposal." Fed. R. Civ. P. 23(e)(1)(B). Rule 23(e)(2), in turn, specifies the following factors the court must ultimately consider at the final approval stage in determining whether a settlement is "fair, reasonable, and adequate":

> (A) the class representatives and class counsel have adequately represented the class;
> (B) the proposal was negotiated at arm's length;
> (C) the relief provided for the class is adequate, taking into account:
>> (i) the costs, risks, and delay of trial and appeal;
>> (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
>> (iii) the terms of any proposed award of attorney's fees, including timing of payment; and
>> (iv) any agreement required to be identified under Rule 23(e)(3); and
>
> (D) the proposal treats class members equitably relative to each other.

Fed. R. Civ. P. 23(e)(2).

Courts within the Sixth Circuit have generally continued to apply the same "within the

range of possible approval" standard to preliminary approval after the 2018 amendments. *See Garner Properties & Mgmt., LLC v. City of Inkster*, 333 F.R.D. 614, 626 (E.D. Mich. 2020); *Wallburn v. Lend-A-Hand Servs., LLC*, 2019 2020 WL 2744101, at *7 (S.D. Ohio May 26, 2020). "The goal of this amendment is not to displace any [existing] factor, but rather to focus the court . . . on the core concerns of procedure and substance that should guide the decision whether to approve the proposal." Fed. R. Civ. P. 23(e) advisory cmte note (2018).

II. THE SETTLEMENT SATISFIES THE STANDARD FOR PRELIMINARY APPROVAL

As discussed below: (1) the settlement was negotiated at arm's length by experienced counsel after extensive discovery; (2) the Class was adequately represented by the Class Representatives and Class Counsel; and (3) the relief provided is adequate and equitable to all Class Members. Accordingly, this Court should grant preliminary approval of the Settlement.

A. The Settlement Is the Product of Arm's-Length Negotiations Facilitated by a Neutral Mediator After Extensive Litigation

Courts consistently approve class action settlements reached through arms-length negotiations after meaningful discovery. *See Johnson v. W2007 Grace Acquisition I, Inc.*, 2015 WL 12001269, at *6 (W.D. Tenn. Dec. 4, 2015) ("Discovery provides a level playing field for negotiations and ensures that the negotiations are informed rather than the product of uneducated guesswork."); *Koenig v. USA Hockey*, 2012 WL 12926023, at *4 (S.D. Ohio Jan. 10, 2012) (documents provided to plaintiffs in advance of settlement provided a "clear picture of the strengths and weaknesses of this case and the sufficiency of the legal and factual defenses the Defendants would raise."); *Garner,* 333 F.R.D. at 627. That is precisely the situation presented here. At all times, the parties negotiated at arm's length. *See Richter Decl. ¶ 13*. Moreover, the parties engaged in extensive discovery before engaging in settlement discussions. *Id. ¶ 9.* This gave the parties a clear view of the facts and law, and the strengths and weaknesses of their case.

Courts in this district have approved settlements at similar or earlier stages of proceedings. *See W2007 Grace Acquisition I*, 2015 WL 12001269, at *3 (approving settlement reached while motion to dismiss pending); *Gokare v. Fed. Express Corp.*, 2013 WL 12094870, at *4 (W.D. Tenn. Nov. 22, 2013) (same); *In re Regions Morgan Keegan Sec., Derivative & ERISA Litig.*, 2013 WL 12329512, at *4 (W.D. Tenn. Sept. 5, 2013) (granting final approval of settlement reached while motion to dismiss pending, although plaintiffs admitted they "do not have many of the important documents necessary to prove their claims."); *Garland v. Memphis-Shelby Cty. Airport Auth.*, 2011 WL 13090678, at *3 (W.D. Tenn. July 19, 2011) (granting final approval to settlement reached while motion to dismiss was pending, prior to formal discovery). Based on the extensive record that was developed and the extensive legal briefing on the motions to dismiss, the parties had more than sufficient information to evaluate settlement.

B. The Settlement Class Was Adequately Represented by the Class Representatives and Class Counsel, Who Support the Settlement

"As the Sixth Circuit has stated [in the context of approving class action settlements]. . . . 'The court should defer to the judgment of experienced counsel who has competently evaluated the strength of his proofs.'" *Gokare v. Fed. Express Corp.*, 2013 WL 12094870, at *6 (W.D. Tenn. Nov. 22, 2013) (quoting *Williams v. Vukovich,* 720 F.2d 909, 922-23 (6th Cir.1983)). That is especially true in this case.

"Plaintiffs' counsel are experienced litigators who serve as class counsel in ERISA actions involving defined-contribution plans[.]" *Moreno v. Deutsche Bank Americas Holding Corp.*, 2017 WL 3868803, at *11 (S.D.N.Y. Sept. 5, 2017). As detailed in the accompanying attorney declaration, Plaintiffs' counsel have: (1) won favorable rulings on dispositive motions and/or class certification in over a dozen ERISA cases; (2) recently tried two ERISA class actions; (3) successfully litigated an appeal before the First Circuit in *Brotherston v. Putnam Invs., LLC*, 907

F.3d 17 (1st Cir. 2018); and (4) negotiated numerous ERISA class action settlements in addition to the present Settlement. *Richter Decl. ¶ 17*. Accordingly, Class Counsel are adequate to represent the class, and were well-equipped to negotiate the Settlement that was reached in this case. *See Sims v. BB&T Corp*., 2017 WL 3730552, at *5 (M.D.N.C. Aug. 28, 2017) ("[T]he Court finds that the plaintiffs' interests would be 'fairly and adequately' represented by appointment of . . . Nichols Kaster as class counsel."). Based on their experience handling similar ERISA cases, and the record that was developed, Class Counsel have concluded that the relief provided by the Settlement is fair and reasonable. *Richter Decl. ¶ 21*.

The Settlement Class Members also have been adequately represented by the class representatives in this case. The class representatives have fulfilled their duties to the class by (among other things) reviewing the Complaint, producing documents, reviewing written discovery responses, communicating regularly with Class Counsel, and reviewing the proposed Settlement. *See Declarations of Becky Kirk, Perry Ayoob and Dawn Karzenoski*, submitted herewith ("*Plfs' Decls.*"). These are the type of actions that constitute adequate representation. *See Fitzgerald v. P.L. Mktg., Inc.*, 2020 WL 3621250, at *8 (W.D. Tenn. July 2, 2020) (class representatives adequately represented class "by participating in client interviews and conferences with Class Counsel and by providing relevant documents"); *Willis v. Big Lots, Inc*., 242 F. Supp. 3d 634, 649–50 (S.D. Ohio 2017) (finding class representatives adequately represented class by reviewing pleadings, assisting counsel in responding to requests for production and interrogatories, and being available for depositions). Each of the Class Representatives also have submitted declarations expressing their support for the Settlement. *SeePlfs' Decls.*

C. The Settlement Provides Significant Relief to Settlement Class Members and Treats Settlement Class Members Equitably

Both the class representatives and Class Counsel support the Settlement because it

represents a favorable outcome for the Settlement Class in connection with the claims asserted against the CHS/ Defendants. The monetary relief constitutes approximately 50% of the total damages that Plaintiffs calculated were associated with the standalone Principal index funds selected by the CHS/ Defendants for the Plan, and nearly 94% of the portion of fees for those funds that Plaintiffs alleged to be excessive.[9] *Richter Decl. ¶ 5*. This compares favorably to other class action settlements. *See, e.g., Sims v. BB&T Corp.*, 2019 WL 1995314, at *5 (M.D.N.C. May 6, 2019) (approving ERISA 401(k) settlement that represented 19% of estimated damages); *Urakhchin v. Allianz Asset Mgmt. of Am., L.P.*, No. 8:15-cv-01614, ECF No. 185 (C.D. Cal. July 30, 2018) (approving ERISA 401(k) settlement that represented approximately one-quarter of estimated losses); *Johnson v. Fujitsu Tech. & Business of America, Inc.*, 2018 WL 2183253, at *6-7 (N.D. Cal. May 11, 2018) (approving ERISA 401(k) settlement that represented "just under 10% of the Plaintiffs' most aggressive 'all in' measure of damages"); *W2007 Grace Acquisition I*, 2015 WL 12001269, at *8 (finding settlement representing 25% of plaintiffs' maximum loss reasonable); *In re Regions Morgan Keegan Sec., Derivative & ERISA Litig.*, 2013 WL 12329512, at *3 (approving ERISA settlement equal to approximately 16% of total damages); *see also In re Rite Aid Corp. Sec. Litig.*, 146 F. Supp. 2d 706, 715 (E.D. Pa. 2001) (noting that since 1995, class action settlements have typically "recovered between 5.5% and 6.2% of the class members' estimated losses").

Moreover, the recovery will be distributed equitably to eligible Settlement Class Members pursuant to the Plan of Allocation in the Settlement. Specifically, Settlement Class Members will receive distributions in proportion to their investments in the standalone Principal index funds that

[9] The at issue standalone index funds in the Plan began charging zero fees to Plan participants on January 15, 2020.

were the focus of Plaintiffs' claims against the CHS/ Defendants. *Settlement Agreement ¶ 8.3.2*. This Plan of Allocation is consistent with those approved in similar cases. *See, e.g., Andrus v. N.Y. Life Ins. Co.*, No. 16-5698, ECF No. 66-1 ¶ 6.4.1 (Feb. 14, 2017) (in similar lawsuit alleging excessively expensive index fund, allocating funds in proportion to investment in at-issue index fund); *id*, ECF No. 84 (S.D.N.Y. June 15, 2017) (granting final approval); *Sims v. BB&T*, No. 1:15-cv-00732, ECF No. 436-2, ¶ 6.4.2 (Nov. 30, 2018) (allocating funds in proportion to investments in at-issue proprietary funds); *id.,* ECF No. 452 (M.D.N.C. May 6, 2019) (granting final approval).

Although Settlement Class members will not receive distributions based on their investment in the TDSAs, their claim against the Principal Defendants relating to the TDSAs is preserved, *see Settlement Agreement, ¶ 4.5*, and the CHS/ Defendants have agreed to provide certain further discovery related to that claim, *id. ¶ 9.1*. A separate monetary recovery from the CHS/ Defendants on the same claim would create a potential double recovery.

D. Plaintiffs Would Have Faced Potential Litigation Risks and Substantial Delay in the Absence of the Settlement

In the absence of a Settlement, Plaintiffs would have faced significant litigation risk. *See In re Regions Morgan Keegan Sec., Derivative & ERISA Litig.*, 2014 WL 12808031, at *3 (W.D. Tenn. Dec. 24, 2014) (noting the risks of continued litigation, including "further uncertainty given the evolving case law in ERISA cases."); *Todd v. Retail Concepts, Inc.*, 2008 WL 3981593, at *4 (M.D. Tenn. Aug. 22, 2008) ("It is also pertinent for the Court to consider the risk, expense and delay of further litigation."); *Shanechian v. Macy's,* 2013 WL 12178108, at *4 (S.D. Ohio June 25, 2013) (noting difficulty of proving both liability and damages at trial even where plaintiffs prevailed on previous motion to dismiss and class certification rulings).

In their motion to dismiss (which remained pending at the time the Court entered the stay

of litigation pending settlement), the CHS/ Defendants argued that Plaintiffs' allegations fail to state a plausible claim for relief against the CHS/ Defendants and must be dismissed because: (a) Plaintiffs merely allege that the standalone Principal index funds in the Plan were not the cheapest and best performing funds available on the market and fail to allege any affiliation between the CHS/ Defendants and Principal, thus nothing in the Complaint gives rise to an inference of imprudence or disloyalty with respect to the retention of the standalone Principal index funds in the Plan (Dkt. 50 at 8-17); (b) Plaintiffs do not allege that the selection, monitoring, performance, or fees of the challenged TDSAs themselves was deficient (Dkt. 50 at 7); (c) the duty to monitor the TDSAs' underlying investments rests with Principal as the TDSAs' ERISA § 3(38) investment manager (*id.* at 17-18) and Plaintiffs do not allege any "red flags" that would have triggered a need to question Principal's monitoring of the investments; and (d) even if additional monitoring of the TDSA was merited, Plaintiffs' allegations fail to state a claim that the TDSAs' underlying investments were imprudent or disloyal options for the Plan (*see* Dkt. No. 52 at 17-24). The CHS/ Defendants also argued that Plaintiffs lack Article III standing to assert claims related to Standalone Accounts because they did not invest in those accounts and thus did not suffer an injury-in-fact (*id.* at 24-25). While Plaintiffs believe their counterarguments to be well supported under the law, it was not clear at the time of settlement how the Court would rule.

If the Court denied the CHS/ Defendants' motion to dismiss (and any subsequent summary judgment motion), Plaintiffs still would have faced substantial risk at trial, as illustrated by two recent trial judgments in favor of the defendants in ERISA breach of fiduciary duty cases involving defined contribution plans. *See Wildman v. Am. Century Servs., LLC*, 362 F. Supp. 3d 685 (W.D. Mo. 2019); *Sacerdote v. New York Univ.*, 2018 WL 3629598, at (S.D.N.Y. July 31, 2018). Moreover, even if Plaintiffs established a fiduciary breach, it is "difficult" to measure damages in

cases alleging imprudent or otherwise improper investments. *See* Restatement (Third) of Trusts § 100 cmt. b(1). Thus, significant issues would have remained regarding proof of loss. *See Sacerdote v. New York Univ.*, 328 F. Supp. 3d 273 at 280 (S.D.N.Y. 2018) (finding that "while there were deficiencies in the Committee's [fiduciary] processes—including that several members displayed a concerning lack of knowledge relevant to the Committee's mandate—plaintiffs have not proven that … the Plans suffered losses as a result.").[10]

While the outcome of the litigation was uncertain, there is little doubt that continued proceedings would have been complex, costly, and lengthy. As other courts have recognized, "ERISA is a complex field that involves difficult and novel legal theories and often leads to lengthy litigation." *Krueger v. Ameriprise*, 2015 WL 4246879, at *1 (D. Minn. July 13, 2015); *see also In re Marsh ERISA Litig.*, 265 F.R.D. 128, 138 (S.D.N.Y. 2010) ("Many courts have recognized the complexity of ERISA breach of fiduciary duty actions."). Indeed, it is not unusual for these cases to extend for a decade or longer before final resolution. *See Shanechian,* 2013 WL 12178108, at *5 (discussing how ERISA case that had lasted for six years could last for six more years absent a settlement); *Tussey v. ABB Inc.,* 2017 WL 6343803, at *3 (W.D. Mo. Dec. 12, 2017) (requesting proposed findings more than ten years after suit was filed on December 29, 2006); *Tibble v. Edison Int'l*, 2017 WL 3523737, at *15 (C.D. Cal. Aug. 16, 2017) (outlining remaining issues ten years after suit was filed on August 16, 2007); *Abbott v. Lockheed Martin Corp.*, 2015 WL 4398475, at *4 (S.D. Ill. July 17, 2015) (noting that the case had originally been filed on September 11, 2006).

[10] As a case in point, Class Counsel recently suffered an adverse judgment regarding a loss issue midtrial in an ERISA case against Putnam Investments, later appealed to the First Circuit and prevailed on the same issue, and then settled the case before the trial was completed (following over four years of litigation). *See Brotherston v. Putnam Invs., LLC*, 907 F.3d 17 (1st Cir. 2018) (partly vacating judgment against Plaintiffs); *Putnam Invs., LLC v. Brotherston*, 140 S. Ct. 911 (2020) (denying defendants' petition for certiorari); No. 15-13825, ECF No. 220 (D. Mass. Apr. 29, 2020) (approving plaintiffs' motion for preliminary approval).

Given the risks, cost, and delay of further litigation, it was reasonable and appropriate for Plaintiffs to reach a settlement on the terms that were negotiated. *See Kruger v. Novant Health, Inc.*, 2016 WL 6769066, at *5 (M.D.N.C. Sept. 29, 2016) (stating that settlement of a 401(k) class action "benefits the employees and retirees in multiple ways"). One of the chief advantages of the Settlement in this case is that it provides immediate and guaranteed relief to the Class.

III. THE CLASS NOTICE PLAN IS REASONABLE AND SHOULD BE APPROVED

In addition to reviewing the substance of the Settlement Agreement, the Court must ensure that notice is sent in a reasonable manner to all class members who would be bound by the settlement. Fed. R. Civ. P. 23(e)(1). The "best notice" practicable under the circumstances includes individual notice to all class members who can be identified through reasonable effort. Fed. R. Civ. P. 23(c)(2)(B). That is precisely the type of notice proposed here.

The Settlement Administrator will provide notice to the Settlement Class via U.S. Mail. *Settlement Agreement ¶ 1.11.* This type of notice is presumptively reasonable. *See Phillips Petroleum Co. v. Shutts,* 472 U.S. 797, 812 (1985). Moreover, the Notice will be supplemented through the Settlement Website and telephone support line. *See supra at p. 6*. This is more than sufficient to meet the standard under Rule 23 and is consistent with other ERISA settlements that have been approved. *See, e.g., In re Regions Morgan Keegan Sec., Derivative & ERISA Litig.*, 2014 WL 12808031, at *4 (approving substantially similar notice plan).[11]

The content of the Notice is also reasonable. The Notice includes, among other things: (1) a summary of the lawsuit; (2) a clear definition of the Settlement Class; (3) a description of the

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[11] *See also, e.g., Amos v. PPG Indus., Inc.*, 2019 WL 3889621, at *6 (S.D. Ohio Aug. 16, 2019), *report and recommendation adopted*, 2019 WL 3980570 (S.D. Ohio Aug. 22, 2019); *Sims v. BB&T Corp.*, Nos. 1:15–cv–732, 1:15–cv–841, ECF No. 439 (M.D.N.C. Dec. 13, 2018); *Moreno v. Deutsche Bank*, No. 1:15 cv-09936-LGS, ECF No. 335 (S.D.N.Y. Oct. 9, 2018), *Urakhchin v. Allianz Asset Mgmt. of Am., L.P.*, 2018 WL 3000490, at *6-7 (C.D. Cal. Feb. 6, 2018).

material terms of the Settlement; (4) a description of the claims being released; (5) instructions as to how to object to the Settlement and a date by which Settlement Class Members must object; (6) the date, time, and location of the final approval hearing; (7) contact information for the Settlement Administrator; (8) information regarding Class Counsel; and (9) a statement regarding Administrative Costs that may be deducted in connection with the Settlement. *Settlement Agreement Ex. A.* This Notice is clearly reasonable as it "fairly apprise[s] the prospective members of the class of the terms of the proposed settlement so that class members may come to their own conclusions about whether the settlement serves their interests." *In re Regions Morgan Keegan Sec.*, 2013 WL 12110279, at *4 (W.D. Tenn. Aug. 6, 2013) (quoting *Vassalle v. Midland Funding LLC*, 708 F.3d 747, 759 (6th Cir. 2013)).

IV. THE PROPOSED CLASS SHOULD BE CERTIFIED FOR SETTLEMENT PURPOSES

The Court should also certify the Settlement Class for settlement purposes.[12] As noted above, the proposed class includes all participants in the Plan who invested in the Disputed Investments (including participants of certain predecessor plans that merged into the Plan). *See supra at p. 4*. This class is consistent with other settlements that have been approved,[13] and easily satisfies the requirements of Rules 23(a) and 23(b)(1).

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[12] In the context of a settlement, class certification is more easily attained because the court need not inquire whether a trial of the action would be manageable on a class-wide basis. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997) ("Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems … for the proposal is that there be no trial."). If the Settlement does not become Final, no Settlement Class will be deemed to have been certified, and the Action will for all purposes revert to its status as of the day immediately prior to the date on which the District Court stayed this matter pending the Settlement.

[13] *See, e.g.*, *Moreno v. Deutsche Bank*, No. 1:15 cv-09936-LGS, ECF No. 347 ¶ 3 (S.D.N.Y. Mar. 1, 2019); *Main v. Am. Airlines, Inc.*, No. 4:16-cv-00473, ECF No. 137 ¶ 3 (Feb. 21, 2018); *Andrus v. N.Y. Life Ins. Co.*, No. 16-5698, ECF No. 84 ¶ 3 (S.D.N.Y. June 15, 2017).

A. The Requirements of Rule 23(a) are Satisfied

Rule 23(a) sets forth four requirements applicable to class actions: (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy of representation. *Amchem*, 521 U.S. at 620. Each of these requirements is met here.

1. Numerosity

Numerosity requires that the number of persons in the proposed class is so numerous that joinder of all class members would be impracticable. Fed. R. Civ. P. 23(a)(1). "[T]he difficulty inherent in joining as few as 40 class members should raise a presumption that joinder is impracticable, and the plaintiff whose class is that large or larger should meet the test of Rule 23(a)(1) on that fact alone." *City of Goodlettsville v. Priceline.com, Inc.*, 267 F.R.D. 523, 529 (M.D. Tenn. 2010) (quoting 1 William B. Rubenstein, Alba Conte and Herbert B. Newberg, *Newberg on Class Actions* § 3:5 (4th ed.)). This standard is clearly met for the Settlement Class, as it includes thousands of persons. *See City of Goodlettsville*, 267 F.R.D. at 529 (finding numerosity satisfied with 128 proposed class members); *Christy v. Heritage Bank*, 2013 WL 6858008, at *3 (M.D. Tenn. Nov. 8, 2013) ("[A] potential class that reaches into the hundreds, if not the thousands, satisfies the numerosity requirement."); *Kelly v. Montgomery Lynch & Assocs., Inc.*, 2007 WL 4562913, at *3 (N.D. Ohio Dec. 19, 2007) (finding numerosity satisfied with 50 proposed class members); *see also Bittinger v. Tecumseh Products Co.*, 123 F.3d 877, 884 n.1 (6th Cir. 1997) (Objection to numerosity of 1,100 was "frivolous").

2. Commonality

Commonality requires the existence of "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(1). "[T]he commonality requirement is typically easily satisfied in ERISA cases." *Shanechian v. Macy's,* 2011 WL 883659, at *3 (S.D. Ohio March 10, 2011); *see also In re Nortel Networks Corp. ERISA Litig.*, 2009 WL 3294827, at *6 (M.D. Tenn. Sept. 2, 2009)

("Because the issues that the proposed class members have in common are necessary to advance their claims under ERISA, Plaintiffs have satisfied commonality"). Here, the lawsuit raised numerous common questions, including whether "Defendants' process for assembling and monitoring the Plan's menu of investment options . . . was tainted by a conflict of interest or imprudence . . . ." *See Moreno*, 2017 WL 3868803, at *15. Accordingly, the commonality requirement is satisfied. *See Kerns v. Caterpillar, Inc.*, 2007 WL 2044092, at *4 (M.D. Tenn. July 12, 2007) (finding the issue of "whether the defendants violated vested rights under ERISA" sufficient to satisfy commonality); *Shirk v. Fifth Third Bancorp*, 2008 WL 4425535, at *2 (S.D. Ohio Sept. 30, 2008) (ERISA case finding commonality as to "whether the Defendants breached their fiduciary duties to the Plan and members of the class, [and] whether the Defendants failed to act prudently and solely in the interest of the Plan and the Plan's participants and beneficiaries").

3. Typicality

The typicality requirement "tend[s] to merge" with the commonality requirement. *Gen. Tel. Co. of the S.W. v. Falcon*, 457 U.S. 147, 157 n.13 (1982). A class representative's claim is typical if "it arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory." *Beattie v. CenturyTel, Inc.*, 511 F.3d 554, 561 (6th Cir. 2007) (quotation omitted). This requirement is satisfied in a breach of fiduciary duty case such as this, which is brought on behalf of the Plan.[14] *See In re Nortel Networks Corp. ERISA Litig.*, 2009 WL 3294827, at *8 (the fact that Plaintiffs bring the claims on behalf of the Plan "weigh[s] heavily in a Rule 23(a)(3) analysis of the parties'

[14] Plaintiffs bring this action pursuant to 29 U.S.C. § 1132(a)(2) and (3), which provide that participants in an employee retirement plan may pursue a civil action on behalf of the plan to remedy breaches of fiduciary duties and other prohibited conduct, and to obtain monetary and appropriate equitable relief as set forth in 29 U.S.C. § 1109. *Compl. (ECF No. 1) ¶ 13.*

claims and defenses."); *Shirk*, 2008 WL 4425535, at *3 ("Generally, there is little doubt that a class representative's breach of fiduciary duty claim is in every respect typical of those of his fellow class members. Typicality is further supported by the fact that ERISA contains unique standing and remedial provisions that allow a participant who sues for a breach of fiduciary duty to obtain plan-wide relief.") (citations omitted).

4. Adequacy

The fourth requirement under Rule 23(a) is that the Class Representatives and counsel "fairly and adequately represent the interests of the class." Fed. R. Civ. P. 23(a)(4). For the reasons discussed above, this requirement is satisfied. *See supra at pp. 10-11.*

B. The Requirements of Rule 23(b)(1) Are Satisfied

The proposed class also satisfies Rule 23(b)(1). Under Rule 23(b)(1), a class may be certified if prosecution of separate actions by individual class members would create a risk of:

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

Fed. R. Civ. P. 23(b)(1). Cases such as this, which involve allegations of fiduciary breaches to a trust or plan, are precisely the type of cases that are encompassed by the rule. *See Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 834 (1999) (noting that a breach of trust action is a "classic example" of a Rule 23(b)(1) class); *Dudenhoeffer v. Fifth Third Bancorp*, 2016 WL 9343955, at *2 (S.D. Ohio July 11, 2016) (finding ERISA 401(k) case a "paradigmatic example" of a 23(b)(1) class); *In re Schering Plough Corp. ERISA Litig.*, 589 F.3d 585, 604 (3d Cir. 2009) ("In light of the derivative nature of ERISA § 502(a)(2) claims, breach of fiduciary duty claims brought under

§ 502(a)(2) are paradigmatic examples of claims appropriate for certification as a Rule 23(b)(1) class, as numerous courts have held.") (citing cases).

1. Rule 23(b)(1)(A)

Certification of the class under Rule 23(b)(1)(A) is proper because prosecution of individual actions would create incompatible standards of conduct for Defendants. The fiduciary duties imposed by ERISA are "duties with respect to a plan" that are intended to protect the "interest of the participants and beneficiaries" collectively. *See* 29 U.S.C. § 1104(a). Accordingly, "separate lawsuits by various individual Plan participants to vindicate the rights of the Plan could establish incompatible standards to govern Defendants' conduct, such as . . . determinations of differing 'prudent alternatives' against which to measure the proprietary investments, or an order that Defendants be removed as fiduciaries." *Krueger v. Ameriprise Fin., Inc.*, 304 F.R.D. 559, 577 (D. Minn. 2014); *see also In re Nortel Networks Corp. ERISA Litig.*, 2009 WL 3294827, at *15 ("This risk of inconsistent standards is particularly high where, as here, the fiduciary duties are owed to the Plan itself. Separate actions would establish differing standards for the duty that Defendants owe to the Plan under ERISA.") (internal citation omitted); *Harris v. Koenig,* 271 F.R.D. 383, 394 (D.D.C. 2010); *Kanawi v. Bechtel Corp.,* 254 F.R.D. 102, 111 (N.D. Cal. 2008).

2. Rule 23(b)(1)(B)

Likewise, because an adjudication on behalf of one participant of the Plan would effectively be dispositive of the claims of the other class members, class certification is also appropriate under Rule 23(b)(l)(B). *See Moreno*, 2017 WL 3868803, at *8. The Advisory Committee Notes to Rule 23 expressly recognize that class certification is appropriate under Rule 23(b)(1)(B) in "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, Advisory Committee Note (1966). "[T]his case falls squarely within the meaning articulated by the Advisory Committee as Plaintiff allege[s] breaches of fiduciary duties affecting the Plans and the thousands of participants in the Plans." *Shanehchian,* 2011 WL 883659, at *10. Numerous courts have granted certification under Rule 23(b)(1)(B) in similar cases.[15]

V. THE BAR ORDER IS APPROPRIATE.

The Settlement Agreement calls for the entry of a Bar Order by the Court following the Fairness Hearing, prohibiting the Principal Defendants, Plaintiffs, and other third parties from asserting claims against the CHS/ Defendants and related entities for indemnity, contribution or other third-party claims arising from this Action, or any other Claims released in the Settlement Agreement. *Settlement Agreement ¶ 3.3.4(b)(viii).* "Entry of a bar order that is required by a proposed settlement agreement is within a court's authority and discretion." *Gordon v. Dadante*, 2008 WL 1805787, at *14 (N.D. Ohio Apr. 18, 2008), *aff'd*, 336 F. App'x 540 (6th Cir. 2009). The Sixth Circuit has held that, in certain situations, a court must conduct an evidentiary hearing before imposing a bar order against non-settling defendants to determine whether the settling

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[15] *See, e.g.*, *See In re Nortel Networks Corp. ERISA Litig.*, 2009 WL 3294827, at *8; *Karg v. Transamerica Corp.*, 2020 WL 3400199 (N.D. Iowa March 25, 2020); *Vellali v. Yale Univ.*, 2019 WL 5204456 (D. Conn. Sept. 24, 2019); *Beach v. JPMorgan Chase Bank, Nat'l Ass'n*, 2019 WL 2428631 (S.D.N.Y. June 11, 2019); *Cassell v. Vanderbilt Univ.*, 2018 WL 5264640 (M.D. Tenn. Oct. 23, 2018); *Tracey v. MIT*, 2018 WL 5114167 (D. Mass. Oct. 19, 2018); *Henderson v. Emory Univ.*, 2018 WL 6332343 (N.D. Ga. Sept. 13, 2018); *Short v. Brown Univ.*, 320 F. Supp. 3d 363 (D.R.I. 2018); *Clark v. Duke Univ.*, 2018 WL 1801946 (M.D.N.C. Apr. 13, 2018); *Sacerdote v. New York Univ.*, 2018 WL 840364 (S.D.N.Y. Feb. 13, 2018); *Daugherty v. Univ. of Chicago*, 2018 WL 1805646 (N.D. Ill. Jan. 10, 2018); *Wildman v. Am. Century Servs., LLC*, 2017 WL 6045487 (W.D. Mo. Dec. 6, 2017); *Moreno*, 2017 WL 3868803, at *8; *Urakhchin v. Allianz Asset Mgmt. of Am., L.P.,* 2017 WL 2655678, at *8 (C.D. Cal. June 15, 2017); *Ameriprise,* 304 F.R.D. at 577; *Shanehchian,* 2011 WL 883659, at *10.

defendants are paying their fair share of the liability. *See In re Greektown Holdings, LLC*, 728 F.3d 567, 576 (6th Cir. 2013). However, such a hearing is not necessary here.

First, the Principal Defendants do not oppose entry of the Bar Order. Second, "this rule [requiring an evidentiary hearing] only applies when the defendants share a common liability and the non-settling defendant's right of contribution against the settling defendant is extinguished by the bar order." *Id*. Plaintiffs did not assert that the Principal Defendants were liable for the CHS/ Defendants' selection of the standalone index funds for the Plan. *See ECF No. 1 ¶¶ 68-82*. Regardless, courts in this Circuit have uniformly held that a right of contribution does not exist among ERISA co-fiduciaries. *See Computer & Eng'g Servs., Inc. v. Blue Cross & Blue Shield of Michigan*, 2015 WL 4207150, at *2 (E.D. Mich. July 10, 2015) ("[T]o this Court's knowledge, every one of the numerous district courts within the Sixth Circuit to have addressed the issue . . . reject[ed] a right of contribution among ERISA co-fiduciaries."); *see also Loo v. Cajun Operating Co.*, 130 F. Supp. 3d 1097, 1109–10 (E.D. Mich. 2015) (quoting *Computer & Eng'g Servs.* and holding same); *May v. Nat'l Bank of Commerce*, 390 F. Supp. 2d 674, 677 (W.D. Tenn. 2004) ("This Court concludes that ERISA does not provide for a right of contribution among fiduciaries and it is not appropriate to create such a right using federal common law."); *Fedex Corp. v. N. Tr. Co.*, 2010 WL 2836345, at *4 (W.D. Tenn. July 16, 2010) ("[T]his Court finds no reason to differ with the many cases in this Circuit, including *May*, holding that ERISA does not include a right of contribution or to restate all of the reasons supporting that rule. In fact, the Court finds that subsequent decisions have only increased the persuasiveness of this holding."). As such, the Court should enter the Bar Order called for by the Settlement Agreement.

VI. THE COURT SHOULD CONTINUE TO STAY THIS ACTION PENDING FINAL APPROVAL.

An express condition of the Settlement Agreement is that "a subsequent order continuing the stay of this Action in its entirety . . . shall remain in effect, except as to the Settling Defendants' obligations in connection with this Agreement." *Settlement Agreement ¶ 3.2.* After the CHS/ Defendants and Plaintiffs reached a settlement in principal, the Parties filed a joint motion to stay the Action pending settlement on July 27, 2020. *ECF No. 91.* The Court granted the motion and stayed the Action effective July 29, 2020 for a period of 45 days. *ECF No. 92.* The Parties filed joint motions to continue the stay for an additional 30 days on September 16, 2020 and for an additional 45 days on October 19, 2020, which the Court granted on September 17, 2020 and October 20, 2020, respectively. *ECF Nos. 94-95, 97-98*. The parties now respectfully request that the Court continue the stay of this litigation until the Settlement becomes Effective under Paragraph 1.16 of the Settlement Agreement.

As the parties previously discussed in initially seeking a stay pending discovery, in the absence of such a stay, "[i]n the unlikely event that the settlement is not confected or approved by the Court, the claims against the Principal Defendants and the CHS/ Defendants will end up on separate litigation tracks which prejudices the parties and is inefficient." *ECF No. 91 ¶ 9(c)*. Moreover, "[i]f the litigation has proceeded in the interim as to the unsettled claims, the CHS/ Defendants would be prejudiced by having not been permitted to participate in the litigation that had ensued between Principal and Plaintiffs." *Id.* Finally, in the absence of a continued stay, Plaintiffs' motion for certification of a litigation class would be due on December 17, 2020, with subsequent deadlines shortly thereafter. *ECF Nos. 90, 92, 95, 98*. Proceeding with the litigation in the midst of the current settlement would be inefficient and counterproductive. *See ECF No. 91*

¶ 8(a). Thus, the parties respectfully request that the Court continue the stay of this litigation until the Effective Date of the Settlement.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court (1) preliminarily approve the Settlement; (2) approve the proposed Notice and authorize distribution of the Notice; (3) certify the Settlement Class; (4) schedule a final approval hearing; and (5) enter the accompanying Preliminary Approval Order.

Dated: December 4, 2020

/s/ Kai Richter
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CERTIFICATE OF SERVICE

I hereby certify that on December 4, 2020, a true and accurate copy of the foregoing *Plaintiffs' Memorandum in Support of Motion for Preliminary Approval of Class Action Settlement* electronically using the Court's CM/ECF system, which will send a notice of electronic filing to the following:

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