UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

VALESKA SCHULTZ, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Cause No. 4:16-cv-1346-JAR
	)	
EDWARD D. JONES & CO., L.P., *et al.*,	)	
	)	
Defendants.	)	

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT, CERTIFICATION OF SETTLEMENT CLASS AND APPROVAL OF CLASS NOTICE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

Treatises

Plaintiffs Valeska Schultz, Melanie Waugh and Rosalind Staley (collectively, "Plaintiffs") submit this Memorandum of Law in support of their Motion for Final Approval of a Settlement that the parties have reached in this class action. Plaintiffs seek an Order: (1) approving to the Settlement under FED. R. CIV. P. 23(e); (2) certifying the below-defined Class; and (3) approving the notice provided to the Class.

After more than two years of litigation, multiple motions and the review of more than 100,000 pages of documents exchanged in discovery, Plaintiffs and Defendants have agreed to settle the claims in this ERISA litigation on a class-wide basis in exchange for $3.175 million and the releases contained in the settlement agreement. The Settlement is a fair, reasonable and adequate resolution of the proposed Class's claims and should be approved under Rule 23(e). In particular, the Settlement represents more than 50% of the Class's potential damages and eliminates the numerous, substantial risks, expenses and possible delays that would lay ahead if they continued prosecuting this case. The Settlement, negotiated at arms-length by experienced counsel on both sides, is an excellent result and in Class members' best interests. Plaintiffs also request that the Court confirm certification of the Settlement Class and approve the notice that was provided to Class members in accordance with the Preliminary Approval Order.

I. SUMMARY OF CLAIMS

During the Class Period, the Edward D. Jones & Co. Profit Sharing and 401(k) plan (the "Plan") investment options consisted predominantly of mutual funds managed by "partners" and "preferred partners" of Edward Jones – investment management companies that worked closely with Edward Jones brokers and agents and paid revenue sharing to Edward Jones based on Edward Jones marketing their funds to Edward Jones clients. Plaintiffs allege the Defendants selected and retained certain Plan investment options because of Edward Jones' business relationships, not because the funds were prudent investment options, and that there were superior, less expensive investment options available that Defendants should have chosen. Doc. 58 at ¶¶ 35–97. Accordingly, Plaintiffs contend that Defendants not operate the Plan for the exclusive benefit of Plan participants as ERISA requires, but instead as a way to further Edward Jones' business

interests. Plaintiffs also allege that Defendants caused the Plan to pay excessive recordkeeping fees that harmed Plan participants. *Id*. at ¶¶ 98–114.

Defendants deny any wrongdoing or breach of fiduciary duty and assert, *inter alia*, that the Plan's recordkeeping fees were reasonable, and that the Plan offered several funds that were not affiliated with Edward Jones' "partners" and "preferred partners." Doc. 72. Defendants also asserted several affirmative defenses. *Id*. at 19 – 21.

II. LITIGATION HISTORY AND SETTLEMENT NEGOTIATIONS.

A. The Action.

The Complaint in this case was filed on August 19, 2016, by Charlene McDonald. Doc. 1. The original defendants were Edward Jones & Co., L.P., The Jones Financial Companies, L.L.L.P. and the Edward Jones Investment and Education Committee. *Id*. On October 12, 2016, Defendants moved to dismiss under FED. R. CIV. P. 12(b)(1) and (6), claiming that McDonald did not have standing to pursue claims regarding funds in which she did not invest and that she failed to state a claim for breach of fiduciary duty under ERISA as to the funds in which she did investment. Doc. 26, 27. On November 14, 2016, McDonald filed her Opposition to the motion to dismiss (Doc. 37) and Defendants filed a Reply on December 7, 2016 (Doc. 38). On January 26, 2017, the Court denied the motion to dismiss as to Edward Jones and the Committee but granted it as to The Jones Financial Companies, L.L.L.P. Doc. 43.

On February 1, 2017, a Consolidated Complaint was filed, including the claims of Valeska Schultz and Melanie Waugh, who had previously brought a similar case. Doc. 44. The Consolidated Complaint added the individual members of the Investment Committee as additional Defendants. *Id*. On March 31, 2017, Defendants moved to dismiss the Consolidated Complaint (Doc. 51), asserting that the Investment Committee was not responsible for selecting the Plan's recordkeeper. Doc. 52 at 11-12. Plaintiffs then filed a First Amended Consolidated Complaint to add the Administrative Committee as a defendant, alleging that the Administrative Committee had "discretion and control over . . . the Plan's recordkeeping and administrative contracts." Doc. 58 at ¶ 20. On May 26, 2017, Defendants filed a motion to dismiss the First Amended Consolidated

Complaint. Doc. 63. On March 27, 2018, this Court denied Defendants' motion to dismiss, finding that the Plaintiffs pled plausible claims against the Administrative Committee. Doc. 71 at 6-8. Defendants answered the First Amended Consolidated Complaint on April 10, 2018, denying all claims and asserting numerous defenses. Doc. 72.

Plaintiffs served two sets of document requests, two sets of interrogatories and a set of requests for admissions. Declaration of Gregory Y. Porter in Support of Plaintiffs' Motion for Final Approval of Class Action Settlement, Certification of Settlement Class and Approval of Class Notice and Motion for Attorneys' Fees and Expenses and Case Contribution Awards ("Porter Decl."), at ¶ 16. In response, Defendants produced over 22,000 documents that comprised more than 100,000 pages of material, including the minutes from Investment Committee and Administrative Committee meetings showing how Defendants selected and retained the Plan's investment options and chose the Plan's recordkeeper. *Id*. Plaintiffs also served a subpoena on Transamerica, the Plan's recordkeeper, to obtain the Plan's trading records showing the dates and prices of the purchases and sales to calculate the Plan's damages. *Id*. at ¶ 16. Transamerica produced over 300 documents comprising more than 2,500 pages of material in response. *Id*.

B. Settlement Negotiations, Preliminary Approval and Notice to the Class

In June 2018, the Parties began discussing a potential settlement. Counsel for Plaintiffs and Defendants had extensive telephonic and e-mail discussions concerning settlement, and met for face-to-face negotiations on June 6 and August 21. On September 13, 2018, the Court entered an order that stayed this case for 90 days while the Parties continued to negotiate a settlement. Doc. 92. On December 11, 2018, the Parties agreed to the Settlement. Porter Decl. at ¶ 18.

The Court entered the order granting preliminary approval of the settlement on December 13, 2018. Doc. 97. Consistent with the Settlement Agreement and this Court's order, Defendants deposited $3.175 million in the qualified settlement fund established for this settlement. On January 17, 2019, KCC, the administrator selected by the parties, emailed notices to 38,569 Class Members who are current plan participants and who have elected to receive plan communications by email, and mailed notices to 35,552 class members who had either left the Plan or who had not

elected to receive their Plan communications by email. Declaration of Rachel Christman (Exhibit B to Porter. Decl.) ¶¶ 7-10. The notices were substantially in the form approved by this Court in the Order granting preliminary approval, and alerted the participants not only to the key terms of the settlement, but also of their right to object. *Id.* at Ex. A. The Notice also directed participants to a website, www.edwardjones401ksettlement.com, which has been available at all times since January 16, 2019, and which includes links to the relevant filings pertaining to the settlement. The website had received over 85,388 hits since it became available online. Christman Decl. at ¶ 12. A toll-free telephone number was also established, which received over 135 telephone calls from class members. *Id.* at ¶ 11.

III. THE SETTLEMENT AGREEMENT

The Settlement[1] resolves all claims of current and former participants in the Plan since January 1, 2010. Settlement at §§ 2.2, 5.1 and 5.2. Under the Settlement, Defendants will contribute $3.175 million to the Settlement Fund. *Id.* at § 3.1. The Settlement Fund will be used to pay the costs to administer the Settlement, to provide notice to Settlement Class members and to pay any attorneys' fees, expenses or Case Contribution Awards that the Court may order. *Id.* at § 3.5, 7.1 and 7.2. The Settlement Fund will also be used to pay the costs of an independent fiduciary[2] to review the Settlement. *Id.* at § 2.9.

After the payment of costs, expenses and fees described above, the Settlement Fund will be distributed to Class members. *Id.* at § 3.2. Settlement Class members will not have to make a claim to receive their share of the Settlement Fund. The amount distributed to each Settlement Class member will be *pro rata*, based on account balances, a proxy for the alleged losses, as fully described in the Plan of Allocation attached to the Settlement Agreement. Settlement at Exhibit C. No payment to any Settlement Class member shall be smaller than ten dollars ($10.00). Any Settlement Class Member whose payment pursuant to Section 3.2 is less than ten dollars ($10.00) shall receive a payment of ten dollars ($10.00). *Id.* at § 3.2(d). None of the Settlement Fund will

[1] A true and correct copy of the Settlement Agreement is attached to Plaintiffs' Motion.
[2] The expected cost of the Independent Fiduciary is $30,000.

revert back to Edward Jones or the Defendants. *Id.* at § 3.2(e).

Plaintiffs and Settlement Class members will provide a release and covenant-to-not-to-sue to Defendants and the other Released Parties covering the claims that were or could have been asserted in the Action based on the facts alleged in any of the complaints filed in this case, including the First Amended Complaint (Doc. 58) and the proposed Second Amended Complaint (Doc. 78-2) or Defendants' defenses to the Plaintiffs' claims (Doc. 72). Settlement at §§ 1.30, 5.1, 5.2. The release and covenant-not-to-sue in the Settlement does not encompass individual claims for vested benefits that are otherwise due under the terms of the Plan. Settlement at § 1.30.

IV. THE COURT SHOULD APPROVE THE SETTLEMENT

A. Legal Standard

"If the [settlement] would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2); *see also In re Uponor, Inc.*, 716 F.3d 1057, 1063 (8th Cir. 2013). "'[S]trong judicial policy . . . favors settlements, particularly where complex class action litigation is concerned.'" *Yarrington v. Solvay Pharm., Inc.*, No. 09-CV-2261 (RHK/RLE), 2010 WL 11453553, at *6 (D. Minn. Mar. 16, 2010) (quoting *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992) and citing 4 NEWBERG ON CLASS ACTIONS § 11.41 (4th ed. 2002)) .

A class action settlement is a private contract negotiated between the parties that is "presumptively valid." *Uponor*, 716 F.3d at 1063 (internal quotations omitted). "Rule 23(e) requires the court to intrude on that private consensual agreement merely to ensure that the agreement is not the product of fraud or collusion. . . ." *In re Wireless Tel. Fed. Cost Recovery Fees Litig.*, 396 F.3d 922, 934 (8th Cir. 2005). In doing so, courts do not adjudicate the merits of the case or rule on the matters resolved by the parties' agreement, as the very purpose of a settlement is to avoid the expense and delay of a trial. *In re Zurn Plumbing Prods. Liab. Litig.*, No. 08-MDL-1958 (ADM/AJB), 2013 WL 716088, * 6 (D. Minn. Feb. 27, 2013). Courts give "great weight to and may rely on the judgment of experienced counsel in its evaluation of the merits of a class action settlement." *Id.* (internal citations omitted).

To grant final approval, a court must determine that a settlement is "fair, reasonable and adequate." *Uponor*, 716 F.3d at 1063. As of December 1, 2018, Rule 23(e)(2) now codifies several factors to be considered:

> (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). These factors are similar to factors that have been considered by federal courts across the country, including the Eighth Circuit.[3] A district has broad discretion in assessing the weight and applicability of these factors. *Prof. Firefighters Ass'n of Omaha Local 385 v. Zalewski*, 678 F.3d 640, 645 (8th Cir. 2012). As discussed below, application of these factors to the current Settlement demonstrates that it is fair, reasonable and adequate and should be approved.

B. Class Representatives and Class Counsel Have Diligently Prosecuted the Action and Negotiated the Settlement Agreement at Arm's Length

The Class Representatives and Class Counsel have diligently prosecuted this action for over two years. Prior to filing the Complaint, Class Counsel engaged in extensive factual and legal research pertaining to the claims, which ultimately resulted in a thirty-seven page Complaint. Doc No. 1. As discussed above, Plaintiffs successfully opposed Defendants' motion to dismiss the

[3] For example, the Eight Circuit has suggested that courts should consider "(1) the merits of the plaintiff's case weighed against the terms of the settlement; (2) the defendant's financial condition; (3) the complexity and expense of further litigation; and (4) the amount of opposition to the settlement." *In re Wireless Tel. Fed. Cost Recovery Fees Litig.*, 396 F.3d at 932.

original complaint, then filed a Consolidated Complaint. Doc. Nos. 26, 27, 37, 38, 43 and 44. After adding additional claims and detailed allegations, Plaintiffs filed a First Amended Consolidated Complaint, the operative Complaint, and successfully opposed another motion to dismiss. Doc. Nos. 51, 52, 57, 58 and 71. Plaintiffs conducted extensive discovery, reviewed over 100,000 pages of documents provided by Defendants and the Plan's third-party recordkeeper, and retained a highly qualified expert, Dr. Steve Pomerantz. Porter Decl. at ¶ 19.

As a result of Class Counsel's initial investigation, their review of the materials provided through the discovery process, the extensive motion to dismiss briefing and their consultation with Dr. Pomerantz, Plaintiffs and Class Counsel entered into Settlement discussions with a clear understanding of the strengths and weaknesses of their case. *See Rawa v. Monsanto Company*, No. 4:17-CV-1252 (AGF), 2018 WL 2389040, * 7 (E.D. Mo. May 25, 2018) (approving settlement when negotiated by "experienced counsel familiar with the legal and factual issues of the case.").[4]

Class Counsel also has in-depth knowledge of the legal framework applicable to this case. Plaintiffs' attorneys have decades of experience prosecuting, settling, and trying ERISA cases on behalf of retirement plan participants, which they used to evaluate and negotiate the Settlement. Porter Decl. at ¶¶ 4-7; *see also* Izard Decl. at Ex. A; Gyandoh Decl. at Ex. 1. Because the Settlement was negotiated by experienced counsel, there is a presumption that it was "the product of arm's length negotiations." *Netzel v. West Shore Grp.*, No. 16-cv-2552 (RHK/LIB), 2017 WL 1906955, at * 6 (D. Minn. May 8, 2017); *see also Bonetti v. Embarq Mgmt. Co.*, 715 F. Supp. 2d 1222, 1227 (M.D. Fla. 2009) ("If the parties are represented by competent counsel in an adversary context, the settlement they reach will, almost by definition, be reasonable."). The Settlement was also reached after many rounds of negotiation, which allowed Plaintiffs to increase the

[4] *See also Risch v. Natoli Engineering Co., LLC*, No. 11-cv-1621, 2012 WL 4357953, at * 3 (E.D. Mo. Sept. 24, 2012) (approving settlement when the parties engaged in "extensive fact discovery, exchanging and reviewing significant numbers of documents" including "all documents necessary to evaluate the class claims and damages."); *King v. Ranieri Constr., LLC et al.*, No. 14-cv-1828, 2015 WL 631253, at * 3 (E.D. Mo. Feb. 12, 2015) (approving settlement where "parties engaged in settlement negotiations and exchanged a large amount of documents and information for a month before submitting the proposed settlement.").

Settlement's monetary benefits. Porter Decl. at ¶ 18; *Pollard v. Remington Arms Co., LLC*, 320 F.R.D. 198, 220 (W.D. Mo. 2017) (approving settlement entered into after "extensive settlement negotiations" following "meaningful discovery").

C. The Relief Provided For the Class Is Fair, Reasonable and Adequate

The amendments to Rule 23(e) direct the Court to consider the adequacy of the relief provided by the Settlement, taking into account several key factors: the costs, risks and delay that would result from further litigation; the ability to distribute Settlement funds to the Class in an effective way; and the provisions of the Settlement related to attorneys' fees.[5] Consideration of these factors demonstrates that the Settlement is fair, reasonable and adequate.

1. Costs, Risks and Delay of Trial and Appeal

Courts have repeatedly recognized that ERISA 401(k) cases "often lead [] to lengthy litigation." *Krueger v. Ameriprise*, No. 11-cv-2781, 2015 WL 4246879, at * 1 (D. Minn. July 13, 2015). It is not unusual for ERISA fee cases to last for a decade or longer. *See, e.g.*, *Tussey v. ABB, Inc.*, No. 06-cv-4305, 2017 WL 6343803, at * 3 (W.D. Mo. Dec. 12, 2017) (requesting proposed findings on amount of damages more than 10 years after the suit was filed); *Tibble v. Edison Int'l*, No. 07-cv-5359, 2017 WL 3523727, at * 15 (C.D. Cal. Aug. 16, 2017) (outlining issues for trial in a case filed in 2007). The potential for protracted litigation supports the Settlement's approval. *See also Pollard*, 320 F.R.D. at 219 (approving settlement because, *inter alia*, "class actions place an enormous burden of costs and expenses on parties.") (internal quotations omitted).

Plaintiffs would also incur considerable expenses if this case continued. To prove their claims, Plaintiffs would need to depose several Committee members and Edward Jones employees. These depositions, including the costs of transcripts and travel, would be expensive and reduce the net amount of Class's recovery. *Kruger v. Novant Health, Inc.*, No. 14-cv-208, 2016 WL 6769066,

[5] Rule 23(e)(2)(C)(iv) also requires that the court take into account any agreements made in connection with the proposed Settlement. Because there are no agreements, other than the Settlement itself, in this case, this provision is not applicable to the current Settlement.

at * 5 (M.D.N.C. Sept. 29, 2016) (granting final approval, noting that "early settlement of a 401(k) excessive fee case benefits the employees and retirees in multiple ways.").

In addition, Plaintiffs would incur expenses related to expert testimony, as they would need experts on: (a) what is a prudent process for an ERISA fiduciary; (b) what are comparable funds to the ones Plaintiffs allege are imprudent; (c) what are reasonable recordkeeping charges for a 401(k) like the Plan; and (d) the amount of damages because of Defendants' fiduciary breaches. In a comparable case involving a mutual fund company's 401(k) plan which settled at the conclusion of discovery, the plaintiffs incurred $591,000 in expenses. *Urakchin v. Allianz Asset Mgmt. of Amer., L.P.*, No. 15-cv-1614 (C.D. Cal. Feb. 6, 2018), Docket Entries 185 and 186 (final approval order and judgment of that settlement). After fact and expert discovery was complete, the parties would also spend considerable time and expense briefing a contested motion for class certification and (in all likelihood) dispositive motions, and finally preparing for a conducting a trial on the merits. That does not even address the likelihood that the party that did not prevail at trial would file an appeal. The proposed settlement, thus, avoids substantial cost and delay.

The most significant benefit of the Settlement for the Class, however, is avoiding the risk that Defendants would prevail or that Plaintiffs would prevail on liability but not obtain the damages they sought. *See Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1150 (8th Cir. 1999) (most important consideration in determining whether a settlement is fair, reasonable and adequate is "the strength of the case for plaintiffs on the merits, balanced against the amount offered in settlement.") (internal quotations and citations omitted). Analyzing the strength of the plaintiff's case "is not a simple mathematical exercise with definite outcomes; a 'high degree of precision cannot be expected in valuing a litigation.'" *Hashaw v. Department Stores Nat. Bank*, 182 F. Supp. 3d 935, 943 (D. Minn. 2016) (quoting *Synfuel Techs., Inc. v. DHL Express (USA), Inc.*, 463 F.3d 646, 653 (7th Cir. 2006)). Courts perform a "ballpark valuation." *Id.* at 463.

In considering the Settlement's fairness, a court must consider the challenges that plaintiffs would face in prevailing on their claims. *See, e.g., Ramsey v. Sprint Comm. Co., L.P.*, No. 11-cv-3211, 2012 WL 6018154, at * 3 (D. Neb. Dec. 3, 2012). In doing so, court "does not try the case,"

but instead identifies the disputed factual and legal issues that make it less likely for the plaintiffs to receive a full recovery. *Id*. (citing *Grunin v. Int'l House of Pancakes*, 513 F.2d 114, 123 (8th Cir. 1975)). "If the plaintiff class faced a strong unlikelihood of success, or an initial defeat followed by another round at the appellate level, virtually any benefit inuring to the class would be better than the prospect of an ultimately unsuccessful litigation." *Ramsey*, 2012 WL 6108154, at * 3 (citing *DeBoer v. Mellon Mortg. Co.*, 64 F.3d 1171, 1177 (8th Cir. 1995)).

Here, Plaintiffs face significant hurdles. Breach of fiduciary duty claims under ERISA depend on the process by which decisions were made rather than the results of those decisions. *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 595 (8th Cir. 2009). The Plan's investment decisions were made by the Investment Committee. Doc. 58 at ¶ 29. The meeting minutes from the Investment Committee's meetings indicate that it evaluated the Plan's options regularly and, at certain times, removed Partner or Preferred Partner products from the Plan's lineup. Porter Decl. at ¶ 16. The Committee, however, did not remove ***all*** allegedly imprudent funds and often replaced the ones it removed with other Partner or Preferred Partner products. And, Plaintiffs maintain, the Committee's selection and removal process was tainted by disloyalty and its members' desire to benefit Edward Jones' corporate relationships. These disputed issues support the Settlement's approval. *See, e.g.*, *Pollard*, 320 F.R.D. at 220 (approving settlement because there were "many potential intricate factual and legal issues, and the results of the litigation…can never be predicted with absolute certainty.").

Moreover, if Plaintiffs established that Defendants breached their fiduciary duty, proving damages would not be a given. Here, the Settlement's value is $3.175 million, approximately 7.05% of the Class's maximum potential damages of $45 million. Porter Decl. at ¶ 19. This percentage, in and of itself, is reasonable and warrants preliminary approval. *See, e.g.*, *Newbridge Networks Sec. Litig.*, No. 94-1678, 1998 WL 765724, at *2 (D.D.C. Oct. 23, 1998) ("an agreement that secures roughly six to twelve percent of a potential recovery . . . seems to be within the targeted range of reasonableness").

However, the Settlement likely represents a much higher percentage of the Plaintiffs' ***expected*** damages. The $45 million figure is based on comparing the funds Plaintiffs allege were imprudent to Vanguard Index Funds within the same Morningstar Categories as the challenged funds. Porter Decl. at ¶ 19. Plaintiffs performed this comparison because the underlying funds were classified as domestic equity stock funds. However, several of the challenged funds also invested in asset categories outside of their Morningstar Categories. *Id.* After adjusting benchmarks to account for this factor, the Class's expected damages would be reduced to $6 million. *Id*. Therefore, the Settlement represents over ***50%*** of the Class's expected damages if Plaintiffs prevailed at trial, a percentage that is very favorable to settlements in comparable cases. *See*, *e.g.*, *Meiners v. Wells Fargo & Co.*, 898 F.3d 820, 823 (8th Cir. 2018) (affirming dismissal where plaintiff compared imprudent fund to fund with different asset allocation); *Urakchin v. Allianz Asset Mgmt. of Amer., L.P.*, No. 15-cv-1614, 2018 WL 3000490, * 4 (C.D. Cal. Feb. 6, 2018) (granting preliminary approval to settlement that represented between 25.5% of plaintiffs' losses) and Docket Entries 185 and 186 (final approval order and judgment of that settlement). Albeit a decision on the pleading standard on a Rule 12(b)(6) motion, the Eighth Circuit's recent decision in *Meiners* may also impact the benchmarks that Plaintiffs could use for their damages calculation. *Meiners*, 898 F.3d at 823-24.

The Settlement amount is thus fair, reasonable and adequate in light of the substantial risk, cost and delay that further litigation would entail.

2. Effective Methods of Settlement Distribution

No Class Member will be required to do anything to receive a monetary payment from the Settlement. Because the Plan's Recordkeepers maintain detailed records of its current and former participants, the Settlement Administrator will be able to deliver distributions with reasonable confidence that the distributions are being sent to the correct people and the correct addresses. Settlement at § 3.2(e).

The amount distributed to each Settlement Class member will be *pro rata*, based on account balances, a proxy for the alleged losses, as fully described in the Plan of Allocation attached to the

Settlement Agreement. Settlement at Exhibit C. No payment to any Settlement Class member shall be smaller than ten dollars ($10.00). Any Settlement Class Member whose payment pursuant to Section 3.2 is less than ten dollars ($10.00) shall receive a payment of ten dollars ($10.00). Settlement at § 3.2(d). Current Plan Participants will be paid by electronic distribution through their Plan Accounts, while Former Participants will be paid by check. Settlement at § 3.2(e).[6] The Settlement also requires that distribution occur "as soon as administrative feasible following the effective date of the Settlement. Settlement at § 1.13.

3. Provisions Relating to Attorneys' Fees

The Settlement provides that Class Counsel will request that the Court grant an award of seek an award of attorneys' fees, to be paid from the Settlement Fund, in an amount not to exceed 1/3 of the Fund, plus an award for reimbursement of litigation expenses not to exceed $50,000. Settlement Agreement, at §7.2(a). Contemporaneous with the filing of this Motion and consistent with the Settlement, Plaintiffs have filed a Motion for Award of Attorneys' Fees and Expenses and Case Contribution Awards (the "Fee Motion"), which requests an award of $1,058,333 (one-third of the Settlement) in fees and $19,018.50 in litigation expenses.

Nothing in the Settlement's provisions relating to attorneys' fees and expenses undermines the fairness or adequacy of the Settlement. Importantly, the Settlement does not depend upon the Court awarding the requested amounts for fees or expenses. Settlement at § 7.2(b). Moreover, as discussed in detail in Plaintiffs' memorandum of law in support of the Fee Motion, the amounts requested are reasonable based on the factors frequently considered by Courts in this circuit: the benefits conferred through the settlement, the litigation risk that Class Counsel bore by litigating the case on a wholly contingent basis, the difficulty and novelty of the legal issues in the case, the skill and experience of the lawyers in the case, the time and labor Class Counsel devoted to the litigation, and the reaction of the Class. Moreover, a lodestar cross-check indicates that the

[6] If any checks to former Plan participants are uncashed, the money will first be used to pay the costs associated with hiring the independent fiduciary if they exceed $50,000. Settlement at § 3.2(f). The remainder of the Settlement Fund, if any, will be distributed to the Plan to pay Plan expenses not currently paid by Edward Jones or Defendants. Settlement at § 3.2(e).

requested fee provides an extremely modest lodestar multiple of 1.6x, far lower than the 5x or 6x multiples that have often been approved in other cases.

The requested fee is also consistent with the awards in other ERISA class actions. *Spano v. The Boeing Co.*, 2016 WL 3791123, *2 (S.D. Ill. Mar. 31, 2016) (collecting cases); *see also Denard v. Transamerica Corporation*, No. 15-cv-30, 2016 WL 3554978, at * 2 (N.D. Iowa June 24, 2016) (preliminarily approving settlement in ERISA class action where class counsel could seek fees of up to one third of the settlement fund); *Kruger*, 2016 WL 6769066 (approving attorneys' fees of one third of the settlement fund in ERISA 401(k) fiduciary breach class action). Class counsel's requested expense reimbursement, at less than $20,000, is also extremely reasonable for a case of this type.

D. The Settlement Treats Class Members Equitably Relative to Each Other

The Settlement provides that Class Members will be allocated a share of the net Settlement Fund that is proportional to their investment in the Plan during the Class Period. Settlement at Ex. C (Plan of Allocation), ¶ 3. Class Members are, accordingly, treated equitably relative to each other, since their share of the Settlement will be roughly proportional to their Plan investments, with the caveat that no Class Member's share of the Settlement will be reduced to less than $10.

The Settlement also does not unduly favor the Plaintiffs. Plaintiffs' shares of the Settlement will be based on the Plan of Allocation. While Plaintiffs have also requested Case Contribution Awards, the Settlement is not contingent on Plaintiffs receiving an award in a specified amount (*see* Settlement at § 7.2(b)) and the amount that Plaintiffs have requested ($10,000 each) is consistent with the awards in other cases. *See, e.g.*, *Calogiuri v. Symantec Corp.*, 855 F.3d 860, 867 (8th Cir. 2017) (affirming decision to give case contribution awards of $10,000 to each of the plaintiffs); *see also Kruger*, 2016 WL 6769066, at * 6 (awarding class representatives $25,000 each for their contributions); *Adams v. Craddock*, 2016 WL 7664135, at * 6 (granting preliminary approval when "class counsel's compensation is not set by the settlement but will be determined by petition to the Court.").

E. Response of the Settlement Class

To date, Heath Petasche is the only Class Member who has objected to the Settlement. Doc. 98; *see also* Porter Decl. at ¶ 20 and Christman Decl. at ¶ 13. In his objection, Mr. Petasche writes that he disagrees with Plaintiffs' allegations of wrongdoing against Edward Jones objection, and contends that Edward Jones has "provided good options for the plan that allowed for proper diversification . . . with above average returns and competitive fees." Rather than believing that the benefits offered to the Class through the Settlement are inadequate, Mr. Petashe apparently believes that the Class should obtain ***no*** benefit, since he does not believe that Edward Jones committed any wrongdoing. Thus, nothing in his objection suggests that the proposed Settlement is not fair, reasonable or adequate.

The deadline for filing objections has not yet passed. If additional objections are timely filed, Plaintiffs address them in a supplemental memorandum prior to the Fairness Hearing.

V. THE COURT SHOULD PRELIMINARILY CERTIFY THE CLASS

In the Preliminary Approval Order, the Court conditionally certified a Settlement Class compromised of:

> All Current and Former Participants in the Plan who maintained a balance of any amount in the Plan at any point during the period from January 1, 2010 to the date of entry of the Preliminary Approval Order.

Settlement at § 2.2; Doc. 97, ¶¶ 8-10. The analysis supporting class certification is set out in Plaintiffs' Preliminary Approval Brief (Doc. 94, at 17-27), and Plaintiffs incorporate it here by reference. As neither the facts nor the law governing certification of class under Rule 23 have changed since the Court's Preliminary Approval Order, Plaintiffs respectfully request that the Court confirm certification of the class as defined in that Order, as well as the appointment of Plaintiffs as Class Representatives and Plaintiffs' Counsel as Class Counsel.

VI. THE COURT SHOULD APPROVE THE CLASS NOTICE

As described in the declaration of Rachel Christman, the Class received notice of the Settlement in accordance with the Court's Preliminary Approval Order. This included email

notices to 38,569 current plan participants and mail notices to 35,552 class members who had either left the Plan or who had not elected to receive their Plan communications by email. Christman Decl. at ¶¶ 7-10. The notices were substantially in the form approved by this Court in the Order granting preliminary approval, and alerted the participants not only to the key terms of the settlement, but also of their right to object. *Id.* at Ex. A. The Notice also directed participants to a website, www.edwardjones401ksettlement.com, which has been available at all times since January 16, 2019, and which includes links to the relevant filings pertaining to the settlement. *Id.* at ¶ 12. The website had received over 85,388 hits since it became available online. *Id.* at ¶ 12. A toll-free telephone number was also established, which received over 135 telephone calls from class members. *Id.* at ¶ 11.

The notice of a class action settlement "need only satisfy the broad 'reasonableness' standards imposed by due process." *Petrovic*, 200 F.3d at 1153 (quoting *Grunin*, 513 F.2d at 123). Notice is adequate if it is "reasonably calculated, under the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Petrovic*, 200 F.3d at 1153 (quoting *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306, 314 (1950)).

Here, the proposed form and method of Notice satisfy all due process considerations and Fed. R. Civ. P. 23(e)(1). The proposed Notice tells Class members about the lawsuit, the terms of the proposed Settlement and provides them the information they need to make informed decisions about their rights, including how and when to file an objection. Settlement at Exhibit C. The Notice provides this information in a clear, concise manner. Moreover, the method for distributing the Notice was properly designed to reach all Class members. *Mullane*, 339 U.S. at 315. Class Members received notice in the same manner that as they have elected to receive all Plan communications — either electronically to their designated email address, or in paper form to the address they have given the Plan's recordkeeper. Settlement at § 2.10(b). Accordingly, the Court should find that notice to the Class met all requirements of law and due process.

VII. CONCLUSION

For the reasons set forth above, the Settlement meets the standard for final approval under Rule 23. Accordingly, Plaintiffs seek an Order: (1) approving to the Settlement under FED. R. CIV. P. 23(e); (2) certifying the Class; and (3) approving the Class Notice.

Dated: March 19, 2019

Respectfully submitted,

/s/ Mark G. Boyko
Mark G. Boyko, Bar #57318
Jeffrey R. Baron , Bar #54713
Gregory Y. Porter, *pro hac vice*
BAILEY & GLASSER LLP
8012 Bonhomme Avenue, Suite 3000
Clayton, MO 63105
Telephone: (314) 863-5446
Facsimile: (314) 863-5483
jbaron@baileyglasser.com
gporter@baileyglasser.com
mboyko@baileyglasser.com

Robert A. Izard
Mark P. Kindall
Douglas P. Needham
IZARD KINDALL & RAABE LLP
29 South Main Street, Suite 305
West Hartford, CT 06107
Telephone: (860) 493-6292
Facsimile: (860) 493-6290
rizard@ikrlaw.com
mkindall@ikrlaw.com
dneedham@ikrlaw.com

Mark K. Gyandoh
KESSLER TOPAZ MELTZER & CHECK, LLP
280 King of Prussia Rd.
Radnor, PA 19087
Telephone: (610) 667-7706
Facsimile: (610) 667-7056
mgyandoh@ktmc.com

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I, Mark G. Boyko, hereby certify that on this 19th day of March, 2019, a true and correct copy of the foregoing was served upon all counsel of record by operation of this Court's CM/ECF system.

/s/ Mark G. Boyko
Mark G. Boyko, Bar #57318