

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE: BEAZER HOMES USA, INC.
ERISA LITIGATION

CIVIL ACTION NO.

1:07-CV-00952-RWS

**PLAINTIFFS' MOTION FOR FINAL APPROVAL OF CLASS ACTION
SETTLEMENT, CERTIFICATION OF SETTLEMENT CLASS AND
APPROVAL OF PLAN OF ALLOCATION**

Plaintiffs Patrick Denning and Lorene De Stefano (“Plaintiffs” or “Named Plaintiffs”) hereby respectfully move this Court, pursuant to FED. R. CIV. P. 23, for an Order:

1. Granting final approval to the class action settlement in this action on the terms of the Stipulation and Agreement of Settlement (the “Stipulation”), executed on July 19, 2010, and previously filed with the Court, and for certification of the Class as defined in the Stipulation. Annexed hereto as Exhibit A is the Order and Final Judgment in the form agreed to by the parties and attached to the Settlement Agreement as Exhibit B;
2. Certifying the Class as defined in the Stipulation; and
3. For such other and further relief as the Court may deem just and proper.

The grounds for this Motion are set forth in the following papers filed contemporaneously herewith:

A. Memorandum in support of Plaintiffs' Motion for Final Approval of Class Action Settlement, Certification of Settlement Class and Approval of Plan of Allocation;

B. Declaration of Edward W. Ciolko in support of (1) Plaintiffs' Motion for Final Approval of Class Action Settlement, Certification of Settlement Class, and Approval of the Plan of Allocation, and (2) Plaintiffs' Motion for Award of Attorneys' Fees, Reimbursement of Expenses, and Award of Case Contribution Awards to Named Plaintiffs; and

C. Declaration of Sarah H. Kimberly in support of (1) Plaintiffs' Motion for Award of Attorneys' Fees, Reimbursement of Expenses, and Award of Case Contribution Awards to Named Plaintiffs, and (2) Plaintiffs' Motion for Final Approval of Class Action Settlement, Certification of Settlement Class, and Approval of the Plan of Allocation.

DATED: November 5, 2010

Respectfully submitted,

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LOCAL RULE 7.1(D) CERTIFICATION

Counsel for Plaintiffs hereby certifies that the text of this document has been prepared with Times New Roman 14 point, one of the fonts and point selections approved by the Court in Local Rule 5.1(C).

/s/ Sarah H. Kimberly
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CERTIFICATE OF SERVICE

I hereby certify that on November 5, 2010, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notice of such filing to all known counsel of record.

/s/ Sarah H. Kimberly
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EXHIBIT A

Order and Final Judgment

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE BEAZER HOMES USA, INC.)
ERISA LITIGATION)
_____)

CIVIL ACTION NO.
1:07-CV-00952-RWS

ORDER AND FINAL JUDGMENT

This Action involves claims for alleged violations of the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. §§ 1001, *et seq.* (“ERISA”), with respect to the Beazer Homes USA, Inc. 401(k) Plan (the “Plan”). The terms of the Settlement are set out in the Stipulation and Agreement of Settlement (the “Stipulation”) fully executed on July 19, 2010, by counsel on behalf of the Named Plaintiffs and Defendants.¹

This Action came before the Court on November 15, 2010, for a hearing to determine the fairness of the Settlement and the subject of this Court’s Order Granting Preliminary Approval of Class Action Settlement, Preliminarily Certifying a Class for Settlement Purposes, Approving Form and Manner of Class Notice, and Setting Date for Hearing on Final Approval of Settlement (Doc.

¹ Except as otherwise defined herein, all capitalized terms used in this Order and Final Judgment shall have the same meanings as ascribed to them in the Stipulation (Doc. No. 79-3).

No. 82). The Court having considered all matters presented to it at the hearing and in writing, **IT IS HEREBY ORDERED, ADJUDGED, AND DECREED:**

1. **Jurisdiction:** The Court has jurisdiction over the subject matter of the Action and over all parties to the Action, including all members of the Settlement Class.

2. **Class Findings:** Solely for the purposes of the Settlement, the Court finds that the requirements of the Federal Rules of Civil Procedure, the United States Constitution, the Rules of the Court, and any other applicable law have been met as to the Settlement Class defined below. Specifically, the Court finds as follows:

(a) Solely for the purposes of the Settlement, the Court finds that, as required by Federal Rule of Civil Procedure 23(a)(1), the Settlement Class is ascertainable from records kept with respect to the Plan and from other objective criteria, and the members of the Settlement Class are so numerous that their joinder before the Court would be impracticable.

(b) Solely for the purposes of the Settlement, the Court finds that, as required by Federal Rule of Civil Procedure 23(a)(2), there are one or more questions of fact and/or law common to the Settlement Class.

(c) Solely for the purposes of the Settlement, the Court finds that, as required by Federal Rule of Civil Procedure 23(a)(3), the claims of the Named Plaintiffs are typical of the claims of the Settlement Class, in that the claims of the Named Plaintiffs arise from the same alleged course of conduct that gives rise to the claims of the members of the Settlement Class, and the claims are based on the same legal theory. In the present case, the Named Plaintiffs allege that they were Plan participants during the Class Period with Plan accounts that included investments in the Beazer Homes USA, Inc. Company Stock Fund (the “Beazer Stock Fund”), that the Plan’s fiduciaries treated them and all other Plan participants alike, and that Plan-wide relief is necessary and appropriate under ERISA.

(d) Solely for the purposes of the Settlement, the Court finds that, as required by Federal Rule of Civil Procedure 23(a)(4), the Named Plaintiffs have and will fairly and adequately protect the interests of the Settlement Class, in that: (i) the interests of the Named Plaintiffs and the nature of their alleged claims are consistent with those of the members of the Settlement Class, (ii) there appear to be no conflicts between or among the Named Plaintiffs and the Settlement Class, and (iii) the Named Plaintiffs and the members of the Settlement Class are

represented by qualified, reputable counsel who are experienced in preparing and prosecuting large, complicated ERISA class actions.

(e) Solely for the purposes of the Settlement, the Court finds that, as required by Federal Rule of Civil Procedure 23(b)(1), the prosecution of separate actions by individual members of the Settlement Class would create a risk of: (i) inconsistent or varying adjudications as to individual Settlement Class members that would establish incompatible standards of conduct for the parties opposing the claims asserted in this Action or (ii) adjudications as to individual Settlement Class members that would, as a practical matter, be dispositive of the interests of the other members not parties to the adjudications, or substantially impair or impede the ability of such persons to protect their interests.

(f) The Court has also considered each of the elements required by Federal Rule of Civil Procedure 23(g) to ensure that Class Counsel have and will fairly and adequately represent the interests of the Settlement Class. Class Counsel have done the work necessary to identify or investigate potential claims in the Action, to investigate the allegations made in the Consolidated Complaint, including interviewing witnesses, reviewing publicly available information, reviewing documents and materials uncovered in their investigation, consulting with experts, and representing the interests of the Settlement Class. Class Counsel

have substantial experience in handling class actions and claims of the type asserted in this Action. Class Counsel have also demonstrated extensive knowledge of the applicable law. The Court concludes that Class Counsel have fairly and adequately represented the interests of the Settlement Class.

(g) The members of the Settlement Class have received proper and adequate notice of the Stipulation, the Fairness Hearing, Class Counsel's application for attorneys' fees and expenses and for Case Contribution Awards to the Named Plaintiffs, and the Plan of Allocation, such notice having been given in accordance with the Order Granting Preliminary Approval of Class Action Settlement, Preliminarily Certifying a Class for Settlement Purposes, Approving Form and Manner of Class Notice, and Setting Date for Hearing on Final Approval of Settlement (Doc. No. 82). Such notice included individual notice to all members of the Settlement Class who could be identified through reasonable efforts; provided valid, due, and sufficient notice of these proceedings and of the matters set forth therein; and included information regarding the procedure for filing and serving objections. Such notice fully satisfied the requirements of Federal Rule of Civil Procedure 23 and the requirements of due process.

3. Certification of Settlement Class: Solely for the purposes of the Settlement, the Court finally certifies this Action as a class action under Federal Rules of Civil Procedure 23(a) and 23(b)(1). The Settlement Class is defined as:

All persons who were participants in or beneficiaries of the Plan at any time between July 28, 2005 and May 12, 2008, and whose account(s) included investments in the Beazer Stock Fund. Excluded from the Settlement Class are Defendants, any entity in which Defendants have or had a controlling interest, or which is or was a parent or subsidiary of or is or was controlled by Beazer Homes USA, Inc., and the current and former officers, directors, affiliates, legal representatives, heirs, predecessors, and assigns of Defendants.

Pursuant to Federal Rule of Civil Procedure 23(g), the Court appoints Patrick Denning and Lorene De Stefano (“Plaintiffs” or the “Named Plaintiffs”) as Settlement Class representatives and Keller Rohrback L.L.P. and Barroway Topaz Kessler Meltzer & Check, LLP, as Class Counsel for the Settlement Class.

Any certification of a Settlement Class pursuant to the terms of the Stipulation shall not constitute and does not constitute, and shall not be construed or used as an admission, concession, or declaration by or against Defendants that (except for the purposes of the Settlement) this Action or any other action is appropriate for class treatment under Federal Rule of Civil Procedure 23, or any similar federal or state class action statute or rule, for litigation purposes.

4. Settlement Approval: Pursuant to Federal Rule of Civil Procedure 23(e), the Court hereby approves and confirms the Settlement as a fair, reasonable, and adequate settlement and compromise of the Action.

(a) No objections to the Settlement were filed.

(b) The Court hereby approves the Stipulation and orders that the Stipulation shall be consummated and implemented in accordance with its terms and conditions.

(c) In concluding that the Settlement embodied in the Stipulation is fair, reasonable, and adequate, the Court specifically finds as follows:

(i) The Settlement was negotiated vigorously and at arm's-length by counsel for Defendants, on the one hand, and Class Counsel on behalf of the Named Plaintiffs and the Settlement Class, on the other.

(ii) This Action settled after the Court had issued an order granting in part and denying in part Defendants' Motion to Dismiss the Consolidated Complaint. The Settlement was also reached following arm's-length negotiations among counsel with the assistance of an experienced mediator, who was thoroughly familiar with this litigation. Named Plaintiffs and Defendants had sufficient information to evaluate the settlement value of the Action.

(iii) If the Settlement had not been achieved, the parties faced the expense, risk, and uncertainty of extended litigation.

(iv) The Settlement Amount (\$5,500,000) is fair, reasonable, adequate, and within the range of settlement values obtained in similar cases.

(v) At all times, the Named Plaintiffs have acted independently of Defendants and in the interest of the Settlement Class.

5. Approval of the Plan of Allocation: The Plan of Allocation is hereby approved as fair and reasonable. The Court directs Class Counsel, the Claims Administrator, and the designated Financial Institution to administer and implement the Plan of Allocation in accordance with its terms and provisions.

6. Dismissal: The Action is hereby dismissed with prejudice, each party to bear his, her, or its own costs, except as expressly provided in the Stipulation and herein.

7. Releases and Injunctions: The Court hereby approves the Releases and injunctive relief set forth in the Stipulation and orders as follows:

(a) Plaintiffs, members of the Settlement Class, and the Plan (as authorized by the Independent Fiduciary) have released and discharged, and are hereby permanently barred and enjoined from asserting, commencing, prosecuting, or continuing, either directly, individually, representatively, derivatively, or in any

other capacity, any and all claims of any nature whatsoever (including claims for any and all losses, damages, unjust enrichment, attorneys' fees, disgorgement of fees, litigation costs, injunction, declaration, contribution, indemnification, or any other type of legal or equitable relief) for losses suffered by the Plan, Plan participants, or Plan beneficiaries ("Released Claims"):

(i) against all Defendants and the current or former officers, directors, employees, insurers, reinsurers, attorneys, affiliates, subsidiaries, successors, assigns, committees, managers, fiduciaries, or agents of any Defendant, including, without limitation, Beazer Homes USA, Inc. and any fiduciary of the Plan ("Releasees"), whether accrued or not, whether already acquired or acquired in the future, whether known, unknown, or unsuspected, in law or equity, as well as any claim or right obtained by assignment, brought by way of demand, complaint, cross-claim, counterclaim, third-party claim or otherwise, arising out of any or all of the acts, omissions, facts, matters, transactions, or occurrences that are, were, or could have been alleged, asserted, or set forth in the Consolidated Complaint or would be barred by principles of *res judicata* if the claims asserted in the Consolidated Complaint had been fully litigated and resulted in a final judgment in Defendants' favor, including but not limited to claims that Defendants and any fiduciaries of the Plan breached ERISA fiduciary duties in connection with

(1) the offering the Beazer Stock Fund as an investment option in the Plan, (2) the acquisition and holding of Beazer Homes stock by the Plan or Plan participants, (3) the appointment and/or monitoring of the Plan's fiduciaries, or (4) the provision of or failure to provide information to the Plan's fiduciaries, participants, and beneficiaries regarding Beazer Homes or Beazer Homes stock;

(ii) against any applicable fiduciary liability insurance policies with respect to coverage for the Released Claims;

(iii) against Defendants with respect to any claim against them arising from the preparation or structuring of the Plan of Allocation or the calculations performed by the Claims Administrator pursuant to the Plan of Allocation; and

(iv) against Defendants with respect to any claim against them arising from the distribution of the Net Proceeds to the members of the Settlement Class, if such distribution is performed by a third-party entity retained by the Plan.

(b) Effective upon Complete Settlement Approval, Defendants shall absolutely and unconditionally release and forever discharge the Named Plaintiffs, the Settlement Class, Class Counsel, and other counsel who represent members of the Settlement Class from any and all claims relating to the institution

or prosecution of this Action, as well as any and all claims for contribution, indemnification, or any other claims relating to payment of the Settlement Amount by Defendants.

(c) Scope of Releases

(i) Nothing in the Stipulation shall release, bar, waive, or preclude any claim that has been or could be asserted directly or derivatively by any member of the Settlement Class or the Plan in any state or federal securities litigation involving the purchase or sale of any Beazer Homes securities, including *In re Beazer Homes USA, Inc. Securities Litigation*, Civil Action No. 1:07-CV-725-CC, or the right to recovery with respect to such claim, provided, however, that this paragraph shall not be construed to permit any member of the Settlement Class or the Plan to recover more than one hundred percent of his, her, or its respective losses.

(ii) Except as otherwise set forth in the Stipulation, the Releases are not intended to include the release of any rights or duties of the parties arising out of the Stipulation, including the express warranties and covenants contained therein.

(iii) Plaintiffs, members of the Settlement Class, and the Plan (as authorized by the Independent Fiduciary) expressly waive and relinquish, to the

fullest extent permitted by law, any and all provisions, rights, and benefits conferred by (a) California Civil Code § 1542, which provides that

a general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor,

and (b) any similar state, federal, or other law, rule or regulation, or principle of common law of any domestic or foreign governmental entity. The Named Plaintiffs, members of the Settlement Class, and the Plan may hereafter discover facts other than or different from those that they know or believe to be true with respect to the subject matter of the Released Claims with respect to any of the Releasees, but the Named Plaintiffs, members of the Settlement Class, and the Plan hereby expressly waive and fully, finally, and forever settle and release any known or unknown, suspected or unsuspected, asserted or unasserted, contingent or non-contingent claim with respect to the Released Claims, whether or not concealed or hidden, without regard to the subsequent discovery or existence of such other or different facts.

8. Award of Attorneys' Fees and Expenses and Case Contribution

Awards: The Court hereby awards Class Counsel their attorneys' fees and litigation expenses in the amount of \$_____, which shall be paid from the Qualified Settlement Fund. The Court also awards each Named Plaintiff a

Case Contribution Award in the amount of \$_____, which shall be paid from the Qualified Settlement Fund. In making these awards, the Court finds that:

(a) The Settlement achieved as a result of Class Counsel's efforts has created a fund of \$5,500,000, which will benefit thousands of members of the Settlement Class.

(b) Class Counsel have conducted the litigation and achieved the Settlement with skill, perseverance, and diligent advocacy.

(c) The action involves complex factual and legal issues litigated over several years and, in the absence of a settlement, would involve further lengthy proceedings with an uncertain resolution.

(d) Had Class Counsel not achieved the settlement, there would remain a significant risk that the Named Plaintiffs and the Settlement Class may have recovered less or nothing from Defendants.

(e) The award of attorneys' fees and expenses is fair, reasonable, and consistent with awards in similar cases.

(f) The Named Plaintiffs rendered valuable service to the Plan and to the members of the Settlement Class.

9. CAFA Compliance: Defendants have filed a Declaration of Compliance with the Class Action Fairness Act of 2005 ("CAFA"), indicating that,

pursuant to 28 U.S.C. § 1715(b), they timely mailed notice of the settlement to the Attorney General of the United States of America and the Attorneys General of all states in which members of the Settlement Class reside. The notice contained the documents and information required by 28 U.S.C. § 1715(b)(1)-(8). The Court therefore finds that Defendants have complied in all respects with the requirements of 28 U.S.C. § 1715.

10. Retention of Jurisdiction: The Court shall retain exclusive jurisdiction over the Named Plaintiffs, the members of the Settlement Class, and Defendants for all matters relating to this Action and the Settlement, including any disputes or challenges that may arise as to the performance, validity, interpretation, administration, effectuation, termination, or enforcement of the Stipulation and this Order and Final Judgment. The Court shall also retain exclusive jurisdiction to enter further orders regarding any applications for awards of attorneys' fees and expenses incurred in connection with implementing and administering the Plan of Allocation.

11. Termination of Settlement: In the event that the Stipulation is terminated in accordance with its terms, this Order and Final Judgment shall be rendered null and void, *ab initio*, and shall be vacated *nunc pro tunc*, and this Action shall revert to its status as of the day immediately before the parties

engaged in the mediation that resulted in the Settlement. The parties shall be afforded a reasonable opportunity to negotiate a new case management schedule.

12. Use of Order: This Order and Final Judgment is not admissible as evidence for any purpose against Defendants in any pending or future litigation involving any of the parties. This Order and Final Judgment shall not be construed or used as an admission, concession, or declaration by or against Defendants of any fault, wrongdoing, breach, or liability. This Order and Final Judgment shall not be construed or used as an admission, concession, or declaration by or against the Named Plaintiffs or the Settlement Class that their claims lack merit or that the relief requested in the Action is inappropriate, improper, or unavailable.

In the event that the Settlement is terminated, this Order and Final Judgment shall not be construed or used as an admission, concession, declaration, or waiver by any party of any arguments, defenses, or claims that he, she, or it may have, including, but not limited to, any objections by Defendants to class certification. Moreover, the Stipulation and any proceedings taken pursuant to the Stipulation are for settlement purposes only. Neither the fact of, nor any provision contained in the Stipulation or its exhibits, nor any actions taken thereunder shall be construed as, offered into evidence as, received in evidence as, and/or deemed to be evidence of a presumption, concession, or admission of any kind as to the truth

of any fact alleged or validity of any claim or defense that has been, could have been, or in the future might be asserted.

SO ORDERED, this _____ day of November, 2010.

HON. RICHARD W. STORY
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE: BEAZER HOMES USA, INC.
ERISA LITIGATION

CIVIL ACTION NO.

1:07-CV-00952-RWS

**MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR
FINAL APPROVAL OF CLASS ACTION SETTLEMENT,
CERTIFICATION OF SETTLEMENT CLASS AND
APPROVAL OF PLAN OF ALLOCATION**

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Plaintiffs Patrick Denning and Lorene De Stefano (“Plaintiffs” or “Named Plaintiffs”), participants in the Beazer Homes USA, Inc. 401(k) Plan (the “Plan”), respectfully submit this Memorandum of Law in Support of their Motion for an Order Granting Final Approval of the proposed class action settlement as set forth in the Stipulation and Agreement of Settlement dated July 19, 2010 (the “Stipulation”),¹ certification of a Settlement Class, and approval of the proposed Plan of Allocation.² The proposed settlement (“Settlement”) was preliminarily approved by the Court on August 10, 2010 (the “Preliminary Approval Order”).

I. INTRODUCTION

Plaintiffs vigorously litigated this case, ultimately achieving a recovery through settlement that is exceptional, particularly in light of the potential damages

¹ A copy of the Stipulation is attached as Exhibit A to the Declaration of Edward W. Ciolko in Support of (1) Plaintiffs’ Motion for Final Approval of Class Action Settlement, Certification of Settlement Class, and Approval of the Plan of Allocation and (2) Plaintiffs’ Motion for Award of Attorneys’ Fees, Reimbursement of Expenses, and Award of Case Contribution Awards to Named Plaintiffs, (“Ciolko Declaration” or “Ciolko Dec.”). All capitalized terms not otherwise defined in this memorandum shall have the same meaning as ascribed to them in the Stipulation. Additionally, for the Court’s consideration, being filed concurrently herewith is the Declaration of Sarah H. Kimberly in Support of (1) Plaintiffs’ Motion for Award of Attorneys’ Fees, Reimbursement of Litigation Expenses, and Award of Case Contribution Awards to Class Representatives, and (2) Plaintiffs’ Motion for Final Approval of Class Action Settlement, Certification of Settlement Class, and Approval of the Plan of Allocation (“Kimberly Declaration” or “Kimberly Dec.”).

² Plaintiffs have filed concurrently herewith their Memorandum of Law in Support of Plaintiffs’ Motion for Award of Attorneys’ Fees, Reimbursement of Expenses and Case Contribution Awards (“Fee Memorandum”). The Fee Memorandum contains information pertinent to the Stipulation and is incorporated in full with the instant Memorandum of Law.

and litigation risks present in this case. The proposed Settlement consists of a payment of \$5,500,000 which provides substantial benefit to members of the Settlement Class and resolves all claims asserted by Plaintiffs against Defendants.

Lawsuits of this type brought pursuant to the Employee Retirement Income Security Act of 1974 (“ERISA”) face significant risks as they involve complex claims and still evolving law. As detailed below, the risks in this case included the reasonable possibility that, despite their best efforts, the Class would have received a lesser recovery, or even nothing at all, if this case proceeded through trial. Indeed, the Court granted in part Defendants’ motion to dismiss Plaintiffs’ claims, dismissing Plaintiffs’ “prudence” and “monitoring” claims (Counts I and II of the Complaint). Although Plaintiffs believe the dismissal of the prudence and monitoring claims did not affect the potential damage award available to Plaintiffs, Defendants would have strenuously argued to the contrary and sought to limit the recoverable damages in this case. Moreover, Plaintiffs would have needed to overcome substantial obstacles in order to prevail at trial.

As discussed below, the proposed Settlement of \$5.5 million was reached only after vigorous arm’s-length negotiations by experienced counsel with the assistance of a skilled mediator. Under the governing standards for evaluating class action settlements in this Circuit, this Settlement is fair, reasonable, and adequate, and Plaintiffs respectfully ask that the Court approve it.³ *See Bennett v.*

³ Plaintiffs set forth in this Memorandum, as well as in other Settlement documents, various factors (factual, legal, and financial) that support the conclusion that the Settlement achieved in this matter is fair, reasonable, and adequate. Plaintiffs are not, by entering into the Stipulation admitting to the

Behring Corp., 737 F.2d 982, 986 (11th Cir. 1984). The Settlement represents an outstanding recovery in light of the significant hurdles facing Plaintiffs and the proposed Class. Moreover, as discussed below, an independent fiduciary, Reliance Trust Company (“Reliance”), was retained by Beazer Homes USA, Inc. (“Beazer Homes” or the “Company”) to review the Stipulation and has approved the Settlement.

As also detailed below, the Parties have fully complied with the terms of the Preliminary Approval Order, including with respect to providing notice of the Settlement to Class Members. After mailing the approved form of Notice to 6,120 Class Members and publishing the Summary Notice over the *Business Wire*, Class Counsel received *no* objections to the proposed Settlement.⁴ Accordingly, Plaintiffs respectfully request that this Court enter the proposed Order and Final

ultimate truth or falsity of any of the factual, legal or financial factors or conclusions discussed in this Memorandum that favor Defendants; rather, Plaintiffs are merely acknowledging, for settlement purposes only, that the Court could find such factors exist and provide a sound basis for approval of the Settlement. Accordingly, none of the statements in this Memorandum and other Settlement documents constitutes admissions by or evidence against any party to this Action or in any other action.

⁴ The deadline for objecting to the Stipulation expired on October 8, 2010. Class Counsel did receive an email from Laura Skowron on November 4, 2010, who sought to have certain documents considered for the Final Fairness Hearing. *See* Exhibit H to the Ciolko Dec. Upon review of the email, however, Class Counsel made a determination that the documents attached by Ms. Skowron were unrelated to the Action. Rather, the documents concerned a dispute over a Separation and Release Agreement between Ms. Skowron and Beazer Homes. Because Ms. Skowron’s email does not concern this Settlement, Class Counsel do not view the email as an objection.

Judgment granting final approval of the Stipulation, approving the Plan of Allocation, and certifying a Settlement Class comprised of all persons, excluding Defendants, who were participants and/or beneficiaries in the Plan, and whose accounts included investments in the Beazer Homes Stock Fund at any time during the period July 28, 2005 through May 12, 2008 (the “Class Period”).

II. PROCEDURAL AND FACTUAL BACKGROUND

A. Description of Litigation⁵

This Action arises from four similar ERISA class actions that were filed in this Court and subsequently consolidated. The first ERISA case was filed on April 30, 2007, on behalf of the participants and beneficiaries of the Plan. Thereafter, three additional substantially identical cases were filed. The Court consolidated the cases on October 11, 2007, appointed Keller Rohrback L.L.P. and Barroway Topaz Kessler Meltzer & Check, LLP (“BTKMC”) as Interim Co-Lead Counsel (collectively, “Class Counsel”), Holzer Holzer & Fistel, LLC as Interim Liaison Counsel, and Plaintiffs Denning and De Stefano as Interim Lead Plaintiffs.

Plaintiffs filed a Consolidated Amended Class Action Complaint (“Consolidated Complaint”) on June 27, 2008. The Consolidated Complaint asserts claims under ERISA against Defendants Beazer Homes, Ian J. McCarthy,

⁵ Plaintiffs herein incorporate by reference the Memorandum Of Law In Support Of Plaintiffs’ Motion For Preliminary Approval Of Proposed Settlement; Conditional Certification Of Settlement Class; Approval Of Notice Plan, And Setting Of Fairness Hearing (the “Preliminary Approval Memo”) filed on July 19, 2010. The Preliminary Approval Memo describes in detail this Action, including Plaintiffs’ claims, Counsel’s investigation of the claims, the filing of the Complaint, a summary of the litigation, settlement negotiations, and the reasons for Settlement. *See* Preliminary Approval Memo at 2-4.

Brian C. Beazer, Fred Fratto, Jennifer Jones, George Schulmeyer, Peggy Caldwell, Katie Bayne, Larry T. Solari, and Stephen P. Zelnak, Jr. On July 24, 2008, the Court approved the voluntary dismissal of Defendants Laurent Alpert and Peter G. Leemputte.

As set forth in greater detail in the Consolidated Complaint, Plaintiffs alleged that Defendants, who were fiduciaries of the Plan, breached their duties to the Plan, Plaintiffs and the Plan's participants in violation of ERISA (and related Department of Labor ("DOL") regulations) with regard to the Plan's continued, significant investment in Beazer Homes stock.

The Consolidated Complaint alleges that Defendants breached their fiduciary duties by, *inter alia*, selecting and maintaining the Beazer Homes Stock Fund as a Plan investment alternative and permitting the Plan to purchase and hold shares of Beazer Homes stock when it was imprudent to do so. As alleged in the Consolidated Complaint, the heavy investment in Beazer Homes stock was imprudent given the numerous material risks faced by the Company, of which Defendants either knew or should have known. These risks included, *inter alia*, the Company's alleged: (a) fraudulent and highly risky lending practices; (b) lack of adequate internal controls over its improper lending practices contributing to high foreclosure rates among borrowers; and (c) misleading statements and misrepresentations regarding the Company's net income and financial results, all of which constituted a highly risky business strategy culminating in the collapse of the Company's financial position and stock price.

B. Summary of Litigation

Defendants zealously contested this complex litigation from the outset and were represented by highly competent lawyers who aggressively defended Plaintiffs' claims and immediately sought to have the Court dismiss the Consolidated Complaint. Defendants filed a motion to dismiss the Consolidated Complaint on October 10, 2008. Defendants asserted that: (1) they could not be held liable for continuing to offer Beazer Homes stock as an investment alternative and investing Plan assets in Beazer Homes stock; (2) Plaintiffs failed to overcome the presumption that Defendants' acted prudently by deciding to offer Beazer Homes stock as an investment alternative and to invest assets in Beazer Homes stock, to the extent such a presumption was legally cognizable; (3) Plaintiffs' "failure to monitor" claim failed; and (4) Defendants had no duty under ERISA to disclose actual or potential events that could affect the value of the Company's stock.

Plaintiffs filed their response in opposition to Defendants' motion to dismiss on December 9, 2008. Defendants filed a reply in support of their motion to dismiss on January 22, 2009. Following the full briefing on the motion to dismiss, on September 18, 2009, Plaintiffs and Defendants submitted a joint letter to the Court, informing it of an upcoming mediation with Jonathan Marks of MarksADR, and requested that the Court refrain from ruling on the pending motion to dismiss. However, following the mediation held on September 30, 2009, the Parties were unable to reach a resolution and informed the Court of such on December 4, 2009. Plaintiffs subsequently filed notices of supplemental authority on January 6, 2010,

January 13, 2010, February 4, 2010, and March, 23, 2010. Defendants filed a notice of supplemental authority on February 12, 2010.

On April 2, 2010, the Court granted in part and denied in part Defendants' motion to dismiss ("April 2 Order"). The Court upheld the communications, disclosure, and co-fiduciary claims (Counts III-V) of the Consolidated Complaint.

C. Investigation of Claims

In the Consolidated Complaint, Plaintiffs seek to recover losses under ERISA §§ 409 and 502(a)(2), 29 U.S.C. §§ 1109 and 1132(a)(2), suffered by the Plan as a result of Defendants' alleged breaches of fiduciary duty. The Consolidated Complaint contained five causes of action: (1) failure to prudently and loyally manage the Plan's investment in Beazer stock; (2) failure to adequately monitor fiduciary appointees; (3) failure to disclose necessary information to co-fiduciaries; (4) failure to provide Plan participants with complete and accurate information regarding Beazer Homes stock; and (5) failure to prevent breaches by co-fiduciaries of their duties of prudent and loyal management, adequate monitoring, and complete and accurate communications.

Class Counsel conducted a thorough investigation into Plaintiffs' claims and the allegations set forth in the Consolidated Complaint. Investigative efforts included: (1) inspecting, reviewing, and analyzing numerous public documents relating to Beazer Homes, including documents concerning the Company's financial condition and the performance of Beazer Homes stock during the Class Period, including but not limited to: news articles, related complaints and pleadings, press releases, analyst reports, and regulatory filings; (2) inspecting,

reviewing, and analyzing numerous documents concerning the Plan and the administration of the Plan; (3) interviewing Plan participants and reviewing and analyzing documents collected from participants; and (4) extensively researching the applicable law with respect to the claims asserted in the Action and the potential defenses thereto.

D. Settlement Negotiations

Following an analysis of the merits of the litigation as well as an examination of the applicable insurance policies, in mid-2009 the parties began to engage in informal and preliminary settlement talks. The first formal negotiation was then scheduled and subsequently conducted on September 30, 2009, with mediator Jonathan Marks of MarksADR. Following the mediation, and after numerous additional telephonic discussions, the Parties were unable to resolve the Action. Following the April 2 Order, the parties scheduled another formal mediation with Jonathan Marks. On May 26, 2010, the Parties participated in another mediation with mediator Marks, at which time the Parties agreed in principle to settle the Action. The final Stipulation was signed on July 19, 2010. The Stipulation was the result of lengthy and contentious arm's-length negotiations. This process was in all respects thorough, adversarial, and professional.

E. Terms of the Stipulation

The following is a summary of the principal terms of the Stipulation:

1. Settlement Amount: The parties agreed to settle the Action for the sum of \$5,500,000 in cash.

2. Settlement Class: The Class of persons releasing claims pursuant to the Stipulation is defined as a non-opt out class consisting of all persons who were participants in or beneficiaries of the Plan at any time between July 28, 2005, and May 12, 2008, and whose individual Plan account(s) included investment in the Beazer Stock Fund.

3. Plan of Allocation: The Net Settlement Amount will be distributed for the benefit of the Settlement Class according to a plan or formula of allocation, subject to the Court's approval.

4. Independent Fiduciary: Pursuant to the Settlement Agreement, an independent fiduciary, Reliance, was retained to evaluate the fairness and adequacy of the Settlement. Reliance has given its approval to the Settlement. In doing so, Reliance noted in its report that "[t]he Settlement amount of \$5.5 million (or a probable net recovery amount ranging from \$3.8 million to \$4.4 million), which was agreed to after vigorous, arm's-length negotiations, is a significant recovery in light of the major litigation risks presented by this Case." See Report of the Independent Fiduciary for the Proposed Settlement in the *In re: Beazer Homes USA, Inc. ERISA Litigation*, October 28, 2010 (attached to the Ciolko Dec. as Exhibit F).

F. Effectuation of Notice

On July 19, 2010, Plaintiffs filed their motion for preliminary approval of the Settlement with exhibits which included proposed forms of individual and publication notice. The Court preliminarily approved the Settlement in the aforementioned Preliminary Approval Order of August 10, 2010. The Preliminary

Approval Order established (1) a schedule for dissemination of the approved forms of notice and (2) the form, method and timing of any objection(s) to the terms of the Stipulation. Further, November 15, 2010, was set as the date for the Final Fairness Hearing.

At the Final Fairness Hearing, the Court will finally determine, among other issues, whether: (1) the proposed class of Plan participants should be certified for settlement; (2) the settlement is fair, reasonable, and adequate; (3) Plaintiffs' Counsel's application for an award of attorney's fees and expenses should be approved; and (4) Named Plaintiffs' Case Contribution Awards should be paid.

Pursuant to the Preliminary Approval Order, the approved Notice of Class Action Settlement was sent to 6,120 current and former participants of the Plan on August 30, 2010. *See* Affidavit of Anya Verkhovskaya, Senior Executive Vice President and Chief Operating Officer of A.B. Data, Ltd.'s Class Action Administration Division ("A.B. Data"), attached to the Ciolko Dec. as Exhibit G ("A.B. Data Affidavit"). Of these Notices, 588 were returned as undeliverable. Twenty-six had forwarding addresses and were re-sent. Further, the approved Publication Notice was published nationally over the *Business Wire* on August 30, 2010.

In addition, as also stated in the Court's Preliminary Approval Order, Plaintiffs (through Class Counsel), have created a dedicated Settlement website through which current and former Plan participants can (1) view a summary description of the Action, the Settlement, and the case status; (2) access the Stipulation and related documents; (3) review answers to "frequently asked

questions” regarding the litigation and the Settlement and (4) access a phone number to call for further information. The Internet site is located at <http://www.BeazerERISAsettlement.com>⁶ and its contents and information were made accessible by the Court-mandated deadline and have been (and will be) updated as necessary. As of November 3, 2010, the website had received 631 hits. *See* A.B. Data Affidavit (detailing the number of times each document on the website was downloaded). Additionally, Class Counsel received 17 emails regarding the Settlement from Class members and 77 telephone calls and 61 voicemail messages. Of the 61 telephone calls only 22 required or requested a return call. These calls were returned by Class Counsel. A.B. Data Affidavit, ¶ 12.

As of November 5, 2010, *no* objections have been filed to the Settlement, notwithstanding the wide dissemination of the Notice and information concerning the Settlement. Ciolko Dec., ¶ 26.

III. DISCUSSION

A. The Proposed Settlement is Fair, Reasonable and Adequate and Should be Approved by the Court

1. The Law Favors and Encourages Settlements

There is a “strong judicial policy favoring settlement.” *Bennett*, 737 F.2d at 986. Settlements of class actions are “particularly favored” and are not to be lightly rejected. *Maher v. Zapata Corp.*, 714 F.2d 436, 455 (5th Cir. 1983); *Cotton v. Hinton*, 559 F.2d 1326, 1331 (5th Cir. 1977). When analyzing a proposed

⁶ The Settlement Internet website address was provided in both the Notice and Summary Notices.

settlement, the Court is required to make a threshold two-part determination: (1) whether there was fraud or collusion in the making of the settlement, and (2) whether the proposed settlement is “fair, adequate and reasonable.” *Bennett*, 737 F.2d at 986 (citing *Cotton*, 559 F.2d at 1330). Recognizing that a settlement represents an exercise of judgment by the negotiating parties, courts have cautioned that it is not the court’s function to “try the case on the merits” in assessing a settlement. *Behrens v. Wometco Enterprises, Inc.*, 118 F.R.D. 534, 539 (S.D. Fla. 1988) (citing *Cotton*, 559 F.2d at 1330). In this case, the Court has already granted preliminary approval, and such approval also gives rise to the presumption that the settlement is fair, reasonable, and adequate. *Ass’n for Disabled Am., Inc. v. Amoco Oil Co.*, 211 F.R.D. 457, 467 (S.D. Fla. 2002) (citing *U.S. v. City of Miami*, 614 F.2d 1322, 1333 (1980), *on reh’g*, 664 F.2d 435 (5th Cir. 1981)).

Here, this substantial Settlement was negotiated at arm’s length by fully-informed and experienced counsel. Throughout the settlement discussions, Class Counsel and counsel for Defendants each diligently and vigorously advanced their respective claims and defenses. Thus, the Court should find that the first part of the two-part determination favors this Settlement and that the Settlement is entitled to the presumption of fairness discussed above. In addition, after considering the relevant factors, this Court also should find that this Settlement is fair, adequate and reasonable.

2. The Settlement Satisfies the Eleventh Circuit’s Six-Pronged Test of Fairness

The Eleventh Circuit has set forth six factors to consider “[i]n determining

whether the proposed settlement protects the interests of the absent class members” and is fair, adequate, and reasonable:

(1) the likelihood of success at trial; (2) the range of possible recoveries; (3) the point on or below the range of possible recoveries at which the settlement is fair, adequate and reasonable; (4) the complexity, expense and duration of litigation; (5) the substance and degree of opposition to the settlement; and (6) the stage of the proceedings at which the settlement was achieved.

Columbus Drywall & Insulation, Inc. v. Masco Corp., 258 F.R.D. 545, 558-59 (N.D. Ga. 2007) (quoting *Bennett*, 737 F.2d at 986).

a. Likelihood of Plaintiffs’ Success at Trial

While Class Counsel are confident in their ability to prevail at trial in a case such as this, and have expended significant resources preparing and prosecuting this action, Plaintiffs and Class Counsel nonetheless are mindful that in order to succeed at trial, Plaintiffs face several significant obstacles, including the Court’s dismissal of Plaintiffs’ prudence and monitoring claims in its April 2 Order. Defendants would surely have made compelling arguments to try to defeat Plaintiffs’ remaining claims. In particular, during mediation, Defendants argued that several of the remaining Defendants (the Company, Ian McCarthy, and Brian Beazer) did not have any fiduciary duties with respect to communicating with Plan participants and therefore cannot be held liable under any claim. Further, Defendants would have argued that members of the Plan Committee – the only fiduciaries allegedly charged with communicating with Plan participants – had no knowledge of the non-public Company information that Plaintiffs allege they should have communicated to Plan participants.

Plaintiffs asserted that because the Court's April 2 Order upheld the communications, disclosure, and co-fiduciary claims (Counts III-V) in the Consolidated Complaint, the same make-whole relief provided by other ERISA claims, including the dismissed prudence claim, was still available. Plaintiffs also noted that the Court's April 2 Order contained numerous references to the gravity of the Plaintiffs' allegations and the recognition that the conduct, if proven, would entitle Plaintiffs to relief. However, Plaintiffs also recognized that success on the merits was not assured. To Plaintiffs' counsel's knowledge, only four ERISA company stock fund cases have been tried on the merits, each of which resulted in defense verdicts.⁷ As the court in *Whetman v. Ikon*, 209 F.R.D. 94 (E.D. Pa. 2002) stated, in prosecuting these types of claims, Plaintiffs face significant risks and complexities.

Trial would require lengthy inquiries into the question of each of the [defendant's] fiduciary role under ERISA; whether any communications from defendants to class members constituted material misrepresentation as to the risks of investing in [company] stock; and whether the company's financial statements were in fact misstated under accounting principles, a particularly fact-intensive inquiry requiring close scrutiny of [the company's] finances and

⁷ See *DiFelice v. U.S. Airways, Inc.*, 436 F. Supp. 2d 756 (E.D. Va. June 26, 2006), *affirmed*, 497 F.3d 410 (4th Cir. 2007) (The Fourth Circuit affirmed the district court's ruling that defendants did not breach ERISA mandated fiduciary duties by continuing to offer company stock as plan investment option.); *Nelson v. IPALCO Enterprises, Inc.*, 480 F. Supp. 2d 1061 (S.D. Ind. 2007) (The court determined the defendant fiduciaries did not breach their fiduciary duties under ERISA by failing to remove company stock as a plan investment option.); *Langraff v. Columbia Healthcare Corp.*, No. 98-0090, 2000 U.S. Dist LEXIS 21831 (M.D. Tenn. May 24, 2000) (same); *Brieger v. Tellabs, Inc.*, No. 06-1882, 2009 WL 1565203 (N.D. Ill. June 1, 2009) (same).

accounting statements. Whether or not the case proceeded to trial, an appeal and associated costs would be nearly certain. This factor weighs in favor of the proposed settlement.

Ikon, 209 F.R.D. at 104. This case would have presented similar challenges.

Additionally, a recent decision from the Ninth Circuit strengthened Defendants' positions. In *Quan v. Computer Scis. Corp.*, ---- F. 3d ----, 2010 WL 3784702 (9th Cir. Sept. 30, 2010), the Ninth Circuit affirmed the dismissal on summary judgment of similar types of claims and set a high standard for overcoming the "presumption of prudence" with regard to investing Plan assets in Company stock. Moreover, the Seventh Circuit has recognized that a fiduciary who sells company stock too quickly may be sued for taking that action. See *Summers v. State Street*, 453 F.3d 404, 411 (7th Cir. 2006).

Thus, while Plaintiffs and Class Counsel believe in the merits of this case, the outcome of continued litigation would be far from certain. Accordingly, this factor supports preliminary approval of the proposed Settlement.

b. Possible Range of Recovery at Trial

Plaintiffs' potential range of recovery was hotly disputed in this Action. In determining losses under ERISA, Plaintiffs' assert that the relevant benchmark is what a prudent investment would have returned in lieu of the imprudent one. *Donovan v. Bierwirth*, 754 F.2d 1049, 1056 (2d Cir. 1985) ("[T]he measure of loss applicable under ERISA . . . requires a comparison of what the Plan actually earned on the . . . investment with what the Plan would have earned had the funds been available for other Plan purposes."). A common alternative investment often considered when assessing liability in 401(k) and ESOP cases is a 3% money

market account. If Plaintiffs were able to establish liability on all claims for the entire Class Period (July 28, 2005, through May 12, 2008) – a complete victory for Plaintiffs – estimated damages under Plaintiffs’ damages analysis would range from \$31 million to approximately \$37 million. This range was calculated using the return that the Plan would have obtained if it had been invested in a standard money market account, as well as Plan alternatives – the PIMCO Total Return Fund (PTRAX) and the Columbia Acorn Fund (LACAX).

Plaintiffs anticipate that Defendants’ argument would be that *if* there had been any breach, the breach occurred much later than July 28, 2005. The use of a later breach date would result in reduced damages, given the continuous decline in the value of Beazer stock over the course of much of the Class Period.

For purpose of illustration and to assist the Court with its evaluation of the Settlement, Plaintiffs provide two possible alternative breach dates, March 28, 2007 (the date that inquiries by the FBI, HUD, and the IRS were announced) and October 11, 2007 (the date that Beazer announced it would have to restate various financial statements).

The following chart illustrates the range of damages based on the three different breach dates:

	Losses based on Money Market Fund	Losses based on PTRAX Fund	Losses based on LACAX Fund
7/28/2005	\$31,557,835	\$33,442,818	\$36,796,643
3/28/2007	\$9,774,193	\$10,995,255	\$9,231,151
10/11/2007	(\$1,451,940)	(\$1,053,600)	(\$1,953,647)

Hence, based on the three breach dates discussed above, if Plaintiffs proved liability, the range of damages would be from zero to approximately \$37 million. However, the Plan's recovery could be further reduced or eliminated based on various circumstances and determinations by the Court. For example, Defendants would most likely argue that a different measure of damages should be used, particularly in light of the dismissal of Plaintiffs' prudence claim. They further might argue that holder losses are not available or are substantially reduced in light of the impact that disclosure by Beazer Homes of its alleged fraud and accounting abuses would have had on the Beazer Homes stock price. Moreover, Defendants would most likely argue that the Plan's losses should decrease should the price of Beazer Homes stock increase. Plaintiffs, of course, would dispute Defendants' damages theories, but nonetheless recognize that the range is far from certain.

c. Settlement Amount in Relation to the Possible Range of Recovery

To assess the reasonableness of a proposed settlement seeking monetary relief, "the present value of the damages plaintiffs would likely recover if successful, appropriately discounted for the risk of not prevailing, should be compared with the amount of the proposed settlement." *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 806 (3d Cir. 1995) (citing *Manual for Complex Litigation* § 30.44, at 252 (2d ed. 1985)).

Plaintiffs' risk involves both the risk of establishing liability and the risk of proving damages. Plaintiffs recognize that the law in this area is rapidly developing and in some respects unsettled. Defendants would vigorously contest both liability and damages. Under the best of circumstances, trial is risky and

success cannot ever be guaranteed. *See Masco Corp.*, 258 F.R.D. at 559 (noting that “in the absence of a settlement, plaintiffs will continue expending a great deal of time and money to attempting to recover a judgment that may not succeed or result in any larger recovery”).

Assuming, as discussed above, that Plaintiffs’ potential provable damages range from zero to approximately \$37 million (not taking into account the risk of not prevailing, or any of the above described circumstances and determinations that could decrease (perhaps substantially) Plaintiffs’ recoverable losses), the proposed Settlement of \$5.5 million then ranges from 15% to over 100% of Plaintiffs’ provable damages. Therefore, the Settlement Amount is well within the range that courts traditionally have found to be fair and adequate under the law. *See, e.g., Zilhaver v. UnitedHealth Group, Inc.*, 646 F. Supp. 2d 1075, 1080 (D. Minn. 2009) (approving settlement with all defendants of 16% to 18% of estimated damages); *cf. Masco Corp.*, 258 F.R.D. at 559 (noting that in antitrust cases, “district courts have approved settlements equaling a small fraction of the potential recovery at trial because of the inherent uncertainty in antitrust actions”); *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 459 (9th Cir. 2000) (approving settlement of securities class action with all defendants that comprised one sixth of the plaintiffs’ potential recovery).

Given that the Settlement Amount immediately restores to the Plan and the Class a substantial percentage of the potential damages in this complex action, the Settlement is an excellent recovery for the Class.

d. The Complexity, Expense, and Likely Duration of Continued Litigation

The complexity of ERISA breach of fiduciary duty cases is well known.⁸ As one court aptly recognized when considering a proposed class action settlement, complexities abound in these unique cases:

The ERISA cases would pose additional factual and legal issues. Fiduciary status, the scope of fiduciary responsibility, the appropriate fiduciary response to the Plans' concentration in company stock and GX's business practices would be issues of proof, and numerous legal issues concerning fiduciary liability in connection with company stock in 401(k) plans remain unresolved. These uncertainties would substantially increase the ERISA cases' complexity, duration, and expense - - and thus militate in favor of settlement approval.

In re Global Crossing Sec. & ERISA Litig., 225 F.R.D. 436, 456 (S.D.N.Y. 2004).

Indeed, the precise facts compelling the court to approve settlement in *In re Global Crossing* are also present here.

Though Plaintiffs are confident of their claims that survived the motion to dismiss, this case has added complexities given that Plaintiffs' prudence and monitoring claims have been dismissed. If this Settlement is not approved, a substantial amount of work will need to be performed by both Parties, including the completion of fact and expert discovery involving many witnesses and issues, briefing motions for class certification and summary judgment, designation of

⁸ See, e.g., *Ikon*, 209 F.R.D. at 104; *In re Enron Corp. Sec., Derivative and "ERISA" Litig.*, 228 F.R.D. 541, 565 (S.D. Tex. 2005) (finding that the "complexity, expense and likely duration of the litigation . . . are self evident and exceptional").

witnesses and exhibits, preparation of pre-trial memoranda and proposed findings of fact and conclusions of law, presentation of witnesses and evidence at trial, and handling the probable appeal regardless of the trial's outcome. The Settlement obviates this delay and will, if approved, offer the Plan an immediate and certain recovery. Thus, this factor also speaks strongly in favor of preliminary approval of the proposed Settlement.

e. Objections to the Settlement

As noted above, there have been no objections to the Stipulation. As such, this prong of the analysis militates in favor of approving the Stipulation. Moreover, the Class representatives fully support this settlement as well.

f. The Stage of the Proceedings at the Time of Settlement

Although formal discovery has not yet commenced in this Action, Plaintiffs have conducted an extensive economic and factual investigation and evaluation of their claims sufficient to demonstrate the fairness of the Settlement. *See Cotton*, 559 F.2d at 1332 (affirming approval of settlement with little formal discovery); *Mashburn v. Nat'l Healthcare, Inc.*, 684 F. Supp. 660, 669 (M.D. Ala. 1988) (holding that early settlements are to be encouraged; only a reasonable amount of discovery is required to determine the fairness of the settlement). Plaintiffs' investigation included the detailed review of thousands of pages of publicly available documents regarding the Plan, Defendants' financial condition, and the performance of Beazer Homes stock during the Class Period. Plaintiffs also reviewed Plan-related documents produced by Defendants and Plan participants and performed extensive legal research in responding to Defendants' motion to

dismiss.

While there is much to be done to prepare the case for trial, Plaintiffs are fully cognizant of the strength of their claims and the risks that they face, and believe without hesitation that the Settlement is in the best interests of the Class. Thus, taking this and the other factors discussed above into account, Plaintiffs respectfully submit that the Settlement is fair, adequate, and reasonable, and should be preliminarily approved.

IV. CLASS CERTIFICATION OF PLAINTIFFS' CLAIMS IS APPROPRIATE

To proceed with the settlement approval process, it is necessary for the Court to certify a class for Settlement. Federal Rule of Civil Procedure 23 provides that an action may be maintained as a class action if each of the four prerequisites of Rule 23(a) is met and, in addition, the action qualifies under one of the subdivisions of Rule 23(b).

Certification of the Settlement Class in this action is warranted for numerous reasons. First and foremost, before entering the Preliminary Approval Order, this Court examined the record and preliminarily certified the Settlement Class pursuant to FED. R. CIV. P. 23(b)(1). Nothing has changed in the record that would compel the Court to reach a different conclusion with respect to the final approval of the Settlement Class. Further, courts across the country have determined that breach of fiduciary duty claims under ERISA analogous to those at issue in this action are uniquely appropriate for class treatment. *See, e.g., George v. Kraft*

Foods Global, No. 08-3799, 2010 WL 3386402, at *11 (N.D. Ill. Aug. 25, 2010) (certifying class under Rule 23(b)(1)(B));⁹ *Hans v. Tharaldson*, No. 05-115, 2010 WL 1856267, at *10 (D.N.D. May 7, 2010) (certifying under Rule 23(b)(1)(A) and 23(b)(1)(B)); *Moore v. Comcast Corp.*, No. 08-773, 2010 WL 1375462, at *9 (E.D. Pa. Apr. 6, 2010) (certifying under Rule 23(b)(1)(B)).

Moreover, the Supreme Court has acknowledged the propriety of certifying a class solely for settlement purposes. *See, e.g., Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 618 (1997). Accordingly, Plaintiffs respectfully request that the Court make appropriate findings and certify the following Class, for purposes of settlement only:

All persons who were participants in or beneficiaries of the Plan at any time between July 28, 2005 and May 12, 2008 (the “Class Period”), and whose account(s) included investments in the Beazer Stock Fund. Excluded from the Settlement Class are Defendants, any entity in which the Defendants have or had a controlling interest, or which is or was a parent or subsidiary of or is or was controlled by Beazer Homes, and the current and former officers, directors, affiliates, legal representatives, heirs, predecessors, and assigns of Defendants.

The proposed Class meets all four prerequisites of Rule 23(a), and because Rule

⁹ The *Kraft* court went so far as to note that “in light of the derivative nature of Section 1132(a)(2) claims, breach of fiduciary duty claims brought under this statutory provision are ‘paradigmatic examples of claims appropriate for certification as a Rule 23(b)(1) class.’” *Kraft*, 2010 WL 3386402, at *11. The *Delphi* and *Rankin* courts have similarly held. *See In re Delphi Corp. Sec., Der. & “ERISA” Litig.*, MDL No. 1725, 2008 WL 125798, at *9 (E.D. Mich. Jan. 11, 2008) (noting given “ERISA’s distinctive ‘representative capacity’ and remedial provisions, courts have observed that ERISA litigation of this nature present a paradigmatic example of a (b)(1) class action.”); *Rankin v. Rots*, 220 F.R.D. 511, 521-23 (E.D. Mich. 2004) (same).

23(b)(1) is also satisfied, this Class is appropriate for certification.

A. The Proposed Class Satisfies the Requirements of Rule 23(a)

1. Numerosity

To warrant certification under Rule 23(a)(1), a proposed class must be “so numerous that joinder of all class members is impracticable.” FED. R. CIV. P. 23(a)(1). Plaintiffs need not show that the number of class members is so large that it would be impossible to join every class member, only that it is impracticable. *In re Theragenics Corp. Sec. Litig.*, 205 F.R.D. 687, 694 (N.D. Ga. 2002) (“‘Impracticable’ is not synonymous with ‘impossible.’”); *Rhodes v. Cracker Barrel Old Country Store, Inc.*, 213 F.R.D. 619, 674 (N.D. Ga. 2003) (same). Rather, the individual plaintiffs “need only show that it would be extremely difficult or inconvenient to join all members of the class.” *In re Miller Indus. Sec. Litig.*, 186 F.R.D. 680, 685 (N.D. Ga. 1999). Numerosity is clearly satisfied in this case. Defendants have identified, and the Class Notice has been sent to 6,120 Settlement Class Members. *See* A.B. Data Affidavit ¶ 10. Accordingly, the proposed Settlement Class satisfies the numerosity requirement. *See Kilgo v. Bowman Transp., Inc.*, 789 F.2d 859, 878 (11th Cir. 1986) (affirming class of “at least thirty-one individual class members”).

2. Commonality

Rule 23(a)(2) requires that Plaintiffs show that “there are questions of law or fact common to the class.” FED. R. CIV. P. 23(a)(2). The rule is satisfied where the proposed class representatives share at least one question of fact or law with the claims of the prospective class. *Cheney v. Cyberguard Corp.*, 213 F.R.D. 484, 490

(S.D. Fla. 2003); *Brown v. SCI Funeral Servs. of Fla., Inc.*, 212 F.R.D. 602, 604 (S.D. Fla. 2003). “The threshold for commonality is not high.” *Cheney*, 213 F.R.D. at 490. Common questions abound in ERISA breach of fiduciary duty cases because plaintiffs and class members are similarly affected by defendants’ plan-wide conduct. Consequently, in the ERISA context, courts routinely find that Rule 23(a)’s commonality requirement is satisfied.¹⁰

This case presents multiple common questions of law and fact, including:

- (1) whether Defendants were fiduciaries of the Plan;
- (2) whether Defendants breached their fiduciary duties;
- (3) the measure and aggregate amount of losses sustained by the Plan;
and
- (4) the proper remedy for the Plan’s losses.

For settlement purposes, these common issues of law and fact satisfy Rule 23(a)(2).

3. Typicality

Under Rule 23(a)(3), Plaintiffs’ claims must be “typical” of those of the Class. FED. R. CIV. P. 23(a)(3). Claims are typical if they arise from the “same

¹⁰ See, e.g., *Moore v. Comcast Corp.*, No. 08-0773, 2010 WL 1375462, at *5 (E.D. Pa. Apr. 6, 2010) (“[Plaintiff] has established, as well, that a number of common issues pervade this case, including whether defendants were fiduciaries of the Plan and whether defendants breached their fiduciary duties by allowing the Plan to invest in the Company Stock Fund. A plaintiff need show only one common issue to fulfill the commonality requirement.”); *In re CMS Energy ERISA Litig.*, 225 F.R.D. 539, 543-44 (E.D. Mich. 2004) (finding in ERISA company stock case that plaintiffs “have persuaded the court that common issues, the resolution of which would advance the litigation, certainly exist among members of the proposed class,” including, as plaintiffs noted “whether CMS stock was an imprudent investment for the Plan.”); *In re Syncor ERISA Litig.*, 227 F.R.D. 338, 344 (C.D. Cal. 2005) (same).

event or pattern or practice and are based on the same legal theory.” *Cheney*, 213 F.R.D. at 491 (citing *Kornberg v. Carnival Cruise Lines, Inc.*, 741 F.2d 1332, 1337 (11th Cir. 1984)). Because both commonality and typicality focus on the similarity of the claims, the two requirements “tend to merge.” *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 158 n.13 (1982); *see also In re Miller*, 186 F.R.D. at 685 (finding that “[t]he same factors that satisfy the commonality requirement also may satisfy the typicality requirement” (citing *Cox v. Am. Cast Iron Pipe Co.*, 784 F.2d 1546, 1557 (11th Cir. 1986))).

Here, Plaintiffs’ claims satisfy the typicality requirement because their claims are substantially identical to the claims of absent Class Members – all the claims rise and fall under ERISA’s fiduciary duty provisions. Plaintiffs’ claims are not individual claims; they are brought under ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2), on behalf of the Plan as a whole and any relief obtained in the lawsuit would necessarily flow to the Plan as a whole, not to Plaintiffs as individual participants. *LaRue v. DeWolff, Boberg & Assocs., Inc.*, 552 U.S. 248, 254 (2008) (quoting *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 140 (1985)); *accord id.* at 261 (Thomas, J., concurring) (“The plain text of § 409(a), which uses the term ‘plan’ five times, leaves no doubt that § 502(a)(2) authorizes recovery only for the plan.”).

4. Adequacy

The proposed Class Representatives have and will continue to “fairly and adequately protect the interests of the class.” FED. R. CIV. P. 23(a)(4). The adequacy requirement has two prongs: (1) “whether plaintiffs’ counsel are

qualified, experienced, and generally able to conduct the proposed litigation . . . and (2) whether plaintiffs have interests antagonistic to those of the rest of the class.” *Cheney*, 213 F.R.D. at 495 (quoting *Kirkpatrick v. J.C. Bradford & Co.*, 827 F.2d 718, 726 (11th Cir. 1987)).

First, Plaintiffs retained attorneys that are highly qualified, experienced, and able to conduct this litigation. The law firms of Keller Rohrback and BTKMC have extensive experience, and are at the forefront nationally, in litigating complex ERISA breach of fiduciary duty class actions. *See* Resume of Keller Rohrback attached hereto as Exhibit B to Kimberly Dec. and Resume of BTKMC attached hereto as Exhibit I to Ciolko Dec.; *see also* Fee Memorandum at 21-24. Class Counsel have successfully litigated analogous cases on both the District and Circuit court levels.¹¹

Second, the law governing the adequacy of representatives is well settled: “[O]nly a conflict that goes to the very subject matter of the litigation will defeat a party’s claim of representative status.” 7A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure*, § 1768 at 390 (3d ed. 2005). Here the interests of Plaintiffs are aligned with, not antagonistic to, the interests of the proposed Class. Each member of the proposed Class, just like Plaintiffs, has an interest in recovering losses suffered by the Plan as a result of the decimation of Beazer Home’s stock. As such, Plaintiffs’ interests in the lawsuit are the same as absent Class Members. Accordingly, given the retention of highly experienced and

¹¹ Including the following two ERISA cases in this district: *In re Mirant Corp. ERISA Litig.*, No. 03-1027 (N.D. Ga.) and *Spivey v. Southern Co.*, No. 04-1912 (N.D. Ga.).

competent counsel and the lack of conflict, Plaintiffs should be appointed Class Representatives under Rule 23(a)(4).

B. The Proposed Class Meets the Requirements of Rule 23(b)(1)

In addition to demonstrating that the requirements of Rule 23(a) are met, Plaintiffs must also establish that at least one subsection of Rule 23(b) is satisfied. Here, certification is proper under Rule 23(b)(1), which states that a class may be certified if:

(1) 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

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the 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). Thus, Rule 23(b)(1)(A) “considers possible prejudice to the defendants, while 23(b)(1)(B) looks to possible prejudice to the putative class members.” *In re Ikon Office Solutions, Inc. Sec. Litig.*, 191 F.R.D. 457, 466 (E.D. Pa. 2000).

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

Here, Rule 23(b)(1)(A) is satisfied. Class Notice was sent to 6,120 prospective Class Members. In the absence of class certification there is the potential for a large number of individual cases based on the same underlying facts, creating a high risk of inconsistent or varying adjudications that would

establish incompatible standards of conduct for Defendants. *Id.* at 466 (finding a “risk of inconsistent dispositions that would prejudice the defendants: contradictory rulings as to whether Ikon had itself acted as a fiduciary, whether the individual defendants had, in this context, acted as fiduciaries, or whether the alleged misrepresentations were material would create difficulties in implementing such decisions”). Moreover, the claims Plaintiffs allege on behalf of the proposed Class are derived from core issues that apply to all members of the Class: whether Defendants were fiduciaries, whether Defendants breached their fiduciary duties, and whether Plaintiffs were harmed by Defendants’ breaches. *See Jones v. NovaStar Fin. Inc.*, 257 F.R.D. 181, 194 (W.D. Mo. 2009) (finding that “central questions concerning whether fiduciaries breached their duties to the Plan are not individual” matters).

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

Rule 23(b)(1)(B) is also satisfied. The Advisory Committee Note to Rule 23(b)(1)(B) emphasizes that this provision is particularly applicable where trust beneficiaries charge a breach of trust by a fiduciary:

The same reasoning applies to an action which charges a breach of trust by an indenture trustee or other fiduciary similarly affecting the members of a larger class of security holders or other beneficiaries, and which requires an accounting or like measure to restore the subject of the trust.

FED. R. CIV. P. 23(b)(1)(B) Advisory Committee Note (1966 Amendment); *see Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 834 (1999) (quoting the Advisory Committee Note to Rule 23(b)(1)(B) and describing a fiduciary breach of trust as a “[c]lassic example” of the type of action appropriate for certification under

23(b)(1)(B)).

Here, were the Court to adjudicate Plaintiffs' claims that Defendants breached their fiduciary duties by making misrepresentations and failing to disclose information on a Plan-wide basis, it would effectively dispose of the absent Class Members claims. *See In re Syncor ERISA Litig.*, 227 F.R.D. 338, 346 (C.D. Cal. 2005) (certifying a class under Rule 23(b)(1)(B) and finding that "[i]f the primary relief is to the Plan as a whole, then adjudications with respect to individual members of the class would 'as a practical matter' alter the interests of other members of the class – if one plaintiff forces the Defendants to pay damages to the Plan, the benefit would affect everyone who has a right to disbursements from the Plan"). Rule 23(b)(1)(B), therefore, is a proper vehicle for certification of Plaintiffs' claims for settlement purposes.

C. Keller Rohrback and BTKMC Should Be Appointed Counsel for the Class

Rule 23(g) requires the Court to examine the capabilities and resources of counsel for the Class to determine whether they will provide adequate representation to the Class. Here, Class Counsel have done substantial work to identify and investigate potential claims in the Action, and they have refined the allegations through the Consolidated Complaint. Class Counsel have also investigated the allegations made in the Action by interviewing witnesses, reviewing publicly available information, reviewing documents obtained from Defendants, and consulting with an expert. Class Counsel have substantial experience in handling class actions, other complex litigation, and claims of the type asserted in this Action. Class Counsel, together and separately, have litigated

numerous similar ERISA class action cases, and have recovered over a billion dollars for plan participants and retirees in these types of cases. A complete description of the relevant experience of Class Counsel is contained in the resumes of Keller Rohrback and BTKMC, attached to the Kimberly and Ciolko Declarations as Exhibits B and I, respectively, for the Court's reference. *See also* Fee Memorandum at pages 22-24. Hence, Class Counsel's extensive efforts in prosecuting this case in combination with their in-depth knowledge satisfy Rule 23(g).

D. The Court Should Also Approve the Proposed Plan of Allocation

The Plan of Allocation is attached to the Ciolko Declaration as Exhibit B. In relevant part, Plan participants' Settlement allocation will be calculated as follows:

- For each Settlement Class Member, the Claims Administrator shall determine the approximate net loss ("Net Loss") as follows: $\text{Net Loss} = A + B - C - D$, where, for each Settlement Class Member's account: A = the dollar value, if any, of the balance in the Company Stock or units on the first day of the Class Period; B = the dollar value, if any, of all purchases of Company Stock or units during the Class Period, as of the time of purchase(s); C = the dollar value, if any, of all dispositions of Company Stock or units during the Class Period as of the time of the sale(s); and D = the dollar value, if any, of Company Stock or units remaining on the last day of the Class Period.
- The Net Losses of the Settlement Class Members as calculated above will be totaled to yield the loss of the Plans as a whole over the Class Period (the "Plans' Loss").
- The Claims Administrator shall calculate for each Settlement Class Member his or her "Preliminary Fractional Share" of the Plans' Loss, *i.e.*, by dividing each Settlement Class Member's

Net Loss by the Plans' Loss.

- The Claims Administrator shall then calculate for each Settlement Class Member his "Preliminary Dollar Recovery" of the Net Settlement Fund Proceeds by multiplying the Settlement Class Member's Preliminary Fractional Share by the Net Settlement Fund Proceeds.
- The Claims Administrator shall identify all Settlement Class Members whose Preliminary Dollar Recovery is greater than zero but less than a minimum amount of ten dollars (\$10.00) (the "Minimum Amount"). All such Settlement Class Members shall receive an allocation from the Net Settlement Fund Proceeds of the Minimum Amount.
- The Claims Administrator shall then, taking into account the Settlement Class Members who receive the Minimum Amount, recalculate the Preliminary Fractional Shares and the Preliminary Dollar Recoveries as many times as necessary so as to arrive at the "Final Fractional Share" and the "Final Dollar Recovery" for each Settlement Class Member. The sum of the Final Dollar Recoveries must equal the Net Settlement Fund Proceeds.

Under the above Plan of Allocation, a Plan participant's share of the proceeds of the Net Settlement Amount depends generally on the dollar value of the participant's interest in the Beazer Stock Fund held in his/her Plan account during the Class Period and the amount that he/she lost as a result. The formula takes into account the purchases and sales of shares in the Beazer Homes stock made to and from the account during the Class Period. In general, the more a participant lost because of the decline in value of the Beazer Homes stock in his/her Plan account, the larger his/her share of the Net Settlement Amount will be.

All participants are treated equally under the formula. The allocation shares calculated will not be paid directly to participants. Rather, the respective amounts of the Net Settlement Account will be allocated to the individual accounts maintained by the Plan for the Settlement Class members. In the event a Settlement Class member has completely withdrawn his/her account (such as, for example, following termination of employment with Beazer Homes), an account for the participant will be reestablished and the participant notified. The participant can then choose whether to request a distribution in any manner permitted by the Plan.

Under the above-described methodology, individual participants are not required to do anything to receive their portion of the Settlement; rather, the Claims Administrator already possesses all information necessary to produce an accurate allocation calculation. Class Counsel, with the assistance of experts in data analysis, will help oversee all record compilation and allocation calculations.

The allocation method set forth herein is the basic approach that has been used in settlements of other 401(k) company stock cases, and it has been approved by judges in numerous cases. *See, e.g.*, Plan of Allocation and Final Judgment in *Lewis v. El Paso Corp.*, No. 02-4860 (S.D. Tex. Apr. 27, 2009) (attached to the Ciolko Dec. as Exhibit C); Plan of Allocation and Order and Final Judgment in *In re Loral ERISA Litig.*, No. 03-9729 (LTS) (S.D.N.Y. Jan. 20, 2009) (attached to the Ciolko Dec. as Exhibit D); Plan of Allocation and Order Approving Plan of Allocation in *In re Calpine Corp. ERISA Litig.*, No. C 03-1685 (SBA) (N.D. Cal. Dec. 17, 2008) (attached to the Ciolko Dec. as Exhibit E).

V. CONCLUSION

The proposed Settlement is the result of extensive arm's-length negotiations by the parties through an experienced mediator, has been approved by an independent fiduciary, provides substantial benefits to the class of Plan participants, and fully, fairly, and favorably resolves Plaintiffs' claims. For these and the other foregoing reasons detailed above, Plaintiffs respectfully request that the Court approve the Plan of Allocation and approve the Settlement on a final basis.

DATED: November 5, 2010

Respectfully submitted,

KELLER ROHRBACK L.L.P.

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LOCAL RULE 7.1(D) CERTIFICATION

Counsel for Plaintiffs hereby certifies that the text of this document has been prepared with Times New Roman 14 point, one of the fonts and point selections approved by the Court in Local Rule 5.1(C).

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CERTIFICATE OF SERVICE

I hereby certify that on November 5, 2010, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notice of such filing to all known counsel of record.

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