

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN

In re CMS ENERGY ERISA LITIGATION

Master File No. 02-72834

Judge George Caram Steeh

This Document Relates To:

Class Action

**ALL ACTIONS**

**PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR ORDER GRANTING  
PRELIMINARY APPROVAL OF SETTLEMENT AGREEMENT, APPROVING FORM  
AND METHOD OF NOTICE, AND SETTING A DATE AND TIME FOR A FAIRNESS  
HEARING**

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## **STATEMENT OF ISSUES PRESENTED**

1. Whether the Court should preliminarily approve the Settlement Agreement.
2. Whether the Court should approve the form and method of Class notice.
3. Whether the Court should set a Fairness Hearing, along with deadlines for Class Counsel to file and serve their motion for award of attorneys' fees and expenses and Class Representative compensation, and for Class Counsel to file their motion for final approval of the proposed Settlement Agreement.

**STATEMENT OF**  
**MOST APPROPRIATE AUTHORITY FOR RELIEF SOUGHT**

Pursuant to Local Rule 7.1(c)(2), Plaintiffs list the following cases as the most appropriate authorities for the relief sought in their motion:

*Berry v. Sch. Dist. of Benton Harbor*, 184 F.R.D. 93 (W.D. Mich. 1998)

*In re Telectronics Pacing Sys., Inc.*, 137 F. Supp. 2d 985 (S.D. Ohio 2001)

*Reed v. Rhodes*, 869 F. Supp. 1274 (N.D. Ohio 1994)

*Thompson v. Midwest Found. Indep. Physicians Assoc.*, 124 F.R.D. 154 (S.D. Ohio 1988)

*Williams v. Vukovich*, 720 F.2d 909 (6th Cir. 1983)

## **I. INTRODUCTION**

The Class Representatives, by and through their counsel, respectfully move the Court for an Order granting preliminary approval of the Settlement Agreement described herein. The Settlement Agreement, which provides a cash payment of \$28 million plus interest and non-monetary equitable relief regarding the administration and management of the Plan, is an excellent recovery for the Employees' Savings Plan of Consumers Energy Company (the "Plan") and the Class, and resolves the claims against all of the Defendants in this ERISA action. The Settlement, by its express terms, does not release, bar, waive, or otherwise affect the claims asserted in the pending securities action, *In re CMS Energy Securities Litigation*, Master File No. 02-CV-72004. The Settlement Agreement was reached after vigorous motions practice, extensive discovery, and arm's length negotiations. It will provide significant benefits to the Class, while removing the risk and delay associated with further litigation. Plaintiffs request that the Court grant their motion so that the Class may obtain the substantial benefits provided by the Settlement Agreement.

## **II. BACKGROUND FACTS**

### **A. Procedural And Litigation History.**

The Court is familiar with the case as a result of the extensive briefing on the motions to dismiss and the Plaintiffs' motion for class certification. In brief, on December 19, 2003, Plaintiffs filed the Consolidated Amended Complaint for Breach of Fiduciary Duty under ERISA ("Complaint") in this action. Defendants subsequently filed extensive motions to dismiss the Complaint. In a detailed written opinion issued on March 1, 2004, the Court denied Defendants' motions as to three of Plaintiffs' four ERISA claims. *See In re CMS ERISA Litig.*, 312 F. Supp. 2d 898 (E.D. Mich. 2004). The Court ruled that the Complaint stated claims against CMS for: (1) failing to prudently manage the Plan's investment in CMS stock; (2) failing to provide Plan participants with complete and accurate information regarding CMS stock; and (3) failing to monitor the Plan's fiduciaries to ensure that they were faithfully

discharging their duties. *Id.* at 918. Following discovery on class certification issues and extensive class certification briefing by the parties, the Court subsequently granted Plaintiffs' motion for class certification in a written opinion dated December 27, 2004. *See In re CMS ERISA Litig.*, 225 F.R.D. 539 (E.D. Mich. 2004).

Following the Court's decision denying Defendants' motions to dismiss, the parties engaged in extensive and thorough discovery. Such discovery included class representative depositions by Defendants and the review by Class Counsel of tens of thousands of documents from Defendants and various third parties, as well as publicly available documents through both formal and informal discovery. In addition, Class Counsel prepared a detailed deposition plan by which, in conjunction with the plaintiffs in the consolidated securities actions against CMS, they took numerous depositions of Defendants and various third-parties in several states including Michigan, Kentucky, Texas, and Florida. This deposition plan was the result of extensive negotiations with securities plaintiffs' counsel and counsel for the Defendants in the ERISA and securities actions, through which the parties were able to develop an efficient and effective process for conducting combined ERISA and securities depositions. In addition, Class Counsel completed multiple ERISA-only depositions of Defendants and other parties who were relevant to the ERISA action. All told, Class Counsel took 20 depositions in this case, and were preparing to take many more when the Settlement was reached. In addition, Class Counsel retained and worked closely with several ERISA and industry experts during the litigation. Throughout the litigation, and in the midst of the parties' abundant discovery and litigation efforts, the parties continued to discuss possible settlement of the action, and engaged in extensive settlement efforts.

**B. Settlement Negotiations.**

Three separate mediations in this matter were conducted over a period of almost two years before the parties agreed to the Settlement Agreement. The first session took place in New York on March 22-23, 2004 with former U.S. District Judge Nicholas Politan serving as a

mediator. Class Counsel prepared a detailed mediation submission which included thorough analysis of the claims, potential losses and insurance coverage issues. One year later to the day, the ERISA parties convened in Detroit, this time with mediator Eric Green. Again, Class Counsel made a detailed presentation on the claims, damages, and insurance coverage issues, as well as discovery to date, and Defendants disputed Plaintiffs' analysis. The parties reconvened on June 7, 2005 with Mr. Green in New York, in advance of Class Counsel beginning to take depositions. Because the parties were unable to reach agreement, Plaintiffs proceeded with extensive document and deposition discovery.

While discovery was ongoing, and, indeed, on the day that Class Counsel took the deposition of former CMS CEO McCormick, December 15, 2005, an agreement in principle was reached on the amount of the settlement, and the contours of the Settlement Agreement. In the following months, the parties engaged in continued hard-fought negotiations regarding the specific terms of the Settlement Agreement. A final Settlement Terms Sheet reflecting the core terms of the agreement was executed by the parties on February 10, 2006. Following further negotiations, and discussions with the Independent Fiduciary retained by CMS to assess the fairness of the Settlement, the parties executed the final Settlement Agreement on March 1, 2006.

In sum, the Settlement Agreement was the result of lengthy and contentious arm's length negotiations amongst the parties. This process was in all respects thorough, adversarial, and professional.

**C. Terms Of The Settlement Agreement.**

The terms and conditions of the Settlement Agreement are set forth in a Class Action Settlement Agreement (the "Settlement Agreement"), an executed copy of which is attached as Exhibit 1 to this memorandum. The following summarizes the principal terms of the Agreement:

1. Settling Defendants. The Settling Defendants are all Defendants named in this action, each of whom is alleged to have served as a fiduciary for the Plan.

2. Settlement Class. The Settlement Class (the "Class") will be the Class certified by the Court by Order entered on December 27, 2004, consisting of:

All participants in the Employees' Savings and Incentive Plan of Consumers Energy Co. (the "Plan") and their beneficiaries, excluding the Defendants, for whose accounts the fiduciaries of the Plan made or maintained investments in CMS Energy Corporation stock through the Plan's Fund C Investment Fund, the Fund CS Investment Fund, the Fund CE Investment Fund, and the TRASOP Fund (collectively the "CMS Stock Funds") or otherwise between August 3, 2000 and a date to be determined.

For the purposes of the Settlement Agreement, the parties have stipulated to a class period end-date of December 27, 2004, the date on which the Court granted Plaintiffs' motion for class certification. The parties have also identified the Plan in the Settlement Agreement as Employees' Savings Plan of Consumers Energy Company, as has been or may later be amended, individually and collectively, and any trust created under any such Plan.

3. Independent Fiduciary Approval. The Settlement Agreement is contingent upon U.S. Trust N.A., acting as an independent fiduciary (i) approving the Settlement Agreement and giving a release in its capacity as a fiduciary of the Plan and for and on behalf of the Plan which is coextensive with its release from the class members, (ii) authorizing the Settlement Agreement in accordance with Prohibited Transaction Class Exemption 2003-39, and (iii) finding that the Settlement Agreement does not constitute a prohibited transaction under ERISA § 406(a). CMS's insurer will pay all fees and expenses of the independent fiduciary.

4. Settlement Amount. The Plaintiffs and all Defendants agreed to settle this action for the sum of \$28,000,000 in cash ("Settlement Amount") plus certain specified non-monetary equitable relief.

5. Non-Monetary Equitable Relief. The non-monetary equitable relief provided by the Settlement Agreement consists of the following:

- (a) **Company Covenant Not To Restrict Sale Of Its Stock:** After Plaintiffs filed suit in this case, Defendants removed the restriction preventing participants from selling CMS stock in their Plan accounts that had been purchased with matching contributions to the Plan made by the Company. Pursuant to the Settlement, the Defendants will not take any action for a period of four years after final approval of the Settlement to restrict the Settlement Class' ability to sell CMS stock that is in or may be added to the Plan except in instances required to comply with applicable law or internal compliance procedures;
- (b) **Company Covenant To Provide Information To Plan Fiduciaries:** CMS will take steps to see that individuals identified as fiduciaries to the Plan are provided with knowledge of their ERISA imposed duties and obligations. Specifically, CMS will take steps to provide Plan fiduciaries with regularly updated materials regarding Plan management and administration that sets forth their duties and responsibilities under ERISA;
- (c) **Company Covenant To Provide Information To Plan Participants And Beneficiaries.** The Plan Document and Summary Plan Description will identify the fiduciary structure of the Plan such that it is clear who exercises fiduciary responsibility for the Plan and Plan assets. In addition, to the extent not already in place, the Plan Document and Summary Plan Description shall provide contact information for participants or beneficiaries with questions regarding the Plan and Plan assets. To the extent not already accomplished by materials prepared by the current Plan record keeper and trustee, Fidelity, Plan materials shall clearly state the importance of diversification, and shall encourage participants to regularly evaluate whether their retirement plan assets are sufficiently diversified to protect against large losses.

6. Released Claims. Section 3 of the Agreement defines the Released Claims. Generally, they are defined as any claims (i) that were or could have been set forth in the Second Amended Complaint; (ii) against the applicable fiduciary liability Insurance Policy (AEGIS Policy No. F0136A1A01); (iii) that would be barred by *res judicata* if the claims actually asserted had been fully litigated and resulted in a final judgment or order; (iv) that pertain to any decision made by any of the Parties to enter into or approve the Settlement Agreement; or (v) that pertain to any conduct related to the direction to calculate, the calculation of, and/or the allocation of the Settlement Amount to the Plan or any participant or beneficiary of the Plan pursuant to the Plan of Allocation. Nothing in the Settlement Agreement shall release, bar, waive, or otherwise affect any claim that has been asserted in *In Re CMS Securities Litigation*, Master File No. 02-CV-72004.<sup>1</sup>

7. Plan Of Allocation. The Settlement Agreement contemplates, subject to the Court's approval, that after payment of Court-approved fees, costs, and Class Representative incentive fees of \$15,000 each, the net Settlement proceeds will be allocated to the Plan accounts of Class members pursuant to a detailed Plan of Allocation that will be submitted to the Court for approval prior to the Fairness Hearing. In general terms, the Net Proceeds will be allocated to Class Members on a pro rata basis such that the amount received by each Class Member will depend on his or her calculated loss, relative to the losses of other Class Members, related to Plan investments in Company stock. In this way, the Plan of Allocation will distribute the Net Proceeds equitably based upon each Class Member's estimated loss.

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<sup>1</sup> Plaintiffs note that in several analogous situations in which both ERISA and securities classes have been certified, and settlement reached, including the WorldCom and Global Crossing cases, among many others, the ERISA class members were not excluded from the securities class, and the recovery in the ERISA case was not applied in whole or to any degree as a set off against the recovery in the securities case. *See, e.g., In re WorldCom, Inc. Sec. Litig.*, 388 F. Supp. 2d 319, 323 (S.D.N.Y. 2005); *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 446, 462-63 (S.D.N.Y. 2004). Moreover, Plaintiffs note that the Settlement Amount in this case is paid exclusively from a fiduciary liability insurance policy that does not provide coverage to any claims in the Securities Action.

8. Notice. A proposed Preliminary Approval Order is filed herewith. The Preliminary Approval Order provides for the following notices:

(a) A mailed notice (Exhibit 2 to this memorandum), to be mailed to the last known address of all Parties and Class members, and to be published on a website established by Class Counsel;

(b) A published summary notice (Exhibit 3 to this memorandum), to be published in USA Today and the Detroit Free Press.

### **III. DISCUSSION**

#### **A. The Settlement Agreement Meets The Judicial Standards For Preliminary Approval Under Rule 23.**

According to Rule 23 of the Federal Rules of Civil Procedure, court approval is required to settle a certified class action: “The court must approve any settlement, voluntary dismissal, or compromise of the claims, issues, or defenses of a certified class.” Fed. R. Civ. P. 23(e)(1)(A).

“There are three steps which must be taken by the court in order to approve a settlement: (1) the court must preliminarily approve the proposed settlement, (2) members of the class must be given notice of the proposed settlement, and (3) after holding a hearing, the court must give its final approval of the settlement.” *In re Telectronics Pacing Sys., Inc.*, 137 F. Supp. 2d 985, 1026 (S.D. Ohio 2001) (citing *Williams v. Vukovich*, 720 F.2d 909, 921 (6th Cir. 1983)).

“[T]he court first must determine whether the proposed settlement is potentially approvable.” *Berry v. Sch. Dist. of Benton Harbor*, 184 F.R.D. 93, 97 (W.D. Mich. 1998). The purpose of this preliminary review is to “ascertain whether there is any reason to notify the class members of the proposed settlement and to proceed with a fairness hearing.” *Id.*

A district court “bases its preliminary approval of a proposed settlement upon its familiarity with the issues and evidence of the case as well as the arms-length nature of the negotiations prior to the settlement.” *In re Telectronics Pacing Sys.*, 137 F. Supp. 2d at 1026. “If the proposed settlement appears to be the product of serious, informed, non-collusive

negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class, and falls within the range of possible approval, then the Court should direct that notice be given to the class members of a formal fairness hearing, at which evidence may be presented in support of and in opposition to the settlement.” *Id.* at 1015 (citing *Manual for Complex Litig.* § 30.44 (2d ed. 1985)).

Here, the parties engaged in arm’s length negotiations over an extended period of time, and the Class was represented by experienced Class Counsel. In addition, the proposed Settlement Agreement ensures substantial and prompt payment to Plan, and ultimately, to Class members in proportion to the amount of CMS stock in their Plan accounts, after Court-approved fees and costs and Class Representative Compensation are deducted. The proposed Settlement Agreement also ensures substantial Plan-wide injunctive relief. This substantial relief is far preferable to the possibility of a smaller recovery or none at all. In short, the proposed Settlement Agreement is an excellent result for the Class, which merits preliminary approval.

**B. Consideration Of Final Approval Criteria Support Preliminary Approval.**

While the Court is not required at this first stage to determine whether it ultimately will approve the proposed Settlement Agreement, to provide a useful guide and expedite the approval process, Class Counsel set forth in this section the reasons why the Court should ultimately approve the Settlement.

Preliminarily, in reviewing a proposed class settlement, the court does “not decide the merits of the case or resolve unsettled legal questions” in evaluating the settlement. *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 88 n.14 (1981); see also, *Brotherton v. Cleveland*, 141 F. Supp. 2d 894, 904 (S.D. Ohio 2001) (citing *Vukovich*, 720 F.2d at 921). The reasons for this are twofold. First, the object of settlement is to avoid, not confront, the determination of contested issues, and the approval process should not be converted into an abbreviated trial on the merits. *Van Horn v. Trickery*, 840 F.2d 604, 607 (8th Cir. 1987) (“the court need not undertake the type of detailed investigation that trying the case would involve”). Second, “[b]eing a preferred

means of dispute resolution, there is a strong presumption by courts in favor of settlement.” *In re Telectronics Pacing Sys.*, 137 F. Supp. 2d at 1008-09 (citing *Manual for Complex Litig.* § 30.42 (3d ed. 1995)). This is particularly true in the case of class actions. *Berry*, 184 F.R.D. at 97 (“It is beyond question that the law generally favors the settlement of class actions.”)

The Court’s inquiry on final approval is thus limited to the consideration of whether the proposed settlement is “fair, adequate, and reasonable to those it affects and whether it is in the public interest.” *Lessard v. City of Allen Park*, 372 F. Supp. 2d 1007, 1009 (E.D. Mich. 2005) (citing *Vukovich*, 720 F.2d 909, 921-23 (6th Cir. 1983)). This determination requires consideration of “whether the interest of the class as a whole are better served if the litigation is resolved by settlement rather than pursued.” *In re Cardizem CD Antitrust Litig.*, 218 F.R.D. 508, 522 (E.D. Mich. 2003) (citing *Manual for Complex Litig.* § 30.42 at 238 (3d ed. 1995)).

Courts in the Sixth Circuit have found the following factors are relevant in determining whether the settlement is fair, adequate, reasonable, and consistent with the public interest:

- (1) the likelihood of success on the merits weighed against the amount and form of the relief offered in the settlement;
- (2) the risks, expense, and delay of further litigation;
- (3) the judgment of experienced counsel who have competently evaluated the strength of their proofs;
- (4) the amount of discovery completed and the character of the evidence uncovered;
- (5) whether the settlement is fair to the unnamed class members;
- (6) objections raised by class members;
- (7) whether the settlement is the product of arm’s length negotiations as opposed to collusive bargaining; and
- (8) whether the settlement is consistent with the public interest.

*In re Cardizem*, 218 F.R.D. at 522 (citing *Granada Invs., Inc. v. DWG Corp.*, 962 F.2d 1203, 1205 (6th Cir. 1992); *Vukovich*, 720 F.2d at 922-23).

Consideration of these criteria demonstrate that the proposed Settlement Agreement is well within the range of possible final approval. As such, the proposed Settlement Agreement fully merits this Court’s preliminary approval.

**1. The Likelihood Of Class Plaintiffs' Success On The Merits Weighed Against The Amount And Form Of The Relief Offered In The Settlement Agreement Favors Approval.**

As evidenced by the vigor with which they have prosecuted the action, and the amount of time and money they have expended toward that end, Class Counsel are optimistic about their ultimate success in this matter. The Court's denial of the Defendants' motions to dismiss on the majority of claims asserted in the Complaint and its grant of class certification are important milestones in this litigation. The passage of these milestones, and the substantial discovery taken prior to the agreement to settle, set the Class on the path to proving the allegations in the Complaint. Class Counsel are nevertheless mindful that the Court's decisions thus far have largely been based upon the allegations in the Complaint rather than a review of the evidence Plaintiffs ultimately expect to present in this case. While Plaintiffs believe strongly that the evidence developed to date supports that each Defendant was a Plan fiduciary and failed to take the actions required by ERISA to protect the Plan and serve participants' best interests, not surprisingly, Defendants have a different view. At trial, the parties' disparate views on the facts and the significance of the facts, along with the extensive expert testimony would be put to the Court for resolution. Plaintiffs believe they will prevail, but, of course, do not know for sure how the case would be decided by the Court once all evidence is presented.

Moreover, Plaintiffs recognize that this is a complex and rapidly developing area of law, and that trials on these issues have been few and far between. As Defendants have noted in their pleadings, the few decisions on summary judgment and adjudications on the merits in this area demonstrate the burdens of proof that Plaintiffs may ultimately face. *See, e.g., Landsgraf v. Columbia/HCA Healthcare Corp. of Am.*, No. 3-98-0090, 2000 U.S. Dist. LEXIS 21831 (M.D. Tenn. May 24, 2000); *Kuper v. Iovenko*, 66 F.3d 1447 (6th Cir. 1995). Plaintiffs believe that, unlike the adverse cases identified by Defendants, their claims would be successful, but, nonetheless, Plaintiffs are aware of the risks of proceeding to trial.

When weighing the likelihood of ultimate success against the amount and form of relief offered in the Settlement Agreement, it is helpful to have an understanding of the damages to the Plan and the Class. In order 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 Litig.* § 30.44, at 252 (2d ed.)). Here, while the amount of the proposed Settlement is fixed (\$28 million plus interest), the amount Plaintiffs could recover if successful, discounted for risk, is not.

Plaintiffs assert that as of the time CMS commenced its massive round-trip trading scheme, it should have divested the Plan of its then existing holdings of CMS stock, and ceased further purchases of the stock. The potential recovery in this case, thus, is based on two distinct types of loss: **holder** losses and **purchaser** losses.

Plaintiffs note at the outset that Defendants dispute the availability of relief for holder losses because, in their view, the securities laws would have prevented them from divesting the Plan of the stock without first publicly disclosing the adverse information, and had such disclosure been made, the stock would have dropped, and the Plan would have suffered the same loss that occurred when the allegedly improper practices came to light. *See, e.g., In re McKesson HBOC, Inc. ERISA Litig.*, No. 00-20030, 2002 US Dist. LEXIS 19473, at \*20-24 (N.D. Cal. Sept. 30, 2002). Plaintiffs strongly disagree with this analysis as it (1) presumes that ERISA (and the securities laws) countenance Plan fiduciaries taking no action to protect the Plan in the face of imprudent conduct by the fiduciaries themselves, and (2) at any rate, ignores that many months after disclosure, CMS’ stock declined precipitously as the Company’s financial condition became increasingly dire. Nonetheless, Plaintiffs recognize that holder damages are sharply attacked by Defendants, and, at least according to Defendants, the law is unsettled in this area.

The second measure of losses, continuing to purchase imprudent stock, is not subject to this attack. This measure of losses has been expressly endorsed by, among others, the Secretary of Labor in the Enron ERISA Litigation. See Amended Brief of the Secretary of Labor As Amicus Curiae Opposing the Motions to Dismiss submitted in *Tittle v. Enron Corp.*, No. 01-3913 (S.D. Tex. Aug. 30, 2002) at § IV.C (published at <http://www.dol.gov/sol/media/briefs/enronbrief-8-30-02partI.htm>). Hence, at least in principle, it is easier to weigh the proposed Settlement amount against the result that could be obtained by Plaintiffs if successful on their imprudent purchase claims.

In calculating both holder and purchaser losses, Plaintiffs are entitled to the amount that a prudent investment would have returned in lieu of the investment in CMS stock. This is consistent with ERISA's goal of "restoring plan participants to the position in which they would have occupied but for the breach of trust." *Eaves v. Penn*, 587 F.2d 453, 462 (10th Cir. 1978); see also *Donovan v. Bierwirth*, 754 F.2d 1049, 1056 (2d Cir. 1985) (explaining that "[o]ne appropriate remedy in cases of breach of fiduciary duty is the restoration of the trust beneficiaries to the position they would have occupied but for the breach of trust") (citing *Restatement (Second) of Trusts* § 205(c) (1959)). Here, but for the imprudent decision to continue holding and purchasing CMS stock, the Plan would have invested in some other investment whose performance must be considered in calculating losses.

Courts are not of one mind in the manner in which they measure other alternative investments and determine losses under ERISA § 409(a). In *Donovan*, 754 F.2d at 1056, the Second Circuit held that "[w]here several alternative investment strategies were equally plausible, the court should presume that the funds would have been used in the most profitable of these. The burden of proving that the funds would have earned less than that amount is on the fiduciaries found to be in breach of their duty. Any doubt or ambiguity should be resolved against them." *Id.* Other courts have measured losses by comparing the performance of the imprudent investment with the amount the plan "would have earned during this period as

measured and adjusted by the movement of an appropriate index reflecting the stock market.” *Dasler v. E.F. Hutton & Co., Inc.*, 694 F. Supp. 624, 634 (D. Minn. 1988). Another common alternative investment often considered when assessing liability in cases such as this one, where the Plan allows investment in cash or other short-term investment vehicles in lieu of Company stock, is a money market account.

Recognizing the wide variety of potential alternative investments that the Court may ultimately find to be appropriate, Plaintiffs’ loss estimates are based on two potential alternative investments at opposite ends of the spectrum: (1) the best performing alternative in the Plan (the Guaranteed Investment Contract (“GIC”)); and (2) the performance of a 3% money market account. Based on the data we have to date, Plaintiffs estimate losses as follows:

**(a) Estimated Holder Losses<sup>2</sup>**

Alternative Investment	Loss
GIC	\$141.96 million
3% Money Market	\$101.91 million

**(b) Estimated Purchaser Losses<sup>3</sup>**

Alternative Investment	Loss
GIC	\$22.75 million
3% Money Market	\$12.2 million

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<sup>2</sup> Holder losses are based on the return that would have been achieved had Defendants sold the Plan’s holdings of CMS stock at the beginning of the Class Period, and invested the proceeds from the sale in one of the two suggested alternative investments, less the current value of the same number of shares held at the beginning of the Class Period and dispositions for which Plaintiffs currently have data during the Class Period.

<sup>3</sup> Plaintiffs’ analysis is based on purchaser data between the beginning of the Class Period (August 2, 2000) and December 31, 2002, which is the only data provided to date by Defendants. Because the price of CMS stock increased significantly after December 31, 2002, the amount of purchaser loss will very likely decrease once data for the remainder of the Class Period is taken into account.

Thus, based on data currently available to Plaintiffs, the maximum amount that Plaintiffs could recover in this case, not discounting for risk, is between approximately \$114.11 million and \$164.71 million. To be clear, based on this analysis, this is Plaintiffs' *maximum* potential recovery. The actual recovery may well be significantly less even if Plaintiffs' establish liability in this case. For example, Plaintiffs face the following risks which could decrease Plaintiffs' potential recovery: (1) the possibility that the price of CMS stock would continue to increase, causing the Plan's losses to decrease accordingly; (2) the use by the Court of a different alternative investment with a lower return than either of the benchmarks suggested above; and (3) a finding that holder losses are not available, or are substantially reduced in light of the impact that disclosure by CMS of its fraudulent activity would have had on the CMS stock price. Defendants, to be sure, can recite other risks as well, all of which taken together make it difficult to calculate with anything approaching precision "the present value of the damages plaintiffs would likely recover if successful." *In re Gen. Motors Corp.*, 55 F.3d at 806. Nonetheless, for purposes of this analysis Plaintiffs note that the Settlement Amount is a substantial recovery for the Plan, which lies somewhere between 17%-25% of what Plaintiffs would recover if entirely successful, and more than 100% if, contrary to Plaintiffs' argument, they only were to recover their purchaser losses. Once Plaintiffs' potential recovery is discounted for risk, the adequacy of the Settlement is even more apparent.

In the end, whether both holder and purchaser losses are considered, or just purchaser losses, the Settlement Amount is well in excess of the range that courts traditionally have found to be fair and adequate under the law. *See, e.g., In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 459 (9th Cir. 2000) (approving settlement with all defendants that comprised one sixth of the plaintiffs' potential recovery); *In re Crazy Eddie Sec. Litig.*, 824 F. Supp. 320, 323 (E.D.N.Y. 1993) (settlement with all but one of the defendants of between 6% and 10% of damages); *cf. Officers for Justice v. Civil Serv. Comm'n. of San Francisco*, 688 F.2d 615, 628 (9th Cir. 1982) (recognizing that complete settlement for a fraction of total potential damages is acceptable,

particularly where other relief is obtained by the class), *rev'd on other grounds, San Francisco Police Officers Ass'n v. San Francisco*, 812 F.2d 1125 (9th Cir. 1987) . As the court explained in *Officers for Justice*, “the very essence of a settlement is compromise, ‘a yielding of absolutes and an abandoning of highest hopes.’” *Id.* at 624 (citations omitted).

In addition, the Settlement Agreement provides substantial Plan-wide equitable relief to the Class in the form of: (a) injunctive relief that allows members of the Class to sell their Plan investments in Company stock for four years; (b) a requirement that CMS provide information to Plan fiduciaries regarding their duties in relation to the Plan; and (c) a requirement that CMS provide Plan fiduciary communications to Class members about their rights in relation to the Plan, and the importance of diversification to prevent large losses.

The non-monetary equitable relief that the proposed Settlement Agreement provides to the Class in addition to the monetary relief increases its fairness, adequacy, and reasonableness. *Officers for Justice*, 688 F.2d at 628 (recognizing that settlement for a fraction of total potential damages is acceptable, particularly where other relief is obtained by the class). In the *Ikon ERISA Litigation*, in fact, the court approved a settlement of similar ERISA claims in which the relief consisted primarily of removing the plan’s restriction on re-allocation of match contributions, and did not include any direct monetary payment to the class. *In re Ikon Office Solutions, Inc.*, 209 F.R.D. 94, 98-99 (E.D. Pa. 2002); *see also In re Providian Fin. Corp. ERISA Litig.*, Master File No. C-01-5027 CRB, 2003 U.S. Dist. LEXIS 26983, at \*6 (N.D. Cal. June 30, 2003) (noting value to the class of removing restrictions on company stock match in 401(k) ERISA breach of fiduciary duty company stock case).

On balance, the Settlement Agreement here easily falls within the range of potential approval because it restores to the Plan and the Class a substantial percentage of the total potential damages in this case and also provides substantial additional equitable relief.

## **2. The Risks, Expenses, And Delay Of Continued Litigation Favor Approval.**

“Settlements should represent a ‘compromise which has been reached after the risks, expense and delay of further litigation have been assessed.’” *Cardizem CD Antitrust*, 218 F.R.D. at 523 (quoting *Vukovich*, 720 F.2d at 922). “[T]he prospect of a trial necessarily involves the risk that Plaintiffs would obtain little or no recovery.” *Cardizem CD Antitrust*, 218 F.R.D. at 523. This is particularly true in the case of class actions, which are “inherently complex”. *Telectronics Pacing Sys.*, 137 F. Supp. 2d at 1013. “[S]ettlement avoids the costs, delays, and multitude of other problems associated with them.” *Id.*

Here, the Class faces two primary sources of risk in establishing their claims on the merits: the risk of establishing liability; and risk of proving damages. As discussed above, Class Counsel are confident in their ability to prevail at trial against the Defendants on liability given the failure of the Defendants to take any meaningful action to protect the Plan from losses as a result of the Plan’s imprudent decisions to continuing holding and purchasing CMS stock when it no longer was a prudent Plan investment. Nonetheless, Plaintiffs recognize the risks that they face and the possibility that the outcome will not be as expected, particularly in a complex class action litigation such as this. Moreover, while Plaintiffs expect to establish substantial losses to the Plan at trial, as noted above, the law in this area is rapidly developing and is in some respects unsettled. Defendants are expected to vigorously challenge Plaintiffs’ loss estimates if the case were to proceed against them on the merits.

In addition, even though Defendants’ misconduct is now old news in the business community, presenting an ERISA case of this type on the merits is a mammoth undertaking, with associated risks, expense, and delay. Furthermore, Defendants have forcefully defended their actions with respect to the Plan to date, and there is no reason to believe they would show any hesitancy to continue to do so through trial and on appeal if necessary. In short, a favorable decision on the merits is not so much a foregone conclusion as to remove the impetus for settlement.

The proposed Settlement Agreement here ensures substantial and prompt payment to the Plan and substantial injunctive Plan-wide relief. This substantial relief is far preferable to the possibility of a smaller recovery or none at all, after an expensive and protracted trial and appeal are completed.

**3. & 4. The Judgment Of Experienced Trial Counsel And The Amount And Character Of Discovery Weigh In Favor Of Approval.**

The Sixth Circuit has observed that “the court should defer to the judgment of experienced counsel who has competently evaluated the strength of his proofs. Significantly, however, the deference afforded counsel should correspond to the amount of the discovery completed and the character of the evidence uncovered.” *Cardizem CD Antitrust Litig.*, 218 F.R.D. at 523 (quoting *Vukovich*, 720 F.2d at 922-23 (internal citations omitted)).

Class Counsel here have extensive experience in handling class action ERISA cases and other complex litigation. Keller Rohrback L.L.P. is a national leader in this area of ERISA litigation. It has served or is serving as lead counsel for the classes in numerous ERISA class action cases, including *In re WorldCom ERISA Litigation*, *In re Enron Corporation Securities & ERISA Litigations*, *In re Global Crossing Ltd. ERISA Litigation*, *In re HealthSouth ERISA Litigation*, *In re Household ERISA Litigation*, *Reinhart v. Lucent Technologies Inc.*, *In re Williams Companies ERISA Litigation*, as well as *In re Delphi ERISA Litigation* and *In re Visteon ERISA Litigation* both of which are currently pending in the Eastern District of Michigan.

Malakoff, Doyle & Finberg, P.C. regularly represents plaintiff classes in contingent class action litigation, who have claims against insurance companies, banks, pension plans, and other institutional defendants. The firm’s members have been appointed to represent numerous classes in state and federal courts. Ellen M. Doyle, named counsel for Malakoff Doyle & Finberg, P.C., has written several ERISA law related publications, including *ERISA Litigation: The View From the Plaintiff’s Side*, 22 *The Barrister* (1991) and *Fiduciaries Beware:*

*Communications Between Administrators and Counsel Are Not Privileged*, 6 Benefits Law Journal 181 (1993). Since 1985, the firm has represented numerous classes of ERISA plan participants. In 1997, the firm filed its first company stock ERISA fiduciary breach case and has represented participants in many such cases since, including *Presley v. CCH* (N.D. Cal.), *Koch v. Dwyer* (S.D. N.Y.), *Blyler v. Agee* (D. Idaho), *Kling v. Fidelity Management Trust Company* (D. Mass.); *DiFelice v. US Airways, Inc.* (E.D. Va.), and *Sherrill v. Federal Mogul Retirement Plan Retirement Committee* (E.D. Mich.).

The McTigue Law Firm of Washington, D.C. was formed in 1997 to represent pension plan participants. It filed one of the first major “Company Stock” ERISA class action, *Blyler v. Agee*, (D. Idaho) and confines itself primarily to the litigation of class actions under federal pension law. The firm has represented over 50,000 pension plan participants and been appointed by the court to represent plaintiff classes in numerous ERISA class actions involving company stock plans including: *In Re McKesson HBOC, Inc. ERISA Litigation* (N.D. Calif. 2000); *Koch v. Dwyer* (S.D.N.Y. 1998); *Presley v. CHH* (N.D. Calif. 1997); and *Blyler v. Agee*. The firm’s founder, Brian McTigue, was previously counsel to committees of the U.S. House of Representatives and the U.S. Senate, where his work involved investigation and legislation pertaining to ERISA and pension fund investment.

Campbell Harrison & Dagley L.L.P. specializes in civil trial matters, with emphasis on business and commercial disputes. The firm represents both plaintiffs and defendants in actions involving business torts, banking, securities, intellectual property, trust and probate, partnership, contract, deceptive trade practices, and employment issues. The firm’s lawyers have extensive and successful trial backgrounds as well as significant experience in ERISA class action litigation.

In addition, the informal and formal discovery conducted, extensive briefing on the motions to dismiss and class certification, and the exhaustive negotiation process have enabled the parties to develop the issues in this case to an appropriate point for settlement. 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 Agreement is in the best interests of the Plan and the Class.

Class Counsel are in a strong position to evaluate the strengths and weaknesses of this case and believe that the Settlement Agreement achieved here is fair, reasonable, and in the best interests of the Plan and the Class. This opinion should weigh heavily in favor of both preliminary and final approval of the Settlement Agreement.

**5. & 6. Few If Any Objections Are Anticipated By Unnamed Class Members Because The Settlement Agreement Provides For A Fair Allocation Of Relief To All Class Members.**

The Court cannot fully assess this factor until a Fairness Hearing has taken place. In this regard, it is notable that a certain number of objections are to be expected in a class action. *Cardizem CD Antitrust Litig.*, 218 F.R.D. at 527. “Although the Court should consider objections to the settlement, the existence of objections does not mean that the settlement is unfair.” *In re Telectronics Pacing Sys.*, 137 F. Supp. 2d at 1018. “If only a small number of objections are received, that fact can be viewed as indicative of the adequacy of the settlement.” *In re Cardizem*, 218 F.R.D. at 527.

Here, Class Counsel expect few, if any, objections to the proposed Settlement Agreement. It provides significant Plan-wide monetary and injunctive relief that will be equitably allocated to the members of the Class after court-approved fees, costs, and Class Representative Compensation are deducted. That allocation is based upon both the amount of the Class members’ losses and the timing of those losses. This approach is fair and reasonable because it takes into account “the relative strength and values of different categories of claims.” *In re Global Crossing Sec. and ERISA Litig.*, 225 F.R.D. 436, 462 (S.D.N.Y. 2004).

**7. The Settlement Agreement Is The Product Of Arm's Length Negotiations, Which Weigh In Favor Of Approval.**

In the absence of evidence to the contrary, a Court should presume that settlement negotiations were conducted in good faith and that the resulting agreement was reached without collusion. *In re Telectronics Pacing Sys., Inc.*, 137 F. Supp. 2d 985, 1018 (S.D. Ohio 2001) (citing Herbert Newberg and Alba Conte, *Newberg on Class Actions* § 11.51 (3d ed. 1992) (“Courts respect the integrity of counsel and presume the absence of fraud or collusion in negotiating the settlement, unless evidence to the contrary is offered.”)). In this case, the evidence amply supports the presumption.

The proposed Settlement Agreement in this case comes after more than three years of hard-fought litigation. The parties began settlement negotiations armed with a wealth of information, including experience from other similar cases, the results of fact discovery, and expert analyses. That information enabled the parties to accurately assess the relative strengths and weaknesses of their positions and the range of potential damage awards. In addition, as described in detail above, the proposed Settlement Agreement is the product of arm's length settlement negotiations amongst the parties in a mediation process overseen by at first former Judge Nicholas Politan, and later Professor Eric D. Green, both experienced and respected mediators. In addition the parties directly engaged in extensive, hard-fought negotiations, ultimately resulting in the Settlement. Moreover, as required by ERISA, the Settlement itself is contingent on the approval by U.S. Trust N.A., which has been retained by the Defendants to serve as an independent fiduciary to the Plan. U.S. Trust's independent evaluation of the Settlement during the approval process is an additional level of protection for the Plan.

**8. The Settlement Agreement's Consistency With Public Interest Favors Approval.**

“[T]here is a strong public interest in encouraging settlement of complex litigation and class action suits because they are ‘notoriously difficult and unpredictable’ and settlement conserves judicial resources.” *Cardizem CD Antitrust Litig.*, 218 F.R.D. at 530 (quoting

*Granada Invs., Inc. v. DW Corp.*, 962 F.2d 1203, 1205 (6th Cir. 1992)). ERISA class actions are no exception. Many courts have noted the particular complexity of ERISA class actions. See, e.g., *In re Enron Corp. Sec., Deriv. 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 . . .”); *In re Ikon Office Solutions, Inc. Sec. Litig.*, 209 F.R.D. 94, 104-07 (E.D. Pa. 2002) (finding that the complexity and duration of litigation of similar breach of fiduciary duty claims, as well as the expense of litigation and risks of establishing liability and damages, weighed heavily in favor of settlement). Settlements are particularly desirable in cases such as this one, where remedial measures must be implemented over extended periods of time. *Berry*, 184 F.R.D. at 97 (W.D. Mich. 1998). There are no contravening public interest justifications present in this litigation for deviating from the strong public interest in settlement of this complex ERISA class action, which provides significant monetary relief to the Class now and important non-monetary injunctive relief. Thus, this factor as well weighs strongly in favor of approval.

**C. The Proposed Notice To The Class Satisfies Rule 23 And Due Process Requirements.**

Once a court grants preliminary approval to a proposed settlement, “[n]otice of the proposed settlement and the fairness hearing must be provided to class members.” *Reed v. Rhodes*, 869 F. Supp. 1274, 1278 (N.D. Ohio 1994) (citing *Vukovich*, 720 F.2d at 921); see also, Fed. R. Civ. P. 23(e)(1)(B), (C).

To satisfy due process, notice to the Class must be “reasonably calculated under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). Substantively, the notice should provide a “very general description[] of the proposed settlement.” *Weinberger v. Kendrick*, 698 F.2d 61, 70 (2d Cir. 1982), *superseded by statute on other grounds as recognized in Glasser v. Cincinnati Milacron, Inc.*, 808 F.2d 285

(3d Cir. 1986) . This description should nevertheless, be sufficient to allow class members “a full and fair opportunity to consider the proposed decree and develop a response.” *Reed*, 869 F. Supp. at 1279 (citing *Vukovich*, 720 F.2d at 921). Procedurally, members of the class must receive the “best notice practical under the circumstances, including individual notice to all members who can be identified through reasonable effort.” *Vukovich*, 720 F.2d at 921. In this regard, where the names and last known addresses of all class members are available from the Defendants’ business records, mailing the notice of the proposed settlement and fairness hearing to the class members at those addresses is the best notice practicable under the circumstances. *Thompson, v. Midwest Found. Indep. Physicians Assoc.*, 124 F.R.D. 154, 157 (S.D. Ohio 1988) (citing *Mullane*, 339 U.S. at 315). Finally, individual circumstances will dictate the length of time between the notice and the reasonableness hearing, but this length of time should be a minimum of two weeks. *Vukovich*, 720 F.2d at 921.

Here, the proposed form of Class Notice describes in plain English the terms and operation the Settlement Agreement, the considerations that caused the Class Representatives and Class Counsel to conclude that the Settlement Agreement is fair and adequate, the maximum counsel fees and class representative compensation that may be sought, the procedure for objecting to the Settlement Agreement, and the date and place of the Fairness Hearing. *See, Newberg on Class Actions* § 8.34 (4th Ed. 2002). With the Court’s approval, the class notice will be mailed to each Class member, no later than 45 days prior to the Fairness Hearing, and will also be published on a website established by Class Counsel. Last known addresses of Class members are available from the business records of CMS. In addition, a summary notice will be published in USA Today and the Detroit Free Press. These proposed forms of notice will fairly apprise Class members of the Settlement and their options with respect thereto, and fully satisfy due process requirements.

#### **IV. CONCLUSION**

For the reasons discussed herein, the Settlement is an excellent result for the Class in this complex and hard-fought ERISA class action. Thus, Class Counsel respectfully request that the Court grant their motion and (i) enter the Preliminary Approval Order, which provides for notice to the Class as described herein, and (ii) set a Fairness Hearing, along with deadlines for Class Counsel to (a) file and serve their motion for award of attorneys' fees and expenses and Class Representative compensation; and (b) file their motion for final approval of the proposed Settlement Agreement and approval of the Plan of Allocation.

Respectfully submitted this 15th day of March 2006.

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