

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

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IN RE: DELPHI CORPORATION : MDL No. 1725
SECURITIES, DERIVATIVE & “ERISA” : Master Case No. 05-md-1725
LITIGATION : Hon. Gerald E. Rosen
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This Document Relates to:
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In re Delphi Corp. ERISA Litigation,
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Nos. 05-CV-70882, 05-70940,
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05-71030, 05-71200, 05-71249,
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05-71291, 05-71339, 05-71396,
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05-71397, 05-71398, 05-71437,
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05-71508, 05-71620, 05-71897,
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05-72198
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**ERISA NAMED PLAINTIFFS’ MOTION FOR FINAL APPROVAL
OF ERISA CLASS ACTION SETTLEMENT, FOR CERTIFICATION OF
SETTLEMENT CLASS, FOR RESERVE FROM GROSS SETTLEMENT FUND FOR
POTENTIAL AWARD OF ATTORNEYS’ FEES AND EXPENSES, AND FOR CASE
CONTRIBUTION AWARDS TO NAMED PLAINTIFFS**

1. Named Plaintiffs Greg Bartell, Kimberly Chase-Orr, Neal Folck, Thomas Kessler, Donald McEvoy, and Irene Polito, through their Counsel, in compliance with Rule 23 of the Federal Rules of Civil Procedure and the requirements of due process, hereby move the Court for entry of an order and judgment granting final approval of the Stipulation and Agreement of Settlement with Certain Defendants – ERISA Actions, (“Settlement Stipulation”) between all Defendants besides State Street Bank and Trust Company (“State Street”) and the Settlement Class,¹ and to award Case Contribution Awards to the Named Plaintiffs. The Settlement

¹ Capitalized terms not otherwise defined in this Motion have the same meaning as ascribed to them in the Settlement Agreement.

Stipulation appears in the record as Exhibit 1 to the Memorandum in Support of ERISA Named Plaintiffs' Motion for Order Preliminarily Approving Settlement, Preliminarily Certifying a Settlement Class, Approving Forms and Methods of Notice, and Setting a Fairness Hearing, filed on August 31, 2007 (Docket No. 228-1) ("Preliminary Approval Memorandum"). An Amended Settlement Stipulation dated October 31, 2007 and filed with the Court on November 1, 2007, is attached for convenience as Exhibit A to the Declaration of Lynn Sarko in Support of (1) Motion for Final Approval of ERISA Class Action Settlement; (2) Approval of Reserve from the Gross Settlement Fund for Potential Award of Attorneys' Fees and Expenses; (3) Approval of Named Plaintiff Case Contribution Awards; and (4) Motion for Approval of Plan of Allocation, filed herewith ("Sarko Decl."). The Amended Settlement Stipulation was filed to address State Street's objection to the Settlement Bar Order, and to correct certain non-substantive typographical errors.

2. By Order dated September 5, 2007, this Court preliminarily approved the Settlement and directed that notice be provided to Class Members in the manner prescribed in the Order Preliminarily Approving Settlement, Preliminarily Certifying a Settlement Class, Approving Forms and Methods of Notice, and Setting a Fairness Hearing ("Preliminary Approval Order") (Dkt. No. 231). In accordance with the Preliminary Approval Order, Lead Counsel has mailed a copy of the Court-ordered Notice of Class Action Settlement ("Class Notice") to all known class members, published the Court-ordered Legal Notice ("Summary Notice") in the *USA Today* (national edition) and the *Detroit Free Press*, and posted the Class Notice on Lead Counsel's website, www.KellerSettlements.com. Sarko Decl. ¶¶ 19-23.

3. The Court provided an opportunity for members of the Settlement Class to file objections and to appear at a fairness hearing, which the Court has set for November 13, 2007.

The deadline for filing objections to the ERISA Settlement was October 30, 2007, and has been extended for certain Class Members, with the Court's permission, until November 27, 2007. As of the November 2, 2007 filing of this motion, only 4 objections have been received by Lead Counsel or filed with the Court, out of a class of 40,000-plus members. Two of these objections (filed by State Street and Class Member Mr. Boyer) have been resolved, and as discussed in the accompanying memorandum, the remaining two objections (filed by Class Members Ms. Geller and Mr. Halazon) should present no bar to the Court's approval of the Settlement as fair, adequate, and reasonable.

4. The Settlement Stipulation was preliminarily approved by the Bankruptcy Court on October 24, 2007. A copy of this Order is attached to the Sarko Decl. as Exhibit C. The Bankruptcy Court will conduct a hearing on final approval of the Settlement Stipulation contemporaneous with its hearing on confirmation of Delphi's proposed plan of reorganization, currently expected to be held on January 10 - 11, 2008.

5. As explained more fully in the accompanying memorandum, final approval of the proposed Settlement should now be granted. Lead Counsel has satisfied the procedural requirements set by the Court for giving Class Members notice and an opportunity to object to the proposed Settlement. There have been no new developments since entry of the Preliminary Approval Order that call into question the Court's preliminary finding that the Settlement and Case Contribution Awards should be approved.

6. Also pending is a separate motion seeking Court approval of the Plan of Allocation, pursuant to which the Net Proceeds of the Settlement Fund are to be distributed pursuant to the Settlement Stipulation. As part of a final resolution of this litigation, Named Plaintiffs respectfully request that the Court grant this motion as well.

WHEREFORE, for the foregoing reasons and those stated in the supporting memorandum, Plaintiffs respectfully request that the Court enter an order granting final approval to the Settlement and certifying the Settlement Class, reserving 25% from the Gross Settlement Fund for a potential award of attorneys' fees and expenses, awarding Case Contribution Awards to the Named Plaintiffs, as well as granting the pending motion for approval of the Plan of Allocation.

Also submitted herewith are (i) a proposed form of Order and Final Judgment which provides for final approval of the Settlement and certification of the Settlement Class, Case Contribution Awards to Named Plaintiffs, and a reserve for a potential award of attorneys' fees and expenses (attached as Exhibit A to this Motion), and (ii) a redline showing the changes from the proposed form of Order and Final Judgment submitted with the Preliminary Approval Memorandum to the proposed form thereof submitted herewith (attached as Exhibit B to this Motion).

Respectfully submitted this 2nd day of November, 2007.

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**ERISA NAMED PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR
FINAL APPROVAL OF ERISA CLASS ACTION SETTLEMENT, FOR
CERTIFICATION OF SETTLEMENT CLASS, FOR RESERVE FROM THE GROSS
SETTLEMENT FUND FOR POTENTIAL AWARD OF ATTORNEYS' FEES AND
EXPENSES, AND FOR CASE CONTRIBUTION AWARDS TO NAMED PLAINTIFFS**

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STATEMENT OF ISSUE PRESENTED

1. Whether the Settlement Stipulation between the parties in this ERISA class action is fair, adequate, and reasonable to those it affects and in the public interest, such that it warrants this Court's final approval.
2. Whether the Court should certify a Settlement Class.
3. Whether the Court should reserve 25% from the Gross Settlement Fund for a potential award of attorneys' fees and expenses.
4. Whether the Court should approve Case Contribution awards to the Named Plaintiffs in the amount of \$5,000.00 each.

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

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

- *In re Cardizem CD Antitrust Litig.*, 218 F.R.D. 508 (E.D. Mich. 2003)
- *In re CMS Energy ERISA Litig.*, No. 02-72834, 2006 U.S. Dist. LEXIS 55836 (E.D. Mich. June 27, 2006)
- *In re CMS Energy ERISA Litig.*, 225 F.R.D. 539 (E.D. Mich. 2004)
- *Rankin v. Rots*, No. 02-71045, 2006 U.S. Dist. LEXIS 45706 (E.D. Mich. June 28, 2006)
- *Rankin v. Rots*, 220 F.R.D. 511 (E.D. Mich. 2004)
- *Williams v. Vukovich*, 720 F.2d 909 (6th Cir. 1983)
- Fed. R. Civ. P. 23

I. INTRODUCTION

By order dated September 5, 2007 (“Preliminary Approval Order”¹), the Court preliminarily certified the Settlement Class in this Action (also referred to herein as the “Class”), appointed the Named Plaintiffs in this ERISA class action to serve as representatives of the Settlement Class, and preliminarily approved the Settlement with the Settling Defendants,² the details of which are set forth in the Settlement Stipulation negotiated by the Parties.³ Pursuant to the Preliminary Approval Order, the Named Plaintiffs now respectfully move the Court for entry of a final order and judgment that approves the Settlement Stipulation, certifies the Settlement Class, reserves 25% from the Gross Settlement Fund for a potential award of attorneys’ fees and expenses, and awards Case Contribution awards to the Named Plaintiffs.⁴

In preliminarily approving the Settlement Stipulation, the Court found that the Settlement should be approved as (a) fair, reasonable and adequate; (b) appearing to be the product of serious, informed, non-collusive negotiations; (c) having no obvious deficiencies; (d) not improperly granting preferential treatment to Class representatives or segments of the class; (e) falling within the range of possible approval; and (f) warranting notice to Class members of a formal fairness hearing,

¹ Capitalized terms not otherwise defined in this Memorandum have the same meaning as ascribed to them in the Settlement Stipulation.

² The Settling Defendants do not include State Street Bank & Trust Co. (“State Street”). Plaintiffs continue to litigate their claims against State Street.

³ The parties have entered into an Amended Settlement Stipulation dated October 31, 2007. The Amended Settlement Stipulation, filed with the Court on November 1, 2007, contains certain modifications to the definitions of “Contribution Credit” and “Indemnification Credit,” and to the provisions of Paragraph 23 of the Settlement Stipulation. These modifications were made to resolve consensually an objection filed by defendant State Street. The Amended Stipulation also effects certain non-substantive corrections to the Settlement Stipulation, and is attached to the Declaration of Lynn Sarko (“Sarko Decl.”), filed herewith, as Exhibit (“Exh.”) A.

⁴ Also pending is a separate motion seeking Court approval of the Plan of Allocation, pursuant to which the Net Proceeds of the Gross Settlement Fund are to be distributed in accordance with the terms of the Settlement Stipulation (the “Plan of Allocation Motion”). A copy of the Plan of Allocation is attached to the Sarko Decl. as Exh. B.

at which evidence may be presented in support of and in opposition to the proposed Settlement.

Preliminary Approval Order ¶ 4.

Since the Court's September 5 preliminary approval of the Settlement Stipulation, Lead Counsel have provided notice to approximately 42,651 Class members, as directed by the Court.⁵ While this method of notice informed Class members of their right to object, Lead Counsel have received only 4 objections to the Settlement, which are discussed in greater detail *infra*.⁶ Lead Counsel have received no objections to the proposed Plan of Allocation, request for a reserve of 25% from the Gross Settlement Fund for a potential award of attorneys fees and expenses, or the award of Case Contribution awards for Named Plaintiffs.

The Settlement is in all respects fair, adequate, reasonable and in the public interest, and, therefore, warrants final approval.

II. SETTLEMENT TERMS AND COMPLIANCE WITH NOTICE REQUIREMENTS

Named Plaintiffs previously set forth a summary of the principal terms of the Settlement Stipulation in the Memorandum in Support of ERISA Named Plaintiffs' Motion for Order Preliminarily Approving Settlement, Preliminarily Certifying a Settlement Class, Approving Forms and Methods of Notice, and Setting a Fairness Hearing ("Prelim. App. Mem.") at 1-5. *See also id.*, Prelim. App. Mem., at Exh. 1 (attaching same)

⁵ As discussed *infra* note 12, an additional notice mailing was sent to 3,129 late-identified Class Members on November 2, 2007. For this group, and with the Court's permission, the objection deadline has been extended until November 27, 2007.

⁶ Lead Counsel has received objections from the following three individuals regarding the Settlement: Steven Boyer; Pamela Geller; and Randy Halazon. Each of these objections has been filed with the Court, and are attached to the Sarko Decl. as Exhs. D-F. Lead Counsel has also received an objection filed by State Street dated October 5, 2007. As discussed *supra* note 3, the parties filed with the Court a stipulated response addressing the State Street objection on November 1, 2007.

In summary, the Settlement Stipulation covers all claims, parties, and defenses asserted against the Settling Defendants, and provides relief to the Class in the form of a Settlement Amount consisting of approximately \$22,500,000 in cash to be paid from available insurance policies, and an allowed interest in the Delphi Corporation Bankruptcy Case in the face amount of \$24,500,000.⁷ As described to the Class in the Notice of Class Action Settlement and Bar Order (the “Class Notice” or “Notice”), in general terms, and as set forth in the motion filed herewith, the Plan of Allocation provides that the net proceeds of the Net Settlement Fund will be allocated to Class Members on a *pro rata* basis such that the amount received by each Class member will be based upon on each Class Member’s proportionate loss from Plan investments in the Delphi and/or GM Stock funds.

In exchange for this substantial relief to the Class, the Settlement Stipulation provides for the release of any claims against the Released Parties that (i) have been asserted in the Delphi ERISA Action, or (ii) that could have been asserted in any forum, including the Bankruptcy Court, by the Class Members or any of them or the successors and assigns of any of them, which arise out of, are based upon, or in any way relate to the allegations, transactions, facts, matters or occurrences, representations or omissions involved, set forth, or referred to in the Delphi ERISA Action. Settlement Stipulation at § 1(kk). The Settlement and dismissal of the Action shall not release, bar or waive (i) any claims, rights or causes of action or liabilities whatsoever related to the enforcement of the Settlement, (ii) any claim that is the subject of the settlement of the Delphi Securities Action and not the subject of the settlement of the Delphi ERISA Action; or (iii) any

⁷ The Settlement Stipulation was preliminarily approved by the Bankruptcy Court on October 24, 2007. *See Sarko Decl., Exh. C.* If the Bankruptcy Court authorizes Delphi to begin soliciting acceptances or rejections of its plan of reorganization by November 21, 2007, as is expected, the confirmation hearing on the Plan, together with a hearing on final approval of the Settlement Stipulation in the bankruptcy court, will occur on January 10 and 11, 2008.

ERISA Section 502(a)(1)(B) claim for individual vested benefits brought by an individual Plan participant or beneficiary. *Id.*

As required by Fed. R. Civ. P. 23, the requirements of due process, and the Preliminary Approval Order, the Class received proper and adequate notice of the Settlement Stipulation, the Fairness Hearing, and the Plan of Allocation Motion. Pursuant to the Preliminary Approval Order, the Class Notice was mailed to the last known address of Class members, as provided by the Company, as well as published on the website maintained by Lead Counsel that was designated in the Notice. Likewise, the Court-Ordered Legal Notice (“Summary Notice”) was published in the *Detroit Free Press* and the *USA Today* (national edition). Sarko Decl. ¶ 22.⁸

III. THE SETTLEMENT CLASS SHOULD BE CERTIFIED

The Court has previously preliminarily certified the Settlement Class, and Plaintiffs now seek final certification of the Settlement Class under Fed. R. Civ. P. 23(b)(1) and/or (b)(2). The Settlement Class is defined as:

all persons (a) who were (1) participants in or beneficiaries of the Salaried Plan, Hourly Plan or ASEC Plan at any time between May 28, 1999 and November 1, 2005, or (2) participants in or beneficiaries of the Mechatronic Plan at any time between June 1, 2001 and November 1, 2005, and (b) whose accounts included investments in the Delphi and/or GM stock funds. Excluded from the Class are (i) the Defendants; (ii) members of the immediate families of each of the Defendants; (iii) any entity in which any Defendant has a controlling interest; (iv) any parent, subsidiary or affiliate of a Defendant; (v) any person who was an officer or director of a Defendant or any of their subsidiaries or affiliates during the Class Period; and (vi) the legal representatives, heirs, predecessors, successors or assigns of any such excluded person or entity.

⁸ Pursuant to the Court’s preliminary approval order, the Final Approval Motion and the Plan of Allocation Motion and supporting documents are being posted on www.KellerSettlements.com 10 days before the Fairness Hearing. Sarko Decl. ¶ 23. In addition, while not expressly required by the Preliminary Approval Order, the Settlement Stipulation, Preliminary Approval Motion and Supporting Papers, and Preliminary Approval Order also were posted on Lead Counsel’s settlement website described in the Notice as a source of information regarding the Settlement.

Preliminary Approval Order ¶ 2.

The Court may certify the Settlement Class upon finding the action satisfies the four prerequisites of Rule 23(a) and one or more of the three subdivisions of Rule 23(b). *See generally Amchem Prods. v. Windsor*, 521 U.S. 591, 619-29 (1997). Class certification is wholly appropriate in a 401(k) company stock case of this sort. *See, e.g., In re Broadwing, Inc. ERISA Litig.*, No. 02-00857, 2006 U.S. Dist. LEXIS 72609, at *20 (S.D. Ohio Oct. 5, 2006) (“The judicial landscape in cases involving alleged violations of fiduciary duties under ERISA, favors class certification appropriate under Fed. R. Civ. P. 23.”); *In re CMS Energy ERISA Litig.*, 225 F.R.D. 539 (E.D. Mich. 2004) (“*CMS Class Cert.*”); *Rankin v. Rots*, 220 F.R.D. 511 (E.D. Mich. 2004) (“*Kmart Class Cert.*”); *In re IKON Office Solutions, Inc. Sec. Litig.*, 191 F.R.D. 457 (E.D. Pa. 2000); Fed. R. Civ. P. 23(b)(1)(B) Advisory Committee’s Note (1966 Amendment) (certification under Rule 23(b)(1) is appropriate in cases charging breach of trust by a fiduciary to a large class of beneficiaries). Moreover, Congress has embraced the use of representative actions to enforce ERISA. *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 142 n.9 (1985) (noting Congress’ clearly expressed intent that ERISA “actions for breach of fiduciary duty be brought in a representative capacity on behalf of the plan as a whole”). Thus, this is precisely the type of case that Rule 23 was enacted to address.

Lead Counsel has addressed these issues previously in its Prelim. App. Mem., and thus addresses them again here only briefly, beginning with the four requirements of Rule 23(a), followed by the requirements of Rule 23(b).

Numerosity – Fed. R. Civ. P. 23(a)(1) requires that the class be “so numerous that joinder of all members is impracticable.” Here, the class is comprised of approximately 45,780 members. *See Sarko Decl. ¶ 20*. While there are no per se rules for establishing numerosity, *Watson v. Shell*

Oil Co., 979 F.2d 1014, 1022 (5th Cir. 1992), where a class is plainly numerous (hundreds or thousands of members), joinder is impracticable, and Rule 23(a)(1) is satisfied. *Bittinger v. Tecumseh Prods. Co.*, 123 F.3d 877, 884 n.1 (6th Cir. 1997). Clearly joinder of all Class members here would be impracticable and Rule 23(a)(1) is satisfied.

Commonality – Fed. R. Civ. P. 23(a)(2) is satisfied where there are “questions of law or fact common to the class.” It does not require that all questions of law or fact be common—a single significant common issue is enough, provided that the resolution of that common issue will advance the litigation. *Kmart Class Cert.*, 220 F.R.D. at 517. Here, Plaintiffs’ allegations that the Defendants breached the fiduciary duties they owed to members of the proposed class by imprudently offering and maintaining investment in the Delphi and/or GM Stock Fund as investment options under the Plans, and by, *inter alia*, imprudently allowing and/or directing the Plans to purchase and hold Delphi common stock, satisfy Rule 23(a)(2). *Id.* at 518 (common questions include, among others, whether Defendants were fiduciaries of the plan and whether defendants breached their fiduciary duties; “claim for breach of the duty of prudence, clearly presents a common issue”).

Under ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2), any plan participant or beneficiary may sue for breach of fiduciary duties “in a representative capacity on behalf of the plan as a whole.” *Mass. Mut. Life Ins. Co.*, 473 U.S. at 142 n.9; *see also Kling v. Fidelity Mgmt. Trust Co.*, 270 F. Supp. 2d 121, 123-24 (D. Mass. 2003) (claim to recover for wrongfully offering employer stock as an investment in a 401(k) plan is properly brought under 502(a)(2)); *Kmart Class Cert.*, 220 F.R.D. at 517; *Ikon*, 191 F.R.D. at 463. Here, essentially all of the issues presented are common: fiduciary status, fiduciary breach, and the measure of the Plans’ losses. As the Court stated in

Ikon, 191 F.R.D. at 465, “the appropriate focus in a breach of fiduciary duty claim is the conduct of the defendants, not the plaintiffs.” This requirement is plainly met.

Typicality – Rule 23(a)(3) requires that proposed class representatives present claims typical of other class members—in other words, class representatives should have the same interests and seek a remedy for the same injuries as other class members. *East Tex. Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977). Here, the Class representatives’ claims are based on the same legal theory and same course of conduct as the claims of other Class members seeking relief under ERISA § 502(a)(2). *See Kmart Class Cert.*, 220 F.R.D. at 518.

Adequacy – Rule 23(a)(4) requires that the proposed class representatives fairly and adequately protect the interests of the class they wish to represent. There are two prongs to this requirement: (i) the class representatives must have common interests with the class members; and (ii) the class representatives must vigorously prosecute the interests of the class through qualified counsel. *Sosna v. Iowa*, 419 U.S. 393, 417 (1975); *Senter v. GMC*, 532 F.2d 511, 525 (6th Cir. 1976). “Based on the language in *Senter*, the Sixth Circuit appears to focus on the adequacy of plaintiff’s counsel and whether plaintiff has a conflicting interest, not the personal qualifications of the named plaintiff.” *Kmart Class Cert.*, 220 F.R.D. at 520. The Named Plaintiffs easily meet this test. They have vigorously prosecuted this case, and their counsel is very experienced in 401(k) company stock litigation. *See id.* at 520-21; *Ikon*, 191 F.R.D. at 466; *see also Sarko Decl.* ¶ 3 & Exh. J.

Rule 23(b)(1) – Under Rule 23(b)(1), 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).

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.” *Ikon*, 191 F.R.D. at 466. Because of ERISA’s distinctive “representative capacity” and remedial provisions, “ERISA litigation of this nature presents a paradigmatic example of a (b)(1) class.” *Kolar v. Rite Aid Corp.*, No. 01-1229, 2003 U.S. Dist. LEXIS 3646, at *9 (E.D. Pa. Mar. 11, 2003). *Accord*, *Kmart Class Cert.*, 220 F.R.D. at 521-23; *CMS Class Cert.*, 225 F.R.D. at 546; *Ikon*, 191 F.R.D. at 466.

Rule 23(b)(2) – A class may be certified under Rule 23(b)(2) if, in addition to meeting the requirements of Rule 23(a), “the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.” Fed. R. Civ. P. 23(b)(2). Here, plaintiffs allege that Defendants breached their fiduciary duties by (among other things) failing to ensure that Delphi stock was a prudent investment for the Plans, and failing to properly monitor fiduciary appointees.

The available remedies include restoration of the Plans’ losses, as well as such other equitable actions the Court finds appropriate. ERISA §§ 502(a)(2) & (3), 29 U.S.C. §§ 1132(a)(2) & (3); ERISA § 409(a), 29 U.S.C. § 1109(a). Indeed, remedies under § 502(a)(2) are by definition plan-wide, a classic example of equitable relief. See, e.g., *Smith v. Provident Bank*, 170 F.3d 609, 616 (6th Cir. 1999) (“ERISA authorizes participants to sue on behalf of a plan for breach of fiduciary duty, see 29 U.S.C.S. § 1132(a)(2) Permitting such suits by participants is the mechanism which Congress established to enforce the plan's right to recover for a breach of

fiduciary duty.” (citing 29 U.S.C.S. §§ 1109(a), 1132(a)). Once the Plans recover through the relief available under ERISA, any consequential financial benefit to individual participants and beneficiaries “would flow directly and incidentally” from the Plans’ recovery. *Bublitz v. E.I. du Pont de Nemours & Co.*, 202 F.R.D. 251, 259 (S.D. Iowa 2001); see also *Berger v. Xerox Corp. Ret. Income Guarantee Plan*, 338 F.3d 755, 763-4 (7th Cir. 2003) (certifying (b)(2) class where ERISA plaintiffs sought declaratory relief, and monetary follow-on relief would be the direct, anticipated consequence of the declaration). Accordingly, Plaintiffs’ claims are also properly certified under Rule 23(b)(2).

Rule 23(g) – Rule 23(g) requires the Court to examine the capabilities and resources of Lead Counsel to determine whether they will provide adequate representation to the class. The Court is aware of the alleged claims, and the time and effort already expended by Lead Counsel to advance these claims. Moreover, Lead Counsel are among the leading firms in the prosecutions of ERISA class actions, and in the types of claims brought in this lawsuit.

In sum, the Settlement Class easily satisfies all the requirement of Rules 23(a), (b)(1), and (b)(2). Named Plaintiffs respectfully ask the Court to grant final class certification pursuant to Fed. R. Civ. P. 23(e) in conjunction with final approval of the Settlement and to confirm Lead Counsel’s previous appointment as Lead Counsel.

IV. THE SETTLEMENT WARRANTS FINAL APPROVAL

The Settlement Stipulation in this action warrants final approval because it is “fair, adequate, and reasonable to those it affects” and “in the public interest.” *Lessard v. City of Allen Park*, 372 F. Supp. 2d 1007, 1009 (E.D. Mich. 2005) (citing *Williams v. Vukovich*, 720 F.2d 909, 921-23 (6th Cir. 1983)).

Courts in the Sixth Circuit have found eight factors relevant in considering 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 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. Prelim. App. Mem. at 6 (citing *Rankin v. Rots*, No. 02-71045, 2006 U.S. Dist. LEXIS 45706, at *9-10 (E.D. Mich. June 28, 2006) (“*Kmart Final Approval*” (collecting cases)); see also *In re Cardizem CD Antitrust Litig.*, 218 F.R.D. 508, 522 (E.D. Mich. 2003) (citing *Granada Invs., Inc. v. DWG Corp.*, 962 F.2d 1203, 1205 (6th Cir. 1992)); *Vukovich*, 720 F.2d at 922-23.

Plaintiffs previously detailed the factual and legal bases for finding that the Settlement Stipulation satisfied the eight final approval considerations, noting that the final approval criteria lent further support to preliminary approval of the Settlement. Prelim. App. Mem. at 6-13. Two of those considerations (fairness to the Class and objections by Class members) could not be fully assessed until the requirements of Rule 23 and due process had been satisfied and are addressed here, along with a brief discussion of the other criteria.

1. The Likelihood of Plaintiffs’ Success on the Merits Weighed Against the Amount and Form of the Relief Offered in the Settlement Stipulation Favor Final Approval.

Plaintiffs are optimistic about their ultimate success in this matter. They believe strongly that the legal arguments advanced by the Settling Defendants in the pending motions to dismiss

will fail, and that the evidence will support Plaintiffs' theories of liability and damages. Defendants, however, have advanced a different view. Plaintiffs anticipate Defendants would continue to advance this view forcefully through trial and appeal if necessary. Defendants are represented by highly experienced and competent counsel. Accordingly, Plaintiffs acknowledge the risk that Defendants could prevail with respect to certain legal or factual issues, which could result in the reduction or elimination of Plaintiffs' potential recovery.

Indeed, risk is inherent in any litigation, particularly class actions. The risk is even more acute in an ERISA class action, one of the most complex and rapidly developing areas of the law. Trials on these issues have been few and far between. 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., Kuper v. Iovenko*, 66 F.3d 1447 (6th Cir. 1995); *Nelson v. IPALCO Enters., Inc.*, 480 F. Supp. 2d 1061 (S.D. Ind. 2007); *DiFelice v. U.S. Airways, Inc.*, 436 F. Supp. 2d 756 (E.D. Va. 2006), *aff'd*, 497 F.3d 410, (4th Cir. 2007).

As a result, success is far from certain. Further, while the amount of the proposed Settlement is fixed at a substantial amount (approximately \$47 million, consisting of \$22,500,000 in cash and an allowed interest in the Delphi bankruptcy anticipated to have a value of approximately \$24,500,000), the amount Plaintiffs could recover if successful, discounted for risk, is not. Finally, Plaintiffs will proceed in this litigation against the non-settling defendant, State Street, which was the fiduciary and investment manager with respect to the Delphi and GM stock funds. While Plaintiffs recognize that their claims against State Street face many of the same risks as those discussed herein with respect to the settled claims, they believe that they will prevail on those claims and will thereby recover material additional amounts for the Class.

2. The Risks, Expense, and Delay of Further Litigation Favors Final Approval.

“The obvious costs and uncertainty of such lengthy and complex litigation weigh in favor of settlement.” *UAW v. GMC*, No. 05-73991, 2006 U.S. Dist. LEXIS 14890, at *54 (E.D. Mich. Mar. 31, 2006). Notably, several courts have recognized the high degree of complexity of ERISA class actions of this type. *See, e.g., Kmart Final Approval*, 2006 U.S. Dist. LEXIS 45706, at *11. “Settlements should represent ‘a compromise which has been reached after the risks, expense and delay of further litigation have been assessed.’” *Cardizem*, 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.” *Id.* at 523. This is particularly true for class actions, which are “inherently complex.” *In re Telectronics Pacing Sys., Inc.*, 137 F. Supp. 2d 985, 1013 (S.D. Ohio 2001). “[S]ettlement avoids the costs, delays, and multitude of other problems associated with them.” *Id.*

Presenting an ERISA case of this type on the merits is a mammoth undertaking, with extensive associated risk, expense, and delay. Here, Plaintiffs face risk in connection with the legal arguments raised by Defendants’ pending motions to dismiss, in connection with establishing the factual bases to support their legal theories, in proving damages, and in collecting any amount that is ultimately awarded. As discussed above, while Plaintiffs are confident with respect to the prospects of their claims, they recognize the risks they face and the possibility that the outcome will not be as expected, particularly in a complex class action such as this.

ERISA litigation of the type presented here is a rapidly evolving and demanding area of the law. New precedents are issued almost weekly, and the demands on counsel and the Court are complex and require the devotion of significant resources. As noted above, Plaintiffs expect that Defendants would continue their vigorous defense of this case through trial and a probable appeal regardless of the trial’s outcome. The Settlement obviates that delay and will, if approved,

advance the recovery to the Plans by any number of years. Thus, this factor also speaks strongly in favor of preliminary approval of the proposed Settlement.

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 ensures substantial and prompt payment to the Plans. This relief is 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.

In deciding whether a proposed settlement warrants approval, “[t]he Court should also consider the judgment of counsel and the presence of good faith bargaining between the contending parties.” Prelim. App. Mem. at 10 (quoting *Kmart Final Approval*, 2006 U.S. Dist. LEXIS 45706, at *9).

Plaintiffs’ Counsel has extensive experience in handling class action ERISA cases and other complex litigation. Lead Counsel Keller Rohrback L.L.P. is a national leader in the area of ERISA litigation. It has served or is serving as lead or co-lead counsel for the classes in numerous ERISA class action cases, including *In re Enron Corporation ERISA Litigation*, and other nationally-significant actions, both within this District and throughout the country.⁹

Plaintiffs and the Settling Defendants litigated for almost two years before entering into the Settlement Stipulation. During this time, Plaintiffs’ Counsel conducted an extensive investigation and the parties briefed and contested a motion to dismiss before reaching agreement on the Settlement. In addition, Lead Counsel has obtained hundreds of thousands of pages of

⁹ Both *Visteon* and *CMS* were resolved through negotiated settlement approved by courts in this district. *In re CMS ERISA Litig.*, No. 02-72834, 2006 U.S. Dist. LEXIS 55836 (E.D. Mich. June 27, 2006); *In re Visteon Corp. ERISA Litig.*, No. 05-71205, Slip Op. (E.D. Mich. March 9, 2007) (Order and Final Judgment).

documents, including Plan governing documents and materials, communications with plan participants, internal Delphi documents regarding the Plans, Delphi's SEC filings, press releases, public statements, news articles, insurance policies, documents and pleadings filed in the Delphi bankruptcy proceedings, and documents that Delphi and other ERISA and Securities Defendants produced to the SEC regarding Delphi's financial status and alleged fraudulent financial transactions during the Class Period.¹⁰ Plaintiffs' attorneys have conducted an extensive review and analysis of these materials, enabling them to determine key issues regarding the nature of the Plans and the liabilities of various Defendant fiduciaries. Finally, the parties engaged in multiple days of formal mediation, which also allowed the parties to fully explore their respective factual and legal positions. As one court confirmed, "although this settlement came early on – prior to the completion of formal discovery – it is clear that plaintiffs 'have conducted sufficient informal discovery and investigation to . . . evaluate [fairly] the merits of Defendants' positions during settlement negotiations.'" *In re MicroStrategy, Inc. Sec. Litig.*, 148 F. Supp. 2d 654, 664-65 (E.D. Va. 2001) (citation omitted).

In short, these factors support final approval because Lead Counsel's decision to support settlement of the litigation on the terms set forth in the Settlement Stipulation was reached after extensive consideration of the facts obtained through discovery and an evaluation of this information in light of the current state of the law by counsel well versed in this novel and complex area of the law.

¹⁰ Although the amount of discovery completed is a factor to be considered in the settlement approval process, there is no minimum or definitive amount of discovery that must be undertaken to satisfy this factor. *In re Jiffy Lube Sec. Litig.*, 927 F.2d 155, 159 (4th Cir. 1991). Indeed, discovery may not be necessary at all for the parties to fully evaluate the merits of the Plaintiffs' claims. *Id.* (approving settlement after four months of litigation and prior to any formal discovery).

5. & 6. The Lack of Substantive Objections From Class Members Supports the Fairness of the Settlement Stipulation.

Here, despite having received notice and the opportunity to be heard, as provided for in the Preliminary Approval Order, only three Class Members, Steven Boyer, Pamela Geller, and Randy Halazon, have served on Lead Counsel an objection to the Settlement.¹¹ Mr. Boyer's Objection expressed concern that Class Members would not receive full recovery for their losses. After a lengthy conversation with Lead Counsel explaining the risks of further litigation against the Settling Defendants, and the fact of ongoing litigation against State Street, Mr. Boyer withdrew his Objection.

Pamela Geller, a former Delphi officer and employee, filed an Objection to Settlement Order on October 28, 2007. In her Objection, Ms. Geller asserts that she is "qualified . . . for recovery and reimbursement" under National Union insurance policies nos. 931-88-56 and 931-88-61. Geller Objection (Sarko Decl. Exh. E) ¶ 2. Ms. Geller asserts that "[u]nder the terms of Paragraph 23 of the Bar Order," her rights under the policies would be extinguished. *Id.* at ¶ 5.

The proposed Final Order does not even contain a Paragraph 23. To the extent that Ms. Geller's objection is directed to a proposed order or the provisions of some other filing submitted in the Delphi bankruptcy case, such as the Insurance Stipulation referenced in her submission, her objection is misplaced in these proceedings and need not be considered by the Court at the Fairness Hearing. If Ms. Geller believes that filings in the bankruptcy court may affect her right to recover current or potential legal fees, the Fairness Hearing is not the proper forum for her to seek

¹¹ These objections are attached as Exhs. D - F to the Sarko Decl. In addition, three Class Members – Donald Egbert, John Montecalvo, and James Spencer – served statements on Lead Counsel expressing concerns or questions about aspects of the Settlement. Lead Counsel has spoken with these Class Members, and resolved their inquiries. *See* Sarko Decl. Exhs. G - I.

relief. If Ms. Geller articulates a basis on which the proposed Final Order here is prejudicial to her, Named Plaintiffs reserve the right to respond further to her objection.

Finally, Randy Halazon objected to the settlement based on his concern that it is “woefully under funded [sic].” Halazon Obj. (Sarko Decl., Exh. F) at 2. Mr. Halazon believes that a higher settlement is warranted in light of what he considers to be a fraudulent bankruptcy. Lead Counsel has spoken with Mr. Halazon and explained the risks of proceeding to trial versus the substantial benefits of a settlement now, as well as the ongoing litigation against State Street. Mr. Halazon appeared to understand these relative risks and the ongoing litigation, but expressed his belief that he seeks a recovery above and beyond the amount lost by the Plans. While Lead Counsel understands Mr. Halazon’s wish that the Settlement obtained at this time were greater, as discussed in detail above, given the risks inherent in litigation and the excellent recovery represented by the Settlement, Mr. Halazon’s Objection should not change the Court’s conclusion that the Settlement is fair, reasonable, and in the best interests of the Class.

The absence of any substantive objections to the Settlement Stipulation, to the reserve of 25% from the Gross Settlement Fund for a potential award of attorneys’ fees and expenses or to the request for an award of Case Contribution awards for the Named Plaintiffs, from the 40,000-plus Settlement Class members to whom the Notice was mailed, is strong evidence of the high regard of the Class for the results achieved in this case.¹² See Prelim. App. Mem. at 12 (citing *In re Cardizem*, 218 F.R.D. at 527); see also *Kmart Final Approval*, 2006 U.S. Dist. LEXIS 45706,

¹² As the Court is aware, an additional mailing was sent on Nov. 2, 2007, to a group of 3,129 late-identified Class Members. For Class Members receiving this later notice, they have been advised that as to them, they may file any objection to the Settlement by Nov. 27, 2007. Lead Counsel will submit an affidavit of mailing before the Nov. 13, 2007 Final Approval Hearing to apprise the Court of the status of both mailings.

at *12 (the fact that a similar notice program elicited objections from about 0.002% of the class translated into “overwhelming[] support[]” of the settlement). Even if a vociferous opposition should later be lodged by a vocal minority of class members, however, a reviewing court has the obligation to “protect the interests of the silent class majority” in approving a settlement that it deems to be fair, reasonable, adequate and in the public interest. *UAW*, 2006 U.S. Dist. LEXIS 14890, at *61 (citation omitted).

If any additional communications, including actual objections, are lodged prior to the Fairness Hearing or through the extended objection deadline of Nov. 27, 2007 for certain Class Members, Lead Counsel will address such communications at the Fairness Hearing and/or in a supplemental approval memorandum. Lead Counsel for the Settlement Class is proud of its accomplishments in this case, and we are prepared to explain the benefits achieved to the Court and to any other interested party.

7. The Settlement Stipulation 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. *Telectronics*, 137 F. Supp. 2d at 1018 (citing HERBERT NEWBERG & 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.

Lead Counsel has extensive experience in handling class action ERISA cases and other complex litigation, having successfully prosecuted, and defended, dozens of class actions in state and federal courts throughout the nation, including many of the significant cases in this rapidly developing area of ERISA law.

The Settlement was reached after vigorous motion practice and arm's-length negotiations, including an extensive multi-day mediation conducted by the Court-Appointed Master for Settlement Negotiations, the Honorable Layn R. Phillips. With the information gathered by the parties, including experience from similar cases, and the results of investigation, Lead Counsel was well-equipped to accurately assess the relative strengths and weaknesses of their positions and the range of potential damage awards.

8. The Public Interest Warrants Approval of This Agreement.

The Settlement Stipulation serves the public interest by resolving against the Settling Defendants a lawsuit that affects the retirement security of thousands of Delphi employees. “Encouraging qualified counsel to bring inherently difficult and risky but beneficial class actions like this case benefits society.” *In re Cardizem*, 218 F.R.D. at 534. “[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.” *Id.* at 530 (quoting *Granada*, 962 F.2d at 1205). As explained in the Prelim. App. Mem., this comment is particularly apt with respect to this ERISA action, which concerns a complex and rapidly developing area of law, and has been hard-fought. *See* Prelim. App. Mem. at 13.

No contravening public interest justifies deviating from the strong public interest in the final approval of the Settlement Stipulation in this complex ERISA class action, which provides significant and immediate monetary relief to the Class. Accordingly, the Settlement is fully consistent with the public interest. Taken together, each of the factors applied in the Sixth Circuit to evaluate the fairness of a class action settlement support final approval of the Settlement achieved in this case.

V. A RESERVE FROM THE GROSS SETTLEMENT FUND FOR POTENTIAL AWARD OF ATTORNEYS' FEES AND EXPENSES SHOULD BE APPROVED

Lead Counsel respectfully asks that the Court reserve 25% from the Gross Settlement Fund for a potential award of attorneys' fees and expenses, in accordance with ¶ 13 of the Settlement Stipulation. Upon conclusion of this case, Lead Counsel will submit a detailed application for attorneys' fees and expenses to the Court. To date, Lead Counsel have received no objections to the reserve from the Gross Settlement Fund, and therefore ask the Court to grant final approval of the reserve from the Gross Settlement Fund for a potential award of attorneys' fees and expenses.

As will be detailed further by Lead Counsel at the time a request for attorneys' fees and expenses is made, an award of up to 25% of the Gross Settlement Fund for a potential award of attorney's fees and expenses is reasonable in light of the risk and complexity of this action. Courts have routinely granted attorney fee requests in the range of 25% or greater for complex ERISA actions such as this, and such an award would be commensurate with the skill, labor, and expense required to litigate this complex and hard-fought action to a successful resolution against the Settling Defendants. *See, e.g., In re Visteon Corp. ERISA Litig.*, No. 05-71205 (E.D. Mich. Mar. 9, 2007) (28% of \$7.6 million settlement fund); *In re CMS Energy Corp. ERISA Litig.*, No. 02-72834 (E.D. Mich. June 27, 2006) (28.5% of \$28 million settlement fund); *In re Polaroid ERISA Litig.*, No. 03-8335, 2007 U.S. Dist. LEXIS 51983 (S.D.N.Y. July 19, 2007) (28% of \$15 million settlement fund); *In re ADC Telecomms., Inc., ERISA Litig.*, No. 03-2989 (D. Minn. Oct. 16, 2006) (30% of \$3.25 million settlement); *In re Westar Energy, Inc., ERISA Litig.*, No. 03-4032 (D. Kan. July 27, 2006) (30% of \$9.25 million settlement); *Kling v. Fidelity Mgmt. Trust Co.*, No. 01-11939 (D. Mass. June 29, 2006) (30% of \$10.85 million settlement fund); *In re Household Int'l, Inc. ERISA Litig.*, No. 02-7921 (N.D. Ill. Nov. 22, 2004) (30% of \$46.5 million settlement fund).

VI. CASE CONTRIBUTION AWARDS TO NAMED PLAINTIFFS SHOULD BE APPROVED

Each of the Named Plaintiffs has been actively involved in this litigation by providing their plan related documents, reviewing case documents, and consulting with their attorneys and Lead Counsel throughout the litigation and settlement process. Lead Counsel have received no objections to awarding Case Contribution awards, and accordingly, the six Named Plaintiffs respectfully ask the Court to grant final approval of their Case Contribution awards in the amount of \$5,000.00 each.

VII. CONCLUSION

After hard-fought litigation in a difficult and complex case, a Settlement has been achieved that will provide substantial and meaningful relief to the Class. Lead Counsel respectfully submit that the Settlement should be approved, the Settlement Class should be certified so that this relief may be provided to the Class, that a reserve of 25% from the Gross Settlement Fund be approved for a potential award of attorneys' fees and expenses, and that the Named Plaintiffs be awarded Case Contribution awards in the amount of \$5,000.00 each. Accordingly, Named Plaintiffs' motion for final approval should be granted. In addition, for the reasons set forth separately in the motion seeking approval of the Plan of Allocation, Lead Counsel asks that the pending Plan of Allocation Motion be granted as well.

Respectfully submitted this 2nd day of November, 2007.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on November 2, 2007, I electronically filed the forgoing document with the Clerk of the Court using the ECF system which will send notification of such filing to Jeffrey J. Angelovich, Dennis M. Barnes, Stuart Baskin, Bradley E. Beckworth, Frances Bivens, Wilber H. Boies, Patrick E. Cafferty, Michael P. Coakley, John P. Coffey, Timothy A. Duffy, Robert N. Eccles, Christopher H. Giampapa, Gary S. Gaifman, Stuart M. Grant, Hannah E. Greenwald, Sean M. Handler, Fred K. Hermann, Clark C. Johnson, Steven W. Kasten, Howard T. Longman, Mathew J. Lund, Sara L. Madsen, J. Brian McTigue, Jonathan E. Moore, Jodi L. Murland, Marc L. Newman, Sharan Nirmul, Joseph E. Papelian, Debra B. Pevos, Abraham Rappaport, John W. Reale, Richard A. Rossman, James J. Sabella, Williams A. Sankbeil, Sherrie R. Savett, Scott T. Seabolt, Elwood S. Simon, Andrew W. Stern, Jane B. Stranch, Ruth H. Swartout, W. Scott Turnbull, James D. VandeWyngearde, Stephen F. Wasinger, Susan Whatley, Jill M. Wheaton, Michael K. Yarnoff, and John P. Zuccarini and I hereby certify that I have mailed, via first-class U.S. mail, the foregoing documents to the following non-ECF participants:

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