

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

\_\_\_\_\_) )  
IN RE VISTEON CORP. ERISA LITIGATION) Case No. 05-71205 (AC) (DAS)  
\_\_\_\_\_) )  
\_\_\_\_\_)

**NAMED PLAINTIFFS' MOTION FOR FINAL APPROVAL  
OF ERISA CLASS ACTION SETTLEMENT**

1. Pursuant to Fed. R. Civ. P. 23 and the requirements of due process, Named Plaintiffs/Class Representatives David Maran and Onie Moore hereby move the Court for entry of an order and judgment granting final approval of the Class Action Settlement Agreement (“Settlement Agreement”) between all parties and the certified Class.<sup>1</sup> The Settlement Agreement appears in the record as Exhibit 1 to Plaintiffs’ Memorandum in Support of Motion for Order Preliminarily Certifying Settlement Class, Granting Preliminary Settlement Approval, Approving Form and Method of Notice, and Setting a Date and Time for Fairness Hearing on Final Approval, filed on November 22, 2006 (Docket No. 46) (“Preliminary Approval Memorandum”) and 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) Class Counsel’s Motion for Award of Attorneys’ Fees, Reimbursement of Expenses and Award of

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

Compensation to Class Representatives; and (3) Motion for Approval of Plan of Allocation, filed herewith (“Sarko Declaration” or “Sarko Decl.”).

2. By an order dated December 12, 2006, this Court preliminarily approved the Settlement and directed that notice be provided to Class members in the manner prescribed in the Findings and Order Preliminary Certifying Settlement Class, Granting Preliminary Settlement Approval, Approving Form and Method of Notice, and Setting a Date and Time for Fairness Hearing in Final Approval (“Preliminary Approval Order”) (D.I. No. 48). In accordance with the Preliminary Approval Order, Class 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 Detroit Free Press, and posted the Class Notice on Class Counsel’s website, [www.KellerSettlements.com](http://www.KellerSettlements.com). Sarko Decl. ¶¶ 64-68; see also Declaration of Gene D. Kennedy re: Notice Mailing and Affidavit of Publishing, submitted by Dorianna Phillips, copies of which are attached to Sarko Decl. as Exhibits F and G, respectively.

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 March 9, 2007. As of the February 19, 2007 deadline for filing and receipt by counsel of objections, no objections had been received by Class Counsel or filed with the Court, out of a class of more than 10,000 members. On February 21, 2007, Class Counsel received a letter from Mr. Ed Kwiecinski that purports to “reject the settlement,” but does not pertain to the claims alleged in this Action or address or object to the Settlement terms. Rather, Mr. Kwiecinski opines that “Visteon should never have been created the way it was,” and “petition[s] . . . the court . . . to open up the secret warranties from the Japanese transplants.” A copy of Mr. Kwiecinski’s letter, which appears to

have also been filed with the court on February 21, 2007, is attached as Exhibit H to the Sarko Decl.

4. As explained more fully in the memorandum accompanying this Motion, final approval of the proposed Settlement should now be granted. Class Counsel have 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 should be approved.

5. Also pending are separate motions seeking Court approval of (a) the Plan of Allocation, pursuant to which the Net Proceeds of the Settlement Fund are to be distributed pursuant to the Settlement Agreement; and (b) an award of compensation to Class Counsel and the Named Plaintiffs. As part of a final resolution of this litigation, Named Plaintiffs respectfully request that the Court grant those motions 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, as well as granting the pending motion for approval of the Plan of Allocation and award of compensation to Plaintiffs' Counsel and the Named Plaintiffs.

A proposed form of Order and Final Judgment, in substantially the same form as submitted with the Preliminary Approval Memorandum, and which provides for final approval of the Settlement, Plan of Allocation, and request for attorneys' fees, reimbursement of expenses and award of compensation to the Named Plaintiffs/Class Representatives, is submitted herewith.

Respectfully submitted this 27th day of February, 2007.

KELLER ROHRBACK L.L.P.

By: s/ Lynn Lincoln Sarko

Lynn Lincoln Sarko  
Elizabeth A. Leland  
Erin M. Riley  
1201 Third Avenue, Suite 3200  
Seattle, WA 98101-3052  
(206) 623-1900  
lsarko@kellerrohrback.com  
bleland@kellerrohrback.com  
eriley@kellerrohrback.com

**Lead Counsel for Plaintiffs**

Joseph Meltzer  
Gerald D. Wells, III  
SCHIFFRIN BARROWAY TOPAZ  
& KESSLER, LLP  
280 King of Prussia Road  
Radnor, PA 19087  
(610) 667-7706  
jmeltzer@sbtclaw.com  
gwells@sbtclaw.com

Michael Lieder  
Mark Amadeo  
SPRENGER & LANG, PLLC  
1400 Eye Street, N.W. Suite 500  
Washington, DC 20005  
(202) 265-8010  
mlieder@sprengerlang.com  
mamadeo@sprengerlang.com

**Plaintiffs' Executive Committee Counsel**

Stephen Wasinger  
STEPHEN F. WASINGER PLC  
32121 Woodward Avenue, Suite 300  
Royal Oak, Michigan 48073  
(248) 544-6306  
sfw@sfwlaw.com  
Michigan Bar No. (P-25963)

**Plaintiffs' Liaison Counsel**

**CERTIFICATE OF SERVICE**

I, Cathy A. Hopkins, hereby certify that a true and correct copy of the foregoing:

**NAMED PLAINTIFFS' MOTION FOR FINAL APPROVAL OF ERISA  
CLASS ACTION SETTLEMENT;**

**NAMED PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR  
FINAL APPROVAL OF ERISA CLASS ACTION SETTLEMENT;**

are being served this date upon all involved parties by sending a copy of the same to all counsel listed on the attached service by electronic notification or first-class mail, postage pre-paid.

Dated: February 27, 2007.

By: Cathy A. Hopkins  
Cathy A. Hopkins, Legal Assistant  
Keller Rohrback L.L.P.  
1201 Third Avenue, Suite 3200  
Seattle, WA 98101-3052  
Telephone: (206) 623-1900  
Fax: (206) 623-3384  
chopkins@kellerrohrback.com

**Electronic Notification**

<p>Jenice C. Mitchell (P61511) John R. Trentacosta (P31856) Scott T. Seabolt <b>FOLEY &amp; LARDNER LLP</b> One Detroit Center 500 Woodward Avenue, Suite 2700 Detroit, MI 48226-3489 <a href="mailto:jmitchell@foley.com">jmitchell@foley.com</a></p> <p><b>Counsel for Defendants Visteon Corp., Marla Gottschalk, Steven K. Hamp, Kathleen T. Hempel, Thomas Stallkamp, Robert M. Teeter, Kenneth R. Woodrow, Peter Pestillo, Michael F. Johnston, Robert H. Jenkins, Charles L. Schaffer, Daniel Coulson, William H. Gray III, Karl Krapek, Patricia L. Higgin, James D. Thornton, and Anjan Chatterjee (collectively the “non-Committee Defendants”)</b></p>	<p>John F. Hartmann Michael A. Duffy <b>KIRKLAND &amp; ELLIS, LLP</b> 200 East Randolph Drive Chicago, IL 60601 <a href="mailto:maduffy@kirkland.com">maduffy@kirkland.com</a></p> <p><b>Counsel for Defendants Visteon Corp., Marla Gottschalk, Steven K. Hamp, Kathleen T. Hempel, Thomas Stallkamp, Robert M. Teeter, Kenneth R. Woodrow, Peter Pestillo, Michael F. Johnston, Robert H. Jenkins, Charles L. Schaffer, Daniel Coulson, William H. Gray III, Karl Krapek, Patricia L. Higgin, James D. Thornton, and Anjan Chatterjee (collectively the “non-Committee Defendants”)</b></p>
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**Via U.S. MAIL**

<p>Paul J. Ondrasik, Jr. <b>STEPTOE &amp; JOHNSON LLP</b> 1330 Connecticut Avenue NW Washington, D.C. 20036</p> <p><b>Liaison Counsel For Committee Defendants, Defendants: John Cavanaugh, David Doster, Derek Fiebig, John F. Kill, Peter Look, Robert H. Marcin, David Peace, Barbara Quilty, Darren Wells and Mary Winston</b></p>	<p>Lawrence F. Campbell Thomas G. McNeil <b>DICKINSON WRIGHT PLLC</b> One Detroit Center 500 Woodward Avenue, Suite 4000 Detroit, MI 48226</p> <p><b>Local Counsel for Committee Defendants: John Cavanaugh, David Doster, Derek Fiebig, John F. Kill, Peter Look, Robert H. Marcin, David Peace, Barbara Quilty, Darren Wells and Mary Winston</b></p>
<p>Ed Kwiecinski 12500 Tech Drive Livonia, MY 48150</p>	

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

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**NAMED PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR  
FINAL APPROVAL OF ERISA CLASS ACTION SETTLEMENT**

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## **STATEMENT OF ISSUE PRESENTED**

Whether the Settlement Agreement 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 and whether Settlement Class should be certified.

**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) (“*CMS Final Approval*”)
- *In re CMS Energy ERISA Litig.*, 225 F.R.D. 539 (E.D. Mich. 2004) (“*CMS Class Cert.*”)
- *In re IKON Office Solutions, Inc. Sec. Litig.*, 209 F.R.D. 94 (E.D. Pa. 2002)
- *Rankin v. Rots*, No. 02-71045, 2006 U.S. Dist. LEXIS 45706 (E.D. Mich. June 28, 2006) (“*Kmart Final Approval*”)
- *Rankin v. Rots*, 220 F.R.D. 511 (E.D. Mich. 2004) (“*Kmart Class Cert.*”)
- *Williams v. Vukovich*, 720 F.2d 909 (6th Cir. 1983)
- Fed. R. Civ. P. 23

## I. INTRODUCTION

By order dated December 12, 2006 (“Preliminary Approval Order”<sup>1</sup>), 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, the details of which are set forth in the Settlement Agreement negotiated by the Parties. Pursuant to the Preliminary Approval Order, the Named Plaintiffs now respectfully move the Court for entry of a final order and judgment, finally certifying the Settlement Class and approving the Settlement Agreement.<sup>2</sup>

In preliminarily approving the Settlement Agreement, the Court found that the Settlement should be approved as (a) appearing on its face to be 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, at which evidence may be presented in support of and in opposition to the proposed Settlement.

Preliminary Approval Order, ¶ 3.

Since the time that the Court preliminarily approved the Settlement Agreement, Class Counsel have provided notice to the approximately 10,000 Class members, as directed by the Court. While this method of notice informed Class members of their right to object, Class Counsel have received only one objection to the Settlement, which does not specifically address or

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<sup>1</sup> Capitalized terms not otherwise defined in this Memorandum have the same meaning as ascribed to them in the Settlement Agreement.

<sup>2</sup> Also pending are separate motions seeking Court approval of (a) the Plan of Allocation, pursuant to which the Net Proceeds of the Settlement Fund are to be distributed in accordance with the terms of the Settlement Agreement (the “Plan of Allocation Motion”); and (b) an award of compensation to Class Counsel and the Named Plaintiffs (the “Compensation Motion/Memorandum”). As part of a final resolution of this litigation, Named Plaintiffs respectfully request that the Court grant those motions as well.

object to the terms of the Settlement, and is discussed in more detail below. Class Counsel have received no objections to the proposed Plan of Allocation or the request for attorneys' fees, reimbursement of expenses and award of compensation 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 Agreement in Plaintiffs' Memorandum in Support of Motion for Order Preliminarily Certifying Settlement Class, Granting Preliminary Settlement Approval, Approving Form and Method of Notice, and Setting a Date and Time for Fairness Hearing on Final Approval (D.I. 46) ("Preliminary Approval Memorandum") at 1-4. They also provided the Court with a copy of the Settlement Agreement as Exhibit 1 to the Preliminary Approval Memorandum.<sup>3</sup>

In summary, the Settlement Agreement covers all claims, parties, and defenses asserted in this Action and provides relief to the Settlement Class in the form of a cash payment of \$7.6 million, plus interest, to the Plans. As described to the Class in the Notice of Class Action Settlement (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 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 Company Stock.

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<sup>3</sup> The Settlement Agreement is also submitted as Exhibit A to the Declaration of Lynn Sarko in Support of (1) Motion for Final Approval of ERISA Class Action Settlement; (2) Class Counsel's Motion for Award of Attorneys' Fees, Reimbursement of Expenses and Award of Compensation to Class Representatives; and (3) Motion for Approval of Plan of Allocation ("Sarko Decl.")

In exchange for this substantial relief to the Class, the Settlement Agreement releases claims that were or could have been set forth in the Complaint against the Defendants and the applicable fiduciary liability insurance policy that would (a) be barred by *res judicata* if the claims actually asserted had been fully litigated and resulted in a final judgment; or (b) pertain to any decision to enter into or approve the Settlement Agreement or to any conduct related to the calculation and/or allocation of the Net Proceeds pursuant to the Plan of Allocation. Settlement Agreement §§ 3.1-3.5. The Settlement Agreement, however, does not release, bar, waive, or otherwise affect any claim that has been asserted in the ongoing related securities or derivative actions; provided, however, that the Settlement shall not be construed to permit any Plaintiff, any member of the Settlement Class, or the Plans to recover more than one hundred percent of his, her, or their losses, under both the securities and ERISA claims.<sup>4</sup> *Id.* at § 3.6. The Settlement and dismissal of the Action shall not release, bar or waive any ERISA § 502(a)(1)(B) claim for vested benefits where such claims are unrelated to any matter asserted in this litigation. *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 Agreement, the Fairness Hearing, the Compensation Motion, 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 Class Counsel that was designated in the Notice. Likewise, the Court-Ordered Legal Notice (“Summary

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<sup>4</sup> In many analogous situations in which ERISA and securities classes have been certified and settlements reached, including the *WorldCom* and *Global Crossing* cases, neither the ERISA Plans nor the class members were excluded from the securities class, and the ERISA recovery was not applied as a set-off against the recovery in the securities case settlements. *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).

Notice”) was published in the *Detroit Free Press*. Sarko Decl. ¶¶ 64-68; *see also* Declaration of Gene D. Kennedy re: Notice Mailing and Affidavit of Publishing, submitted by Dorianna Phillips.<sup>5</sup> Copies are submitted as Exhibits F and G to the Sarko Decl.

Moreover, the Settlement Agreement and Plan of Allocation have been provided to the Independent Fiduciary, Professor Theodore J. St. Antoine, for his review. On January 23, 2007, Professor St. Antoine issued his evaluation, concluding “that the proposed settlement is fair, adequate, and reasonable.” *See* Report of Independent Fiduciary at p. 4 (Jan. 23, 2007), submitted as Exhibit E to the Sarko Decl.

### **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 who were participants in or beneficiaries of the *Plans* at any time between July 1, 2000 and July 15, 2006 and whose *Plan* accounts included direct or indirect investments in Visteon stock and/or the Visteon Stock Fund(s) provided, however, that the *Settlement Class* shall not include any of the *Individual Defendants* (defined to include all Defendants other than Visteon Corp.) or any of *Individual Defendants*’ immediate family members, beneficiaries, alternate payees, representatives or successors-in-interest, except for immediate family members, beneficiaries, alternate payees, representatives or successors-in-interest who themselves were participants in one or both of the *Plans*, who shall be considered members of the *Settlement Class* with respect to their own *Plan* accounts.

Preliminary Approval Order ¶ 2.

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<sup>5</sup> Pursuant to the Court’s preliminary approval order, the Final Approval Motion, the Compensation Motion, and the Plan of Allocation Motion and supporting documents are being posted on <http://www.kellersettlements.com> 10 days before the Fairness Hearing. Sarko Decl. ¶ 68. In addition, while not expressly required by the Preliminary Approval Order, the Settlement Agreement, Preliminary Approval Motion and Supporting Papers, and Preliminary Approval Order also were posted on Class Counsel’s settlement website described in the Notice as a source of information regarding the Settlement.

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.

Having addressed these issues in the Preliminary Approval Motion, they are addressed 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 10,000 members. *See* Declaration of Gene D. Kennedy re: Notice Mailing, filed herewith. 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 the Visteon Stock Fund as an investment option under the Plans, and by, *inter alia*, imprudently allowing and/or directing the Plans to purchase and hold Visteon 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.* at ¶¶ 15-17.

**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)** – In addition to the bases for class certification provided by Rule 23(b), a class may be certified if:

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).

Plaintiffs’ claims are all based on conduct by Defendants that is generally applicable on a class-wide basis. Plaintiffs allege that Defendants breached their fiduciary duties by, among other things, (i) failing to ensure that Company stock was a prudent investment for the Plans; (ii) failing to provide complete and accurate information concerning the value of Company stock and the prudence of investing Plan assets in Company stock; and (iii) failing to monitor the Plans’ fiduciaries. Complaint ¶¶ 222-264 (Counts I–III). These fiduciary breaches were directed to the Plans as a whole, not specific class members or even a subset of class members. ERISA’s remedial provisions, including restoration of the Plans’ losses, are by definition plan-wide remedies. *Specialty Cabinets & Fixtures, Inc. v. Am. Equitable Life Ins. Co.*, 140 F.R.D. 474, 479 (S.D. Ga. 1991) (“The right to recovery, after all, belongs to the plan”). *See also* *Bublitz v. E.I. du*

*Pont de Nemours & Co.*, 202 F.R.D. 251, 259 (S.D. Iowa 2001) (certifying (b)(2) class in ERISA breach of fiduciary duty case); *Berger v. Xerox Corp. Ret. Income Guar. Plan*, 338 F.3d 755, 764 (7th Cir. 2003) (same).

**Rule 23(g)** – Rule 23(g) requires the Court to examine the capabilities and resources of class counsel to determine whether they will provide adequate representation to the class. The Court is aware of the claims brought in this action, and the extraordinary time and effort already expended by Class Counsel in this action. Moreover, Plaintiffs’ Counsel are among the leading firms in the prosecutions of ERISA class actions, and in the types of claims brought in this lawsuit. In the Preliminary Approval Order, the Court found that:

Lead Counsel is capable of fairly and adequately representing the interests of the class, in that Lead Counsel has done extensive work identifying or investigating potential claims in the action, and has litigated the validity of those claims at the motion to dismiss stage of this case; Lead Counsel is experienced in handling class actions, other complex litigation and claims of the type asserted in the Action; Lead Counsel is knowledgeable of the applicable law; and Lead Counsel has committed the necessary resources to represent the Settlement Class. Rule 23(g) is satisfied.

Preliminary Approval Order ¶¶ 1.G. Since that time, Class Counsel has worked diligently in the interests of the Class, including by issuing the Court-approved notices, responding to Class member inquiries concerning the litigation and proposed settlement, communicating with the Independent Fiduciary, and preparing these final approval papers. Sarko Decl. ¶ 43.

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 Class Counsel.

#### IV. THE SETTLEMENT WARRANTS FINAL APPROVAL

The Settlement Agreement 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. Preliminary Approval Memorandum 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 Agreement satisfied the eight final approval considerations, noting that the final approval criteria lent further support to preliminary approval of the Settlement. Preliminary Approval Memorandum at 6-12. 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.

A key factor to consider in assessing the Settlement's fairness is the report of the Independent Fiduciary, Professor Theodore J. St. Antoine. The Settlement Agreement is contingent upon the Independent Fiduciary's approval. Settlement Agreement § 2.2; Preliminary Approval Memorandum at 2. After review of the materials and information provided by the parties, as well as independent research, on January 27, 2007, the Independent Fiduciary issued his report, in which he concluded that, "[i]n applying [the Sixth Circuit's eight final approval considerations], . . . they all favor the proposed settlement," and "that the proposed settlement is fair, adequate, and reasonable." Independent Fiduciary Report at 3-4.

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

The ultimate question to be answered in evaluating this factor is "whether the interests of the class as a whole are better served if the litigation is resolved by the settlement rather than pursued." *Kmart Final Approval*, 2006 U.S. Dist. LEXIS 45706, at \*9 (quoting Manual for Complex Litigation (Third) § 30.42 at 238 (1995)); *UAW v. GMC*, No. 05-73991, 2006 U.S. Dist. LEXIS 14890, at \*46 (E.D. Mich. Mar. 31, 2006).

The reasons that this consideration supports final approval of the Settlement Agreement were fully detailed in the Preliminary Approval Memorandum. Preliminary Approval Memorandum at 6-12. As evidenced by the vigor with which they have prosecuted the action, and the amount of resources they have expended toward that end, Named Plaintiffs are optimistic about their ultimate success in this matter. They believe strongly that the evidence developed thus

far supports the Defendants' fiduciary status under one or both of the Plans and Defendants' failure to protect the Plans and serve participants' best interests.

Despite these litigation strengths and successes, Named Plaintiffs recognize that they faced risks in bringing this case to trial. For example, their claims are based upon complex and rapidly developing law, and few decisions to date have been rendered at the summary judgment stage or at trial to provide guidance regarding burdens of proof that Plaintiffs face. In addition, there is a significant risk that the dollar amount of any recovery could have been reduced between the date of the Settlement and the date the case would ultimately be tried to a verdict because:

- The parties vigorously dispute the appropriate measure of losses in this case, and, thus, the measure of losses ultimately accepted could have resulted in a recovery that was smaller than the recovery achieved by the Settlement—even if liability were established on all counts of Complaint. At bottom, the case law is sparse on the proper measure of damages in ERISA cases, which presented risks going forward in this case; and/or
- Visteon stock could continue to increase in value, thus arguably decreasing the Plans' losses or general market conditions could change and the benchmark or rate of interest ultimately adopted by the Court may bear a lower rate of interest, thus decreasing the Plans' losses.

Weighing the strengths of Plaintiffs' claims against the risks of litigating those claims to a verdict at trial warrants the conclusion that Class' interests are better served if the litigation is resolved by the settlement rather than pursued. As such, the \$7.6 million (plus interest) Cash Settlement Amount that Class Counsel achieved, which is estimated by the Independent Fiduciary, based upon figures provided by the parties, to constitute approximately 32% of the actual losses in principal sustained by the Plans,<sup>6</sup> is fair, adequate, and reasonable under the circumstances.<sup>7</sup>

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<sup>6</sup> Even if one were to consider interest and other damages sought by Plaintiffs, the Cash Settlement Amount is well within the range of recovery consistently approved by the Courts.

<sup>7</sup> The number of participants who obtain a distribution to their Plan accounts may be less than the number of Class members owing to the *de minimis* provision in the proposed Plan of Allocation.

Moreover, the Cash Settlement Amount is well within the range of settlements approved by courts in other cases. *See, e.g., In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 459 (9th Cir. 2000) (approving settlement 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 sub nom. 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).<sup>8</sup>

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

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The Plan of Allocation proposes to allocate the Distribution Amount (*i.e.*, the total amount to be distributed to the Plaintiffs after deduction of Court-approved fees and expenses) in accordance with Class members’ losses. If the Court approves the requested compensation for Class Counsel and Class Representatives, as well as reimburses them for their expenses, the *average* recovery has been estimated at approximately \$539 per Class member before interest, based upon the figures provided by the parties to the Independent Fiduciary. *See* Independent Fiduciary Report at 2. Of course, because the Plan-wide Settlement will be allocated on *pro rata* basis in proportion to Class members’ losses, some participants will recover significantly more than the average, and others significantly less. This data is presented, however, to demonstrate that the recovery will result in meaningful and substantial relief to the Class.

<sup>8</sup> In the *Kmart ERISA* case, plaintiffs estimated that the \$11.75 million settlement, on behalf of a class of approximately 100,000 plan participants, provided a recovery of between 18% and 46% of claimed damages, depending upon how and when damages were measured. *Kmart Final Approval*, 2006 U.S. Dist. LEXIS 45706, at \*11. Similarly, in the *CMS* case, also filed in this District, the plaintiffs estimated that the \$28 million settlement provided the class with a recovery of between 17% and 25% of claimed damages. 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, *In re CMS Energy ERISA Litig.*, No. 02-72834 (E.D. Mich. filed Mar. 15, 2006) (D.I. 204).

“The obvious costs and uncertainty of such lengthy and complex litigation weigh in favor of settlement.” *UAW*, 2006 U.S. Dist. LEXIS 14890, at \*54. 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; Compensation Memorandum at 13-14 (citing cases). As fully explained in the Compensation Memorandum, this case was similarly complex for the following reasons:

- The complex and novel legal theories involved;
- The lack of established case/plan-wide fiduciary breach values;
- The potential difficulty of establishing liability and losses;
- The risk of unforeseen change in the law;
- The vigorous defense lodged by the Defendants;
- The risk of delay and outcome on appeal; and
- A decision tree analysis based upon the numerous independent defenses Defendants asserted, any one of which, if successful, could have resulted in judgment in Defendants’ favor.

Compensation Memorandum at 14-15; *see also* Preliminary Approval Memorandum at 7-8.

As one court recently noted,

Given the time value of money, a future recovery, even one greater than the proposed Settlement, may be less valuable to the Class than receiving the benefits of the proposed Settlement now. To delay this matter further would not substantially benefit the Class. *See Brotherton v. Cleveland*, 141 F. Supp. 2d 894, 903 (S.D. Ohio 2001).

*Broadwing*, 2006 U.S. Dist. LEXIS 72609, at \*13.

This factor, thus, favors final approval of the Settlement Agreement because it ensures substantial and prompt payment to the Plans “in a highly complex action, undiminished by further expenses, and without delay, costs, and uncertainty of protracted litigation.” *Id.*

### **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.” Preliminary Approval Memorandum at 9 (quoting *Kmart Final Approval*, 2006 U.S. Dist. LEXIS 45706, at \*9). Here, the law firms representing the Class in this case have significant expertise in class action litigation and ERISA cases of this type. See Preliminary Approval Memorandum at 8; Compensation Memorandum at 15-17. It is their considered view that the relief obtained for the Class warrants approval of the Settlement, rather than continuing with litigation and the attendant costs and risks associated with that effort.

The parties litigated for well over a year, including extensive motion to dismiss briefing, before entering into the Settlement Agreement. Further, as part of their investigation, Plaintiffs’ Counsel had the opportunity to evaluate the Plan documents and data, and received expert witness input, which enabled them to determine key issues regarding the mechanics and fiduciary oversight of the Plans and therefore the respective potential liability of various Defendant-fiduciaries. Finally, the parties engaged in lengthy settlement negotiations, including a face-to-face meeting of counsel and formal mediation, which also allowed the parties to fully explore their respective factual and legal positions. While much would need to be done to prepare the case for trial, Named 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 Plans and the Class.

With respect to timing, 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). Indeed, there is no minimum or definitive amount of discovery that must be undertaken to satisfy this factor, and discovery may not be necessary at all for the parties to fully evaluate the merits of the Plaintiffs’ claims. *In re Jiffy Lube Sec. Litig.*, 927 F.2d 155, 159 (4th Cir. 1991) (approving settlement after four months of litigation and prior to any formal discovery); *see also Horton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 855 F. Supp. 825, 829 (E.D.N.C. 1994) (approving settlement in case in which discovery consisted of production of 3,800 pages of documents and two “confirmatory” depositions).

In short, these factors support final approval because Class Counsel’s decision to support settlement of the litigation on the terms set forth in the Settlement Agreement 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 extremely well versed in this novel and complex area of the law.

**5. & 6. The Lack of Objections Asserted by Unnamed Class Members Supports the Fairness of the Settlement Agreement to the Class as a Whole.**

Here, despite having received notice and the opportunity to be heard, as provided for in the Preliminary Approval Order, to date, Class Counsel have received only one objection, which was not timely served on counsel, nor timely file with the Court.

On February 21, 2007, Class Counsel received a letter from Mr. Ed Kwiecinski that purports to “reject the settlement,” but does not pertain to the claims alleged in this Action or address or object to the Settlement terms.<sup>9</sup> Rather, Mr. Kwiecinski opines that “Visteon should never have been created the way it was,” and “petition[s] . . . the court . . . to open up the secret

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<sup>9</sup> Nor does Mr. Kwiecinski object to the Plan of Allocation or the request for attorneys’ fees, reimbursement of expenses and award of compensation for Named Plaintiffs.

warranties from the Japanese transplants.” While not entirely clear, it appears that Mr. Kwiecinski is concerned with Visteon’s use of non-union “transplant” workers. A copy of Mr. Kwiecinski’s letter, received by counsel and filed with the Court on February 21, 2007, is submitted as Exhibit H to the Sarko Decl. Although the Named Plaintiffs are sympathetic to any legitimate issues raised, Mr. Kwiecinski’s attempt to utilize the objection process as a forum to express his views is inappropriate. Consequently, because there appears to be no connection between the Settlement Agreement and the concerns expressed by Mr. Kwiecinski, his objection should be disregarded.

The absence of any actual objections to the Settlement Agreement, or to the request for attorneys’ fees, reimbursement of expenses and award of compensation for Named Plaintiffs, from the approximately 10,000 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. *See Preliminary Approval Memorandum* at 11 (citing *In re Cardizem*, 218 F.R.D. at 527); *see also Kmart Final Approval*, 2006 U.S. Dist. LEXIS 45706, 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). Class Counsel have provided the Independent Fiduciary with all documents and information requested, and, rather than objecting, the Independent Fiduciary has opined that the Settlement is “fair, adequate, and reasonable.” Independent Fiduciary Report at 4.

The Class as a whole will benefit from the substantial monetary relief afforded by the Settlement. The Plan of Allocation seeks to ensure fairness among Class members by allocating

the Distribution Amount on a *pro rata* basis among Class members based on each Class member's loss relative to the Plans' total losses. Through this process, Class members will obtain a recovery that is reasonably and fairly related to their respective losses. The same general approach has been approved in numerous similar ERISA breach of fiduciary company stock class actions.<sup>10</sup> The absence of any objection to the Plan of Allocation by any Class member or the Independent Fiduciary, who was specifically retained to evaluate the fairness of the Settlement, is strong evidence of the fairness of the Plan of Allocation proposed by Class Counsel in this case.

In the event that any additional communications, including actual objections, are lodged prior to the Fairness Hearing, Class Counsel will address such communications in a supplemental approval memorandum, time permitting, as well as at the Fairness Hearing. We are proud of our accomplishment in this case, and are prepared to explain the benefits achieved to the Court and to any other interested party.

**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 Rio Hair Naturalizer Prods. Liab. Litig.*, MDL No. 1055, 1996 U.S. Dist. LEXIS 20440, at \*43 (E.D. Mich. Dec. 20, 1996); *In re Telectronics Pacing Sys., Inc.*, 137 F. Supp. 2d 985, 1018 (S.D. Ohio 2001) (citing Herbert Newberg & Alba Conte, *Newberg on Class Actions* §

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<sup>10</sup> See, e.g., *In re CMS Energy ERISA Litig.*, No. 02-72834, 2006 U.S. Dist. LEXIS 55836, at \*7 (E.D. Mich. June 27, 2006) ("*CMS Final Approval*") (approving plan of allocation substantially similar to the plan presented here); *In re AOL Time Warner, Inc. Secs. & ERISA Litig.*, No. 02-5575, MDL No. 1500, 2006 U.S. Dist. LEXIS 17588, at \*59 (S.D.N.Y. Apr. 6, 2006); *Global Crossing*, 225 F.R.D. at 463; *In re WorldCom, Inc. ERISA Litig.*, No. 02-4816, 2004 U.S. Dist. LEXIS 20671, at \*29 (S.D.N.Y. Oct. 18, 2004), *vacated in part on other grounds*, 2004 U.S. Dist. LEXIS 22952 (S.D.N.Y. Nov. 15, 2004).

11.51 (3d ed. 1992)) (“[C]ourts 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 a year of hard-fought litigation. Preliminary Approval Memorandum at 11-12. With the information gathered by the parties, including experience from similar cases, the results of investigation and discovery, and expert analyses, they were well-equipped to accurately assess the relative strengths and weaknesses of their positions and the range of potential damage awards. Counsel for the parties met face-to-face during April 2006 and explored in great depth the arguments presented by both sides. They thereafter agreed, with the Court’s approval, to engage in formal mediation with Jonathan Marks, a nationally-recognized and highly experienced mediator. The mediation and subsequent negotiations were well-informed, extensive, and hard-fought. *See* Declaration of Jonathan Marks, submitted as Exhibit D to the Sarko Decl.; Sarko Decl. ¶¶ 34-44.

As a further check, pursuant to ERISA and the terms of the Settlement Agreement, the Settlement has been presented to and approved as fair by the Independent Fiduciary, Professor St. Antoine. The Independent Fiduciary found that “[t]he settlement is plainly the product of extensive arm’s-length negotiations, with the crucial session being presided over by a nationally prominent mediator.” Independent Fiduciary Report at 4. The Independent Fiduciary’s independent evaluation, lack of objection to the Settlement, and conclusion that the Settlement is indeed “fair, adequate, and reasonable” weighs strongly in favor of final approval.

#### **8. The Public Interest Warrants Approval of This Agreement.**

The Settlement Agreement in this action serves the public interest by bringing to a close—and a very favorable close—a lawsuit that affects the retirement security of thousands of employees

of Visteon and its affiliates. “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 Preliminary Approval Memorandum, this comment is particularly apt with respect to ERISA cases, and this ERISA case in particular, which involves a complex and rapidly developing area of law, and was by all accounts, hard-fought. *See* Preliminary Approval Memorandum at 12; *see also* Compensation Motion at 13 (noting the importance of protecting employee retirement savings through the vigorous enforcement of ERISA’s fiduciary standards).

No contravening public interest justifies deviating from the strong public interest in the final approval of the Settlement Agreement 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.

Thus, 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. 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. Class Counsel respectfully submit that the Settlement should be approved and the proposed Settlement Class should be certified so that this relief may be provided to the Class. Accordingly, Named Plaintiffs’ motion for final approval should be granted. In addition, for the reasons previously set forth separately in the

respective motions, Class Counsel ask that the pending Plan of Allocation and Compensation Motions be granted as well, thus concluding this litigation.

Respectfully submitted this 27th day of February, 2007.

KELLER ROHRBACK L.L.P.

By: /s/ Lynn Lincoln Sarko

Lynn Lincoln Sarko  
Elizabeth A. Leland  
Erin M. Riley  
1201 Third Avenue, Suite 3200  
Seattle, WA 98101-3052  
(206) 623-1900  
lsarko@kellerrohrback.com  
bleland@kellerrohrback.com  
eriley@kellerrohrback.com

**Lead Counsel for Plaintiffs**

Joseph Meltzer  
Gerald D. Wells, III  
SCHIFFRIN BARROWAY TOPAZ  
& KESSLER, LLP  
280 King of Prussia Road  
Radnor, PA 19087  
(610) 667-7706  
jmeltzer@sbtclaw.com  
gwells@sbtclaw.com

Michael Lieder  
Mark Amadeo  
SPRENGER & LANG, PLLC  
1400 Eye Street, N.W. Suite 500  
Washington, DC 20005  
(202) 265-8010  
mlieder@sprengerlang.com  
mamadeo@sprengerlang.com  
**Plaintiffs' Executive Committee Counsel**

Stephen Wasinger  
STEPHEN F. WASINGER PLC  
32121 Woodward Avenue, Suite 300  
Royal Oak, Michigan 48073  
(248) 544-6306  
sfw@sfwlaw.com  
Michigan Bar No. (P-25963)

**Plaintiffs' Liaison Counsel**