

UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA

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MATTHEW T. ZILHAVER AND  
SASCHA LINN, Individually and On  
Behalf of All Others Similarly Situated,

Plaintiffs,

v.

UNITEDHEALTH GROUP INC., L.  
ROBERT DAPPER, JAMES A.  
JOHNSON, WILLIAM G. SPEARS,  
MAY O. MUNDINGER, WILLIAM W.  
McGUIRE and STEPHEN J. HEMSLEY,

Defendants.

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No. 06 CV 2237 (JMR/FLN)

**PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF  
THEIR MOTION FOR PRELIMINARILY APPROVAL OF  
CLASS ACTION SETTLEMENT AND FOR RELATED RELIEF**

Edwin J. Mills  
**STULL, STULL & BRODY**  
6 East 45<sup>th</sup> Street  
New York, NY 10017  
Telephone: (212) 687-7230  
Facsimile: (212) 490-2022

David E. Krause  
**KRAUSE & ROLLINS**  
310 Groveland Avenue  
Minneapolis, MN 55403  
Telephone: (612)874-8550

**Attorneys For Plaintiffs**

## TABLE OF CONTENTS

	<u>Page</u>
I. BACKGROUND .....	1
A. Summary of the Litigation .....	1
B. Extensive Discovery Had Been Completed When the Settlement Was Reached.....	3
C. Settlement Negotiations and Mediation.....	3
II. THE SETTLEMENT MERITS PRELIMINARY APPROVAL.....	4
A. Judicial Policy Favors Settlement of Class Action Litigation .....	4
B. The Standards for Preliminary Approval of a Settlement under Rule 23(c).....	5
C. The Settlement Merits Preliminary Approval.....	7
III. THE PROPOSED SETTLEMENT NOTICE SATISFIES RULES 23(d) and (e) AND DUE PROCESS REQUIREMENTS .....	11
IV. THE SETTLEMENT CLASS SHOULD BE PRELIMINARILY CERTIFIED .....	13
A. The Prerequisites of Rule 23(a) are Satisfied .....	13
B. The Prerequisites of Rule 23(b)(1) are Satisfied.....	18
C. The Requirements of Rule 23(g) Are Met .....	21
V. CONCLUSION.....	22

**TABLE OF AUTHORITIES**

	<u>Page(s)</u>
<b>CASES</b>	
<i>Amchem Prods., Inc. v. Windsor</i> , 521 U.S. 591 (1997).....	16
<i>Babcock v. Computer Assoc., Int’l</i> , 212 F.R.D. 126 (E.D.N.Y. 2003) .....	19
<i>Dubin v. E.F. Hutton Group Inc.</i> , No. 88 Civ. 0876, 1990 WL 105757, *6 (S.D.N.Y. 1990).....	22
<i>Bowling v. Pfizer, Inc.</i> , 143 F.R.D. 141 (S.D. Ohio 1992) .....	7, 12
<i>Bunnion v. Consolidated Rail Corp.</i> , 1998 WL 372644 (E.D. Pa. May 14, 1998) .....	24
<i>Byrd v. Chadwick</i> , 956 S.W.2d 369 (Mo. Ct. App. 1997) .....	6
<i>Cohn v. Nelson</i> , 375 F. Supp. 2d 844 (E.D. Mo. 2005) .....	11
<i>Denny v. Deutsche Bank AG</i> , 443 F.3d 253 (2d Cir. 2006).....	15
<i>Feret v. Corestates Fin. Corp.</i> , 1998 WL 512933 (E.D. Pa. 1998) .....	24
<i>Gruby v. Brady</i> , 838 F. Supp. 820, (S.D.N.Y. 1993).....	24
<i>Holden v. Burlington</i> , 665 F. Supp. 1398, (D. Minn. 1987).....	4
<i>In re Aquilla ERISA Litig.</i> , 2006 WL 2289234 (W.D. Pa. 2006) .....	19
<i>In re Corrugated Container Antitrust Litig.</i> , 659 F.2d 1322 (5th Cir. 1981) .....	4
<i>In re CMS Energy ERISA Litig.</i> , 225 F.R.D. 534 (E.D. Mich. 2004).....	19
<i>In re Employee Benefit Plan Sec. Litig.</i> , 1993 U.S. Dist. LEXIS 21226 (D. Minn. 1993).....	8
<i>In re Flight Transp. Corp. Sec. Litig.</i> , 730 F.2d 1128 (8 <sup>th</sup> Cir. 1984), <i>cert. denied</i> , 469 U.S. 1207 (1985).....	8
<i>In re IKON Office Solutions, Inc.</i> , 191 F.R.D. 457 (E.D. Pa. 2000).....	24
<i>In re Indep. Energy Holdings PLC</i> , 2003 WL 22244676 (S.D.N.Y.2003) .....	9
<i>In re Southern Ohio Correctional Facility</i> , 173 F.R.D. 205 (S.D. Ohio 1997).....	5
<i>In re Sulzer Hip Prosthesis and Knee Prosthesis Liability Litig.</i> , 2001 WL 1842315 (N.D. Ohio, Oct. 20, 2001) .....	15

*In re Teletronics Pacing Systems, Inc., Accufix Atrial “J” Leads Prod. Liab. Litig.*,  
186 F. Supp. 2d 459 (S.D. Ohio 1999) ..... 5

*In re Warfarin Sodium Antitrust Litig.*, 212 F.R.D. 231 (D. Del. 2002)..... 27

*In re Wireless Tel. Fed. Cost Recovery Fees Litig.*, 2004 U.S. Dist. LEXIS 23342  
(W.D. Mo. 2004)..... 10

*Johnson v. City of Tulsa*, 2003 WL 24015151 (N.D. Okla. May 12, 2003)..... 7, 12

*Kane v. United Independent Union Welfare Fund*, 1998 WL 78985 (E.D. Pa. Feb. 24, 1998) ... 24

*Kane v. United Independent Union Welfare Fund*, No. 97-1505, 1998 WL 78985,  
(E.D. Pa. Feb. 24 1998)..... 26

*Koch v. Dwyer*, 2001 WL 289972 (S.D.N.Y. Mar. 23, 2001) ..... 23

*Koch v. Dwyer*, 2001 WL 289972 (S.D.N.Y. Mar. 23, 2001) ..... 24

*Kogan v. AIMCO Fox Chase, L.P.*, 193 F.R.D. 496 (E.D. Mich. 2000) ..... 7, 12

*Kolar v. Rite Aide Corp.*, 2003 WL 1257272, (E.D. Pa. Mar. 11, 2003)..... 19

*Lowers v. United States*, 2001 U.S. Dist. LEXIS 23899 (D. Iowa 2001)..... 17

*Marshall v. Holiday Magic, Inc.*, 550 F.2d 1173, 1177 (9<sup>th</sup> Cir. 1977)..... 14

*Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950)..... 13

*Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620 (5th Cir. 1999) ..... 20

*Olvera v. Norfolk Southern Ry. Co.*, 2007 WL 107731 (D.S.C., Jan. 9, 2007) ..... 15

*Ortiz v. Fibreboard*, 527 U.S. 815 (1999) ..... 23

*Paxton v. Union Nat’l Bank*, 688 F.2d 552 (8th Cir. 1982) ..... 16, 18

*Petrovic v. AMOCO Oil Co.*, 200 F.3d 1140 (8<sup>th</sup> Cir. 1999) ..... 18

*Rankin v. Rots*, 220 F.R.D. 511 (E.D. Mich. 2004) ..... 19

*Reed v. Rhodes*, 869 F. Supp. 1274 (N.D. Ohio, 1994) ..... 7

*Rogers v. Baxter Int’l, Inc.*, 2006 WL 794734 (N.D. Ill. March 22, 2006) ..... 23

*Sanft v. Winnebago Indus.*, 2003 U.S. Dist. LEXIS 7789 (D. Iowa 2003)..... 17

*Satchell v. Federal Express Corp.*, 2007 WL 1114010 (N.D.Cal., April 13, 2007)..... 9

*Senter v. General Motors*, 532 F.2d 511 (6th Cir. 1976)..... 21

*Sosna v. Iowa*, 419 U.S. 393 (1975) ..... 21

*Specialty Cabinets & Fixtures, Inc. v. American Equitable Life Ins. Co.*, 140 F.R.D.  
474 (S.D. Ga. 1991) ..... 24

*Stoneridge Inv. Partners LLC v. Charter Communs., Inc.*, 2005 U.S. Dist.  
LEXIS 14772 (E.D. Mo. June 30, 2005) ..... 16

*Thomas v. SmithKline Beecham Corp.*, 201 F.R.D. 386 (E.D. Pa. 2001)..... 23

*Van Horn*, 840 F.2d at 607; *Rexam v. USW*, 2007 U.S. Dist. LEXIS 68653 (D. Minn. 2007) ..... 7

*Weathers v. Peters Realty Corp.*, 499 F.2d 1197 (6th Cir. 1974)..... 17

*Weinberger v. Kendrick*, 698 F.2d 61 (2d Cir. 1982) ..... 14

**PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF  
THEIR MOTION FOR PRELIMINARILY APPROVAL OF  
CLASS ACTION SETTLEMENT AND FOR RELATED RELIEF**

Plaintiffs Matthew T. Zilhaver and Sascha Linn (“Plaintiffs”) have moved for an order granting preliminary approval of a proposed class action settlement (the “Settlement”) of this ERISA case for \$17,000,000 on the terms set forth in the Class Action Settlement Agreement dated November 7, 2008 [Docket Entry No. 129] which is being filed with the Court contemporaneously with this Memorandum. Plaintiffs respectfully request that the Court (1) preliminarily certify a settlement class (“Settlement Class”); (2) grant preliminary approval of the Settlement; (3) direct the dissemination of notice to the members of the Settlement Class; and (4) schedule a hearing to consider whether to grant final judicial approval to the Settlement.

**I. BACKGROUND**

**A. Summary of the Litigation**

The Second Amended ERISA Complaint (Docket Entry No. 57) which was filed on May 1, 2007 (the “Complaint”) alleges that UnitedHealth and the other defendants (the “Defendants”) were fiduciaries of the UnitedHealth 401(k) Savings Plan, a defined contribution retirement plan for UnitedHealth employees (the “Plan”). The Complaint further alleges that Defendants violated their fiduciary duties of prudence and loyalty to the Plan and to participants in the Plan (“Participants”) by allowing Plan assets to be invested, in part, in a fund comprised almost entirely of UnitedHealth common stock (“the UnitedHealth Common Stock Fund”) when such an investment was not prudent,

and by failing to make full disclosure to Participants of all material risks associated with investing in the UnitedHealth Common Stock Fund.

The Complaint alleges that UnitedHealth stock, and in consequence, the UnitedHealth Common Stock Fund, were imprudent investments because the market of UnitedHealth stock was artificially inflated as a result of misrepresentations and failures to disclose material adverse information concerning UnitedHealth's from December 21, 2005 through May 24, 2006, inclusive (the "Settlement Class Period"). These misrepresentations and failures to disclose related to the Company's executive stock option program and irregularities therein, as well as resulting accounting and disclosure violations. The misstatements allegedly caused an artificial inflation in the Company's stock price during the proposed Class Period. When the truth was disclosed, UnitedHealth stock price dropped substantially.

Defendants responded to the Complaint by filing motions to dismiss and for summary judgment which argued, in substance, that it was not imprudent to offer Company stock even if the improprieties alleged by Plaintiffs were established since the market nonetheless ascribed substantial value to the common stock and the Company as a whole; that appropriate disclosures were made to the Participants and, in particular, that the fiduciaries could not have properly provided any special notice to the Participants without running afoul of the rules against selective disclosure; and that the Complaint was insufficient for a variety of other, additional reasons. On March 31, 2008, the Court denied Defendants' motion to dismiss and for summary judgment (Docket Entry No. 118).

Plaintiffs moved to certify as a class all persons who held a portion of their Plan accounts in the Fund during the Class Period. (Docket Entry No. 59). Defendants filed their opposition to Plaintiffs' class certification motion on August 7, 2007 (Docket Entry 90). Plaintiffs' motion for class certification had been scheduled for hearing when the second mediation in this case resulted in the settlement in principle now before the Court.

**B. Extensive Discovery Had Been Completed When the Settlement Was Reached**

Before engaging in settlement discussions, Plaintiffs' counsel conducted extensive discovery. Teams of Plaintiffs' attorneys had reviewed millions of pages of documents which UnitedHealth had provided in electronic format to Plaintiffs in this case and in the related securities fraud class action case. Plaintiffs' counsel also conducted significant discovery, separate and apart from the documents provided in the securities fraud case, relating specifically to the structure, operation and administration of the Plan and the conduct of the Plan's fiduciaries. In addition to reviewing documents provided by UnitedHealth under Section 104 of ERISA, Plaintiffs' counsel also deposed the Company under Rule 30(b)(6) on Plan-related matters on June 5, 2008.

**C. Settlement Negotiations and Mediation**

Accompanying this filing is the Declaration of Edwin J. Mills of Stull Stull & Brody, Lead Counsel for Plaintiffs, which avers that the proposed Settlement is the result of arm-length negotiations between adverse represented parties and is not the result of collusion or complicity of any kind. Further, as explained in the Mills Declaration, the proposed Settlement was only achieved following and as a result of two mediations conducted by retired federal judges whose insights and experience helped the parties to

bridge the initial gaps in their expectations and reach a compromise acceptable to all parties. Finally, the record demonstrates that this was a hard fought and strongly disputed action. As discussed below, there were substantial risks and uncertainties surrounding this litigation, yet despite these risks Plaintiffs were able to obtain a settlement of \$17 million in cash to be paid into an interest-bearing escrow account maintained on behalf of the Class.

## **II. THE SETTLEMENT MERITS PRELIMINARY APPROVAL**

### **A. Judicial Policy Favors Settlement of Class Action Litigation**

Strong judicial policy favors resolution of litigation prior to trial, particularly in class actions. *In re Employee Benefit Plans Sec. Litig.*, 1993 U.S. Dist. LEXIS 21226, \*13 (D. Minn. 1993); *Holden v. Burlington*, 665 F. Supp. 1398, 1405 (D. Minn. 1987).

Settlements of complex cases such as this one greatly contribute to the efficient utilization of scarce judicial resources and achieve the speedy resolution of justice, for a “just result is often no more than an arbitrary point between competing notions of reasonableness.” *In re Corrugated Container Antitrust Litig.*, 659 F.2d 1322, 1325 (5th Cir. 1981). Because settlement is a preferred means of dispute resolution, there is a strong presumption by courts in favor of settlement. *In re Telectronics Pacing Systems, Inc., Accufix Atrial “J” Leads Prod. Liab. Litig.*, 186 F. Supp. 2d 459, 476 (S.D. Ohio 1999); *In re Southern Ohio Correctional Facility*, 173 F.R.D. 205, 211 (S.D. Ohio 1997); *Rio Hair*, 1996 U.S. Dist. LEXIS 20440 at \*36; Moore’s Federal Practice, *Manual for Complex Litigation (Third)*, § 30.42 (1995).

**B. The Standards for Preliminary Approval of a Settlement under Rule 23(c)**

In re *Flight Transportation Corp Securities Litigation*, 730 F. 2<sup>nd</sup> 1128, 1135 (8<sup>th</sup> Cir. 1984), the Court of Appeals explained that proposed class action settlements are “committed to the sound discretion of the trial judge,” with the trial judge to consider the following factors (among other factors, in the trial judge’s discretion) bearing on the fairness of the settlement. The relevant factors includes:

- a. The probability of success in the litigation;
- b. The difficulties, if any, to be encountered in the matter of collection;
- c. The complexity of the litigation involved, and the expense, inconvenience and delay necessarily attending it; and
- d. The paramount interest of the creditors and a proper deference to their reasonable views in the premises.

This case is currently at the first step of the settlement approval process where the issue now before the Court is not whether the Settlement merits final approval, but rather whether the Court should direct notification to the class members of the proposed settlement and eventually proceed with a fairness hearing. *Byrd v. Chadwick*, 956 S.W.2d 369 (Mo. Ct. App. 1997). The *Byrd* court, citing federal precedent, characterized this stage as determining whether the Settlement could be “tentatively certified,” and “it is at most a determination that there is what might be termed ‘probable cause’ to submit the proposal to class members and hold a full-scale hearing as to its fairness.” *Id.* (quoting *In re Traffic Executive Ass’n*, 627 F.2d at 634). According to *Byrd*, the trial court should review whether “it appeared that the named plaintiffs were adequate

representatives of the class, that there is no apparent conflict of interest between the representatives and the class or among the class, that the settlement on its face appears to be fair and to have been the result of arms length negotiations.” *Id.*

To the extent that the Court should examine, at this stage in the proceedings, factors which determine whether *final* approval is likely to be granted, the scope of that consideration is limited. At this stage, the Court could not undertake a full and complete fairness review. *Id.* Rather, the Court’s duty is to conduct a threshold examination of the overall fairness and adequacy of the settlement in light of the likely outcome and the cost of continued litigation. *Van Horn*, 840 F.2d at 607; *Rexam v. USW*, 2007 U.S. Dist. LEXIS 68653, \*13 (D. Minn. 2007). Moreover, in making this threshold examination of the fairness of the settlement, the Court is entitled to rely upon the judgment of experienced counsel, especially where, as here, substantial discovery has already been conducted. *Johnson v. City of Tulsa*, 2003 WL 24015151, \* 11 (N.D. Okla. May 12, 2003); *Kogan v. AIMCO Fox Chase, L.P.*, 193 F.R.D. 496, 501 (E.D. Mich. 2000); *Bowling v. Pfizer, Inc.*, 143 F.R.D. 141, 151 n.7 (S.D. Ohio 1992). In making its determination of whether to grant preliminary approval the Court is also entitled to rely upon “its familiarity with the issues and evidence of the case as well as the arms-length nature of the negotiations prior to the settlement.” *Robinson v. Ford Motor Co.*, 2005 WL 5253339, \* 3 (S.D. Ohio June 15, 2005); *Reed v. Rhodes*, 869 F. Supp. 1274, 1278 (N.D. Ohio, 1994).

### **C. The Settlement Merits Preliminary Approval**

Applying the standards set forth above, it is apparent that the Settlement merits preliminary approval.

#### **1. The Settlement Is the Result of a Thorough, Rigorous and Adversarial Process**

A primary focus, in determining whether to grant preliminary approval, is to determine whether the Settlement is “the product of fraud or collusion.” *In re Employee Benefit Plan Sec. Litig.*, 1993 U.S. Dist. LEXIS 21226,\*13 (D. Minn. 1993) (citing *Van Horn*, 840 F.2d at 606); *In re Flight Transp. Corp. Sec. Litig.*, 730 F.2d 1128, 1135 (8<sup>th</sup> Cir. 1984), *cert. denied*, 469 U.S. 1207 (1985).

This Court is familiar with the procedural history of this case – a history which clearly demonstrates a proper adversarial relationship between the parties. The suit was filed almost three years ago. Plaintiffs successfully defended the vast majority of their claims against comprehensive motions to dismiss and for summary judgment, engaged in discovery, briefed the motion for class certification, engaged an expert on damages and obtained a preliminary report from him, before even engaging in any settlement discussions.

During the settlement discussions, which included both face-to-face negotiations and numerous telephone conversations after the initial meeting, the parties forcefully defended their interests and advocated their respective positions. Moreover, the negotiations were presided over by well-respected mediators. As one court recently noted, “[t]he assistance of an experienced mediator in the settlement process confirms that the settlement is non-collusive.” *Satchell v. Federal Express Corp.*, 2007 WL

1114010, \* 4 (N.D.Cal., April 13, 2007); *see also In re Indep. Energy Holdings PLC*, 2003 WL 22244676 at \*4 (S.D.N.Y.2003) (“the fact that the Settlement was reached after exhaustive arm's-length negotiations, with the assistance of a private ‘mediator experienced in complex litigation, is further proof that it is fair and reasonable”).

Here, former Chief United States Magistrate Judge Jonathan Lebedoff and former United States District Judge Nicholas H. Politan conducted mediations at which each Judge brought his expertise to bear in helping the parties debate and discuss the many disputed issue of law and fact in this complex case and bridge the gaps in the parties’ expectations regarding settlement. That the proposed settlement is the result of work by seasoned mediators as well as experienced counsel supports the conclusion that the proposed settlement is at very least in the range of possible settlement approval and worthy of cost notice and a public hearing on the merits of the settlement.

**a. Class Members Should Be Given Notice and Opportunity to Be Heard Concerning the Proposed Settlement**

The Settlement, which obligates Defendants to pay \$17 million, clearly merits – at the very least – consideration by all of the members of the Settlement Class. It is difficult to compare the Settlement to the amount that the Class might have obtained if it had been completely successful in establishing liability at trial, because the parties hotly debated the proper methodologies for computing damages. However, the Settlement represents approximately 17 percent of Plaintiff’s “best case” damages scenario, and Plaintiffs’ other scenarios would result in sharply reduced recoveries. The settlement amount

substantially exceeds Defendants' "best case" damages calculation (which resulted in a finding of no damages whatsoever).

The fairness and adequacy of the Settlement is further underscored by taking into account the obstacles the Class faced in ultimately succeeding on the merits, as well as the expense and likely duration of the litigation. *In re Wireless Tel. Fed. Cost Recovery Fees Litig.*, 2004 U.S. Dist. LEXIS 23342, \*39-40 (W.D. Mo. 2004).

Plaintiffs believe that they have a strong case on the merits, based on the evidence obtained through extensive document discovery and investigation into the allegations of the Complaint. However, victory was far from assured. As one court has held:

In this "battle of experts," it is virtually impossible, for purposes of considering a settlement agreement, to predict with any certainty which testimony would be credited, and ultimately, which damages would be found to have been caused by actionable, rather than the myriad nonactionable factors such as general market conditions. Uncertainties also exist with respect to both the fact and quantum of damages. Courts routinely acknowledge the difficulty in proving damages, particularly in the securities context, where reliance on experts is often necessary. Establishing damages likely requires extensive, costly and complex expert testimony.

*Cohn v. Nelson*, 375 F. Supp. 2d 844, 858 (E.D. Mo. 2005). Plaintiffs here would face the same obstacles to establishing liability and proving damages.

In addition to the risks of establishing liability and damages, the Court should balance the *immediacy* and *certainty* of a substantial recovery, against the delay, uncertainty and expense of the litigation. *In re Wireless Tel. Fed. Cost Recovery Fees Litig.*, 2004 U.S. Dist. LEXIS 23342, \*39-40. Although the parties have already engaged in protracted litigation, at considerable expense, over the past three years, in the absence

of a Settlement Class Members will have to wait substantially longer before they obtain any relief, even assuming they are entirely successful and overcome every obstacle. As aptly summarized by the *In re Wireless* Court, “in contrast to the delay and uncertainty attendant with such litigation, the Settlement Agreement provides substantial and immediate benefits. The Court concludes this consideration weighs in favor of approval.” *Id.* at \*40.

In weighing the potential benefits of the Settlement against the risks and delays of continued litigation, the Court should give weight to the fact that Class Counsel, who are intimately acquainted with the facts and have substantial expertise litigating precisely this type of ERISA Class Action, favor the Settlement and believe that it is in the best interests of the Class. As noted above, Class Counsel did not even *commence* Settlement discussions until after they had engaged in substantial motion practice, extensive discovery, and consultation with relevant experts. Thus, Class Counsel entered into the settlement discussions “fully apprised about the legal and factual issues presented as well as the strengths and weaknesses of their cases” and able to make “a well-informed decision to enter into the proposed Settlement agreement.” *Broadwing*, 2006 WL 3831382. In these circumstances, the opinion of experienced Class Counsel is entitled to deference. *Johnson v. City of Tulsa*, 2003 WL 24015151, \* 11 (N.D. Okla. May 12, 2003); *Kogan v. AIMCO Fox Chase, L.P.*, 193 F.R.D. 496, 501 (E.D. Mich. 2000); *Bowling v. Pfizer, Inc.*, 143 F.R.D. 141, 151 n.7 (S.D. Ohio 1992).

## 2. The Settlement is in the Public Interest

A final factor supporting the Settlement is that it is in the public interest. *In re Employee Benefit Plans Sec. Litig.*, 1993 U.S. Dist. LEXIS 21226, \*13 (D. Minn. 1993). It is in the public interest to resolve all such claims against UnitedHealth globally, rather than through duplicative and individual suits which would drain judicial resources while, at best, resolving only a tiny fraction of all claims. As stated in *In re Wireless*,

The possible length and complexity of further litigation is a relevant consideration to the trial court in determine whether a class action settlement agreement should be affirmed...If this Court were to reject this Settlement agreement, this single piece of litigation would likely drag on for years, require the expenditure of millions of dollars, all while the class members would receive nothing.

2004 U.S. Dist. LEXIS 23342, \*39-40.

## III. THE PROPOSED SETTLEMENT NOTICE SATISFIES RULES 23(d) and (e) AND DUE PROCESS REQUIREMENTS

Class Counsel propose that mailed notice be given in the form of the Notice which is attached as Exhibit A to the proposed Preliminary Approval Order. Notice to the Class in the form and in the manner set forth in the proposed Preliminary Approval Order will fulfill any requirements of due process that may apply, comply with the Federal Rules of Civil Procedure, and inform Class Members about the Settlement and their opportunity to appear and be heard at the Fairness Hearing.

In order to satisfy due process, notice to Class Members must be “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S. Ct. 652, 657 (1950).

Notice should also provide a fair description of the proposed settlement. *Weinberger v. Kendrick*, 698 F.2d 61, 70 (2d Cir. 1982).

Providing notice to the Class in this case is fairly straightforward. All class members are current or former Participants of the Plan. UnitedHealth and/or its record keeper should have the name and address of all or substantially all class members. Their names and addresses will be provided to Plaintiffs in electronic format to permit the rapid and efficient distribution of notice. If experience is any guide, the vast majority of class members will receive this notice promptly.

The substance of the notice also presents no difficulty. The proposed forms of Class notice describe in plain English the terms and operation of the Settlement, the considerations that caused Lead Counsel to conclude that the Settlement is fair and adequate, the maximum counsel fees and expenses that may be sought, the procedures for objecting to the Settlement (objections here may be lodged in paper form or electronically), and the date and place of the Fairness Hearing. The notices fairly apprise Class Members of the Settlement and their options with respect thereto, and fully satisfy any other due process requirements. *See, e.g., Marshall v. Holiday Magic, Inc.*, 550 F.2d 1173, 1177 (9<sup>th</sup> Cir. 1977) (notice must only apprise class members of the subject matter of the suit, the proposed terms of the settlement, and the members' opportunity to be heard). The form and manner of notice proposed here clearly fulfill the requirements of Fed. R. Civ. P. 23 and due process.

#### IV. THE SETTLEMENT CLASS SHOULD BE PRELIMINARILY CERTIFIED

While the parties have stipulated to conditional certification of the Class for settlement purposes, such certification is, of course, subject to review by the Court. *See Weinberger v. Kendrick*, 698 F.2d 61, 73 (2d Cir. 1982). The Court must assure itself, even at this preliminary stage, that certification is proper under Rules 23(a) and (b). *Denny v. Deutsche Bank AG*, 443 F.3d 253, 270 (2d Cir. 2006). However, at this stage, findings regarding class certification are only preliminary. Thus, “mindful of the substantial judicial processes that remain to test the assumptions and representations upon which the parties' motions are premised,” courts may reserve to the final hearing “the right and obligation to test all of the premises behind the parties' motions and the [preliminary] ruling, through the most probing of inquiries.” *In re Sulzer Hip Prosthesis and Knee Prosthesis Liability Litig.*, 2001 WL 1842315, \* 3-4 (N.D. Ohio, Oct. 20, 2001); *see also Olvera v. Norfolk Southern Ry. Co.*, 2007 WL 107731, \* 5 (D.S.C., Jan. 9, 2007).

##### A. The Prerequisites of Rule 23(a) are Satisfied

To proceed as a class action, the litigation must satisfy the four prerequisites of Rule 23(a) and at least one of the three requirements of Rule 23(b). *Stoneridge Inv. Partners LLC v. Charter Communs., Inc. (In re Charter Communs., Inc.)*, 2005 U.S. Dist. LEXIS 14772 (E.D. Mo. June 30, 2005); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614 (1997).

Rule 23(a) provides:

One or more members of a class may sue . . . as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class,

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

These prerequisites, often referred to in shorthand fashion as “numerosity,” “commonality,” “typicality” and “adequacy of representation,” *see Paxton v. Union Nat'l Bank*, 688 F.2d 552, 559 (8th Cir. 1982) are easily satisfied here.

### **1. The Class Satisfies the Numerosity Requirement**

Under Rule 23(a)(1), the class must be sufficiently large so that joinder of all members is impracticable. “There is . . . no set formula to determine if the class is so numerous that it should be so certified. *Bacon*, 370 F.3d at 570. Instead, a “judge may consider reasonable inferences drawn from facts before him at that stage of the proceedings, and an appellate court will generally defer to the District Court's determination that a class is sufficiently numerous to make joinder impracticable.” *Sanft v. Winnebago Indus.*, 2003 U.S. Dist. LEXIS 7789 (D. Iowa 2003). “In light of prevailing precedent, the difficulty inherent in joining as few as 40 class members should raise a presumption that joinder is impracticable, and the plaintiff whose class is that large or larger should meet the test of Fed. R. Civ. P. 23(a)(1) on that fact alone.” *Lowers v. United States*, 2001 U.S. Dist. LEXIS 23899, \*11 (D. Iowa 2001) “[T]he numerosity requirement is usually satisfied by the showing of a colorable claim by the named plaintiff who is a member of a larger class having potentially similar claims.” *Weathers v. Peters Realty Corp.*, 499 F.2d 1197, 1200 (6th Cir. 1974).

Numerosity is clearly satisfied in this case. The Plan's Form 5500 Annual Reports for the Class Period indicated that the Plan had over 30,000 Participants during the Class

Period, and it is reasonable to believe that many of these Participants had a portion of their Plan investments in the Fund. It is thus reasonable to estimate that the Class consists of at least thousands of individuals. Consequently, because the sheer size of the proposed Class makes joinder impracticable, Rule 23(a)(1) is satisfied.

## **2. Common Questions of Law and Fact**

Rule 23(a)(2) requires that there be “questions of law *or* fact common to the class.” (Emphasis added). The test for commonality under 23(a)(2) is far less demanding than the question of whether common questions predominate under Rule 23(b)(3). “Under 23(a)(2), a finding of commonality ‘requires only a single issue common to the class.’” Thus, the commonality requirement is met easily. *Petrovic v. AMOCO Oil Co.*, 200 F.3d 1140, 1148 (8<sup>th</sup> Cir. 1999). The commonality requirement is met if the class members share common objectives and legal or factual positions. *Paxton v. Union Nat'l Bank*, 688 F.2d 552, 559 (8th Cir. 1982)

Here, there are numerous questions of law and fact common to the proposed Class. These questions include:

- a. whether Defendants were fiduciaries of the Plan and/or the Participants;
- b. whether Defendants breached their fiduciary duties;
- c. whether the Plan and the Participants were injured by such breaches; and
- d. whether the Class is entitled to the return of lost investment capital and opportunities, damages and/or injunctive relief.

Plaintiffs Zilhaver and Linn and all class members are similarly situated in their answer to these questions. *See id.*; *Rankin v. Rots*, 220 F.R.D. 511, 518 (E.D. Mich. 2004) (common questions include, among others, whether Defendants were fiduciaries of the plan and whether defendants breached their fiduciary duties; claim that “defendants’ decision to continue investing Kmart’s matching portion solely in company stock notwithstanding Kmart’s financial situation . . . is a claim for breach of the duty of prudence, [which] clearly presents a common issue”); *In re Aquilla ERISA Litig.*, 2006 WL 2289234 (W.D. Pa. 2006); *In re CMS Energy ERISA Litig.*, 225 F.R.D. 534 (E.D. Mich. 2004); *Kolar v. Rite Aide Corp.*, 2003 WL 1257272, at \*2 (E.D. Pa. Mar. 11, 2003) (“There are also obvious “questions of law or fact common to the class” including “whether the individual defendants violated their ERISA fiduciary duties by imprudently allowing the Plans to invest in Rite Aid stock”); *Babcock v. Computer Assoc., Int’l*, 212 F.R.D. 126, 130 (E.D.N.Y. 2003) (common questions include “whether the defendants failed to provide class members with the proper investment options under the Plan” and “whether the defendants failed to diversity the assets of the Plan”).

### **3. Plaintiffs’ Claims are Typical of the Claims of the Class**

Under Rule 23(a)(3), Plaintiffs must show that the “claims or defenses of the representative parties are typical of the claims or defenses of the class.” Fed. R. Civ. P. 23(a)(3). As with commonality, “the test for typicality is not demanding.” *Sprague*, 133 F.3d at 415 (citing *Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620, 625 (5th Cir. 1999). This is because “[n]o class that includes thousands of plaintiffs will be perfectly homogeneous[.]” *Sprague*, 133 F.3d at 415. Even relatively pronounced factual

differences between class members will not preclude a finding of typicality where there is a strong similarity of legal theories or where the claims of the class representatives and the class members arise from the same course of conduct by the defendant. As the court in *Rankin, supra*, explained, “[t]he typicality requirement is met if the plaintiff’s claim arises from the same event or practice or course of conduct that gives rise to the claims of the other class members, and her or his claims are based on the same legal theory.” *Rankin*, 220 F.R.D. at 518 (quotations omitted). In this case, Plaintiffs’ claims are typical of and precisely aligned with those of the Settlement Class members.

#### **4. Plaintiffs Will Adequately Protect the Interests of the Class**

Finally, Plaintiffs will fairly and adequately protect the interests of the class under Rule 23(a)(4). Resolution of two questions determines legal adequacy: (1) do the class representatives have common interests with unnamed class members and (2) will they vigorously prosecute the litigation using qualified counsel. *Senter v. General Motors*, 532 F.2d 511, 252 (6th Cir. 1976); *see also Sosna v. Iowa*, 419 U.S. 393, 403 (1975) (factors that will satisfy Rule 23(a)(4) are the absence of potential conflicts between the class representatives and the class and the assurance that the class action will be vigorously prosecuted); *Sprague*, 133 F.3d at 415; *CMS*, 225 F.R.D. at 544.

The “legal adequacy” test is easily met in this case. First, the claims and interests of Plaintiffs Zilhaver and Linn are congruent with those of the other class members and Plaintiffs have no interests antagonistic to those of the other class members. *Sprague*, 133 F.3d at 415 (6th Cir. 1998) (“Interests are antagonistic when there is evidence that the representative plaintiffs appear unable to ‘vigorously prosecute the interests of the

class.”; *CMS*, 225 F.R.D. at 544; *Rankin*, 220 F.R.D. at 521; *Dubin v. E.F. Hutton Group Inc.*, No. 88 Civ. 0876, 1990 WL 105757, \*6 (S.D.N.Y. 1990). Indeed, the proposed Plaintiffs’ claims are identical to the legal claims belonging to all Class members, and Plaintiffs and Class members alike seek to prove Defendants’ liability on the basis of common facts underlying those claims.

Second, Plaintiffs have retained counsel highly experienced in this type of litigation and eminently able to conduct this litigation to protect the interests of the class. The adequacy element with respect to Class Counsel is therefore satisfied.

**B. The Prerequisites of Rule 23(b)(1) are Satisfied**

To proceed as a class action under Rule 23(b)(1), the proponent of class certification must satisfy each of the requirements of Rule 23(a) and, in addition, demonstrate that the prosecution of separate actions creates the risk of “inconsistent or varying adjudications with respect to individual members of the class,” Rule 23(b)(1)(A), or the risk of “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.” Rule 23(b)(1)(B).

Courts considering ERISA breach of fiduciary duty claims for class certification have consistently followed the reasoning of the drafters of the Federal Rules of Civil Procedure in concluding that subsection 23(b)(1)(B) is the most appropriate basis for class certification. *See* Advisory Comm. Notes to 1966 Amendment of Fed. R. Civ. P. 23(b)(1)(B) (stating that certification under 23(b)(1)(B) is appropriate in cases charging

breach of trust by a fiduciary to a large class of beneficiaries). As the Supreme Court explained in *Ortiz v. Fibreboard*, 527 U.S. 815 (1999), the risks of impairment [under Rule 23(b)(1)(B)] may . . . be found in . . . actions charging a breach of trust by an indenture trustee or other fiduciary similarly affecting the members of a large class of beneficiaries, requiring an accounting or similar procedure to restore the subject of the trust.” (quoting Advisory Committee Notes on Fed. R. Civ. P. 23).

ERISA breach of fiduciary duty cases where courts have granted class certification under subsection (b)(1)(B) include: *Broadwing*, 2006 WL 3831382; *CMS*, 225 F.R.D. at 545-546; *Rogers v. Baxter Int’l, Inc.*, 2006 WL 794734 8-10 (N.D. Ill. March 22, 2006); *Rankin*, 220 F.R.D. at 522; *Kolar*, 2003 WL 1257272, at \*3; *Koch v. Dwyer*, 2001 WL 289972 (S.D.N.Y. Mar. 23, 2001); *Thomas v. SmithKline Beecham Corp.*, 201 F.R.D. 386, 397 (E.D. Pa. 2001); *In re IKON Office Solutions, Inc.*, 191 F.R.D. 457 (E.D. Pa. 2000); *Bunnion v. Consolidated Rail Corp.*, 1998 WL 372644 (E.D. Pa. May 14, 1998); *Kane v. United Independent Union Welfare Fund*, 1998 WL 78985 (E.D. Pa. Feb. 24, 1998); *Feret v. Corestates Fin. Corp.*, 1998 WL 512933 (E.D. Pa. 1998); *Gruby v. Brady*, 838 F. Supp. 820, 827 (S.D.N.Y. 1993); and *Specialty Cabinets & Fixtures, Inc. v. American Equitable Life Ins. Co.*, 140 F.R.D. 474, 479 (S.D. Ga. 1991).

Once satisfied that subsection 23(b)(1)(B) applies, some courts have felt it unnecessary to reach other potentially applicable subsections, such as 23(b)(1)(A). *E.g.*, *Koch v. Dwyer*, 2001 WL 289972, at \*5 n.2 (S.D.N.Y. Mar. 23, 2001). Other courts, however, have certified ERISA class actions under either one or both subsections of 23(b)(1). *See, e.g.*, *CMS*, 225 F.R.D. at 544-545; *Rogers v. Baxter Int’l, Inc.*; *Rankin*, 220

F.R.D. at 523 (certifying ERISA claims under 23(b)(1) (A) and (B) because “a failure to certify a class could expose defendants to multiple lawsuits and risk inconsistent decisions” and “adjudication of [plaintiff’s] claims will likely be dispositive of the claims of other potential class members”); *Kolar*, 2003 WL 1257272, at \*3; *IKON*, 191 F.R.D. at 466. As one court explained,

We find that the ERISA [claims for breach of fiduciary duties, among others] are appropriate for certification under both [23(b)(1)(A) and (b)(1)(B)]. All of these claims relate to the interpretation and application of ERISA plans. [Defendant] Conrail treated the proposed class and subclass identically and any equitable relief granted will affect the entire class and subclass. Failure to certify a class would leave future plaintiffs without adequate representation. Moreover, we see a high likelihood of similar lawsuits against defendants should this class be denied. . . . Inconsistent judgments concerning how the Plans should have been interpreted or applied would result in prejudice.

*Bunnion*, 1998 WL 372644, at \*13.

Plaintiffs’ breach of fiduciary duty claims satisfy both prongs of Rule 23(b)(1) because success will bring Plan-wide relief while failure would likely preclude actions by other Plan Participants. Accordingly, class action treatment under Rule 23(b)(1) is the best way to manage this litigation and ensure that the rights of all Plan Participants are protected. *See Rankin*, 220 F.R.D. at 522-23; *IKON*, 191 F.R.D. at 466 (recognizing the difficulty imposed by contradictory dispositions and observing that “contradictory rulings as to whether IKON had itself acted as a fiduciary, whether the individual defendants had, in this context, acted as fiduciaries, or whether the alleged misrepresentations were material would create difficulties in implementing such decisions”); *Kolar*, 2003 WL 1257272, at \*3 (“Palpably, inconsistent or varying adjudications would be intolerable for the employees of the same employee benefit plans).

Likewise, one Participant's claim in this case would, as a practical matter, be dispositive of the interests of fellow members of the Plan because 502(a)(2) claims must be brought in a representative capacity on behalf of the entire Plan and the relief granted by the Court to remedy a breach of fiduciary duty would "inure[ ] to the plan as a whole" rather than to the individual plaintiff. *Massachusetts Mut.*, 473 U.S. at 140. *See also Rankin*, 220 F.R.D. at 523; *IKON*, 191 F.R.D. at 466 ("given the nature of an ERISA claim which authorizes plan-wide relief, there is a risk that failure to certify the class would leave future plaintiffs without relief"); *Kane v. United Independent Union Welfare Fund*, No. 97-1505, 1998 WL 78985, at \*9 (E.D. Pa. Feb. 24 1998) (certifying class under Rule 23(b)(1)).

**C. The Requirements of Rule 23(g) Are Met**

In addition to the other requirements outlined above, Rule 23 requires the Court to examine the capabilities and resources of Class Counsel to determine whether they will provide adequate representation to the Class. Class Counsel easily meet the dictates of Rule 23(g).

Here, the Settlement was achieved by Class Counsel with years of experience in ERISA law and in prosecuting and trying complex actions. Accompanying this Motion is the Declaration of Lead Counsel Edwin J. Mills of Stull, Stull & Brody attesting to Stull, Stull & Brody's and his own experience in litigating and settling complex class actions generally and ERISA breach of fiduciary duty class actions in particular. Here, Class Counsels' experience and skill were demonstrated by the effective prosecution of this action, including the substantial settlement entered into with Defendants. The result

achieved is the clearest reflection of counsel's skill and expertise. *See In re Warfarin Sodium Antitrust Litig.*, 212 F.R.D. 231, 261 (D. Del. 2002) (class counsel "showed their effectiveness through the favorable cash settlement they were able to obtain"); *see also Ikon Office Solutions Sec. Litig.*, 194 F.R.D. 166, 194 (E.D. Pa. 2000) ("the most significant factor in this case is the quality of representation, as measured by the 'quality of the result achieved, the difficulties faced, the speed and efficiency of the recovery, the standing, experience and expertise of the counsel, the skill and professionalism with which counsel prosecuted the case and the performance and quality of opposing counsel"). Hence, Class Counsel's extensive efforts in prosecuting this case, in combination with the in-depth knowledge of Class Counsel, satisfy Rule 23(g).

#### **V. CONCLUSION**

For the reasons set forth above, Class Counsel respectfully request that the Court grant preliminary judicial approval of the Settlement, preliminarily certify the Settlement Class, and direct that class notice be mailed as provided for in the Preliminary Approval Order which is annexed to the accompanying Motion.

Dated: November 7, 2008

Respectfully submitted,

s/ Edwin J. Mills

Edwin J. Mills  
**STULL, STULL & BRODY**  
6 East 45<sup>th</sup> Street  
New York, NY 10017  
Telephone: (212) 687-7230  
Facsimile: (212) 490-2022

David E. Krause  
**KRAUSE & ROLLINS**  
310 Groveland Avenue  
Minneapolis, MN 55403  
Telephone: (612)874-8550

**Attorneys for Plaintiffs**



I, Edwin J. Mills, certify that Plaintiffs' Memorandum of Law in Support of Their Motion for Preliminary Approval of Class Action Settlement and for Related Relief complies with Local Rule 7.1(c) and with the type size limitation of LR 7.1(e).

I further certify that, in preparation of this Memorandum, I used Microsoft Office Word 2003, and that this word processing program has been applied specifically to include all text, including headings, footnotes, and quotations (but excluding the caption and signature text) in the following word count.

I further certify that the above-referenced memorandum contains 5,905 words.

Dated: October 31, 2008

**STULL, STULL & BRODY**

By: s/Edwin J. Mills

Edwin J. Mills

6 East 45<sup>th</sup> Street

New York, New York 10017

(212) 687-7230

**KRAUSE & ROLLINS**

David E. Krause

310 Groveland Avenue

Minneapolis, MN 55403

(612) 874-8550

Attorneys for Plaintiffs