IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

LORRAINE M. RAMOS, et al., Plaintiffs, v. BANNER HEALTH, et al., Defendants.	Case No.: 1:15-cv-02556 Honorable William J. Martinez Magistrate Judge N. Reid Neureiter

PLAINTIFFS' CONSENT MOTION FOR CLASS CERTIFICATION AND PRELIMINARY APPROVAL OF CLASS SETTLEMENT AS TO CLAIMS AGAINST JEFFREY SLOCUM & ASSOCIATES, INC. AND MEMORANDUM IN SUPPORT

Plaintiffs, by and through their undersigned counsel, and pursuant to Fed. R. Civ. P. 23, respectfully submit this Consent Motion for Class Action Settlement As to Claims Against Defendant Jeffrey Slocum & Associates, Inc. ("Slocum").[1] Defendant Slocum consents to this motion.

INTRODUCTION

Plaintiffs brought this action alleging that the Banner Defendants and Slocum breached their duties under the Employee Retirement Income Security Act of 1974 ("ERISA"). They alleged that Slocum, the investment consultant for the Banner Health 401(k) Plan (the Plan"), breached its fiduciary duties under ERISA by allowing the Plan to pay excessive recordkeeping fees and maintain underperforming investment options. After extensive litigation, lengthy discovery, and protracted arm's-length negotiations with the assistance of a national mediator, Plaintiffs and Slocum have reached a proposed Settlement that provides meaningful relief to a class of all current Plan

[1] Pursuant to D.C.Colo.L.R.7.1(a), counsel for Plaintiffs and Slocum discussed this motion extensively via telephone and email on December 30 and 31, and counsel for Slocum does not object to the relief requested here. Additionally, counsel for the Banner Defendants was informed of this motion and the Settlement.

participants and beneficiaries (the "Settlement Class")—relief rendered all the more meaningful given the chance that most members of the Settlement Class would have to continue protracted litigation, including certain appellate work, in order to obtain *any* recovery at all from Slocum.[2] In light of the litigation risks further prosecution of this action would entail, Plaintiffs respectfully request that the Court: (1) certify the Settlement Class and appoint Schlichter Bogard & Denton as Class Counsel; (2) preliminarily approve the proposed Settlement based on the material terms described herein; (3) approve the proposed form and method of notice to the Settlement Class; and (4) schedule a hearing to consider final approval of the Settlement.

BACKGROUND

I. Plaintiffs' Claims

Plaintiffs filed their putative class complaint against a set of Banner Defendants on November 20, 2015. Dkt. 1. On November 9, 2016, they filed an amended class complaint adding Slocum as a defendant. Dkt. 118. Although the Amended Complaint contains five counts, only two are directed at Slocum. Both allege that Slocum breached its duty of prudence under 29 U.S.C. § 1104(a), by allowing the Plan: (1) to pay unreasonable fees to its recordkeeper, Fidelity (Count I); and (2) to maintain underperforming investment options, namely, the Fidelity Freedom Funds, and the Plan's Level 3 designated investment options referred to internally by the Defendants as the "Mutual Fund Window" (Count II).

II. Status of the Litigation

Plaintiffs, Slocum, and the Banner Defendants have engaged in extensive discovery. Slocum

[2] Given the nature of the proposed Settlement, Plaintiffs have excluded past participants from the class definition.

alone produced over 25,000 pages of documents, in addition to the almost 100,000 pages the Banner Defendants produced. The parties also took over 20 depositions. Slocum—which ceased operations effective October 24, 2016—secured the cooperation of two former employees, plus Mr. Jeffrey Slocum, to sit for depositions. The parties also engaged in extensive expert discovery.

Through litigation, the Court pared down claims against Slocum. First, on March 28, 2018, the Court denied Plaintiffs' motion to certify a class as to claims against Slocum (though it certified a class as to the Banner Defendants). Dkt. 296 at 26. The Court reaffirmed this ruling on January 29, 2019. Dkt. 345. Second, on April 23, 2019, the Court granted partial summary judgment on Plaintiffs' claims against Slocum. Dkt. 372. It granted summary judgment on Plaintiffs' recordkeeping and Mutual Fund Window claims, finding that Slocum was not a fiduciary with regard to the commentary and advice it gave on either. *Id.* at 19-22, 24-27. Accordingly, the only claim that remains against Slocum for trial concerns the advice that it gave to the Plan's fiduciaries regarding the Fidelity Freedom Funds. *Id.* at 22-24. Currently, Slocum can only be liable for damages to the seven individual Plaintiffs, totaling $22,000 as of June 28, 2019, when Plaintiffs served amended Rule 26(a) disclosures. Trial is scheduled for January 6, 2020.

III. Terms of the Proposed Settlement

A. Settlement Fund

Given that Plaintiffs and Slocum only reached agreement on settlement yesterday, they have not yet executed a settlement agreement.[3] However, in light of upcoming trial and to preserve resources, they have agreed on all material terms. Namely, the Settlement Class will consist of

[3] The parties propose to submit an executed settlement agreement within 30 days following completion of the trial set for January 6, 2020.

"All current participants and beneficiaries of the Banner Health Employees 401(k) Plan, excluding Defendants." In exchange for a release of all ERISA claims against Slocum, its former owners, employers, directors, and other associated parties, Slocum will deposit $500,000 ("Gross Settlement Amount") in an interest-bearing settlement account (the "Settlement Fund"). The Settlement Fund will be used to defray only the Plan's recordkeeping expenses that are deemed to be reasonable. The Settlement Fund will also be used to pay Class Counsel's attorneys' fees and expenses, Administrative Expenses of the Settlement, and the Class Representatives' Compensation as described in the Settlement. All amounts deposited in the Settlement Fund will be distributed in accordance with the terms of the proposed Settlement. No residual monies remaining in the Settlement Fund will revert back to Slocum.

B. Notice and Class Representatives' Compensation

The costs to administer the proposed Settlement and incentive payments in an amount approved by the court for the named Plaintiffs will be paid from the Settlement Fund. Plaintiffs will solicit proposals from candidates to serve as Independent Fiduciary and Settlement Administrator. Based on Plaintiffs' experience, they estimate the Settlement Administrator, in its limited role, will charge approximately $5,000 to administer the Settlement, and the Independent Fiduciary will charge approximately $10,000-$15,000.

Plaintiffs will seek incentive awards of $2,500 for each named Plaintiff. This is consistent with precedent recognizing the value of individuals stepping forward to represent a class, particularly in contested litigation like this where the potential benefit to any individual does not outweigh the cost of prosecuting class-wide claims and there are significant risks of no recovery.

C. Attorneys' Fees and Costs

Similar to other ERISA class actions, Class Counsel will request attorneys' fees to be paid out of the Settlement Fund in an amount not more than one-third of the Settlement Fund, or $166,666.67, as well as reimbursement for costs incurred of no more than $56,562.40. Class Counsel will not seek attorneys' fees (1) from the interest earned on the Gross Settlement Amount; (2) for time associated with administering the settlement; and (3) for work required to enforce the proposed Settlement, if necessary. Class Counsel will submit a formal application for attorneys' fees and costs and for the Class Representatives' incentive awards at least 30 days prior to the deadline for Class Members to file objections to the proposed Settlement.

ARGUMENT

I. The Court Should Certify A Class For Settlement Purposes.

In order to certify the Settlement Class, the Court must find that it satisfies each requirement of Rule 23(a) and at least one subpart of Rule 23(b). *Walmart Stores, Inc. v. Dukes*, 564 U.S. 338, 345 (2011). The standard for certifying a class for settlement purposes is more lenient than that applied in certifying a class for trial, as the court need not inquire whether the class would be manageable for trial purposes. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997).

A. The Proposed Class Satisfies Rule 23(a).

Rule 23(a) sets forth four requirements the Settlement Class must meet: (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy of representation. The Court has already ruled that the first three requirements have been met in this case. Dkt. 296.

With respect to the fourth requirement, Plaintiffs acknowledge that the Court previously declined to certify a class against Slocum on adequacy grounds because it found that the named

Plaintiffs lacked sufficient detailed knowledge of Slocum's role. Dkt. 296 at 26. However, that is not a bar to certification for settlement purposes. "Courts … regularly certify settlement classes that might not have been certifiable for trial purposes." William B. Rubenstein, Newberg on Class Actions § 4:63 (5th ed. 2016). Indeed, the Ninth Circuit recently upheld certification for settlement purposes even where the lower court had issued a tentative ruling declining to certify a class for purposes of trial, explaining that the "criteria for class certification are applied differently in litigation classes and settlement classes." *In re Hyundai & Kia Fuel Economy Litig.*, 926 F.3d 539, 556 (9th Cir. 2019) (en banc).

For example, in *In re Diebold ERISA Litig.*, the court denied certification in an ERISA class action also on adequacy grounds, finding that there were "potential conflicts . . . likely to undermine the adequacy of representation of class members." 2009 WL 9120614, at *5 (N.D. Ohio Mar. 11, 2009). That did not stop the court, however, from certifying a class for settlement purposes. *In re Diebold ERISA Litig.*, No. 06-cv-170 (N.D. Ohio Feb. 11, 2011), ECF No. 118; *see also Da Silva Moore v. Publicis Groupe SA*, No. 11-cv-1279 (S.D.N.Y. Jan. 13, 2016), ECF No. 612 (certifying settlement classes after denying class certification for trial purposes).

Likewise, here, the Court's prior ruling is not an impediment to certifying the Settlement Class. The Court's concern regarding the named Plaintiffs' ability to represent the class has been mooted given their achievement of procuring from Slocum class-wide relief, in the form of defraying only reasonable Plan recordkeeping expenses, relief that would not have been available to them absent this Settlement. Moreover, the named Plaintiffs' interests in pursuing a recovery on a classwide basis here are aligned with those of the Settlement Class. In addition, given that

this is a classwide settlement with the relief directed to the benefit of the Plan, Plaintiffs' interests in pursuing their representative claims against Banner Defendants are uncompromised.

Finally, through their vigorous pursuit of this lawsuit, the named Plaintiffs and Class Counsel have adequately represented the Settlement Class. The named Plaintiffs have been actively investigating and litigating this case for over four years. They have spent a great deal of time assisting the lawyers, preparing for their depositions, responding to written discovery, and now, preparing for trial. And, as discussed further below, Schlichter Bogard & Denton is an expert in the field that has zealously represented Plaintiffs in this suit. (*See* Part II, *infra*.).

Thus, Rule 23(a)'s requirements are satisfied for purposes of certifying a Settlement Class.

B. The Proposed Class Satisfies Rule 23(b)(1).

In addition to meeting Rule 23(a)'s requirements, the proposed class must satisfy a subpart of Rule 23(b). "Most ERISA class action cases are certified under Rule 23(b)(1)," *In re Northrop Grumman Corp. ERISA Litig.*, 2011 WL 3505264, at *15 (C.D. Cal. Mar. 29, 2011) (citation omitted), under which a class may be certified due to the risk (A) of inconsistent adjudications that would establish incompatible standards of conduct for the defendant, or (B) that separate actions would establish be dispositive of the interests of other participants not parties to those actions, or substantially impair other participants' ability to protect their interests. Fed. R. Civ. P. 23(b)(1)(B). "[N]umerous courts have held" that "breach of fiduciary duty claims brought under [29 U.S.C. § 1132(a)(2)] are paradigmatic examples of claims appropriate for certification as a Rule 23(b)(1) class." *In re Schering Plough Corp. ERISA Litig.*, 589 F.3d 585, 604 (3d Cir. 2009); *see also Kanawi v. Bechtel Corp.*, 254 F.R.D. 102, 112 (N.D. Cal. 2008).

In its original class order, the Court found "Plaintiffs' arguments for certification under Rules

23(b)(1)(A) &(B) to be particularly persuasive, given the recognition of many other courts that 'ERISA fiduciary litigation presents a paradigmatic example of a Rule 23(b)(1) class.'" Dkt. 296 at p. 27. Indeed, on subpart (A), individual adjudications would open Slocum up to vast and varying liability from individual plaintiffs based on different aspects of the Plan. On subpart (B), any determination as to Slocum would certainly be used by Slocum in any subsequent action, which would impair the interest of other Plan participants. Moreover, in light of Slocum's dissolution and limited resources (*see* Part III, *infra*), any determination in this action would impair the ability of future Plan participants to collect anything from Slocum whatsoever. Accordingly, the Court should certify the Class under Rule 23(b)(1) for settlement purposes.

The Settlement Class thus meets Rule 23's requirements and should be certified.

II. The Court Should Appoint Schlichter Bogard & Denton As Class Counsel.

When the Court certifies a class, it must also appoint class counsel who will represent the interests of the class fairly and adequately. Fed. R. Civ. P. 23(c)(1)(B), (g)(1). In doing so, the Court must consider: (1) the work counsel has done on the action; (2) counsels' relevant experience; (3) counsel's knowledge of the applicable law; and (4) the resources counsel will commit to representing the class. Fed. R. Civ. P. 23(g)(1)(A).

First, Schlichter has done enormous work on this action (as evidenced by the over 400 filings on the docket), and continues to represent a class as to claims against the Banner Defendants.

Second, Schlichter has extensive experience. Courts have found that it is the "preeminent firm" in excessive fee litigation having "achieved unparalleled results on behalf of its clients" in the face of "enormous risks." *Nolte v. Cigna Corp*., 2013 WL 12242015, at *2 (C.D.Ill Oct. 15, 2013).

Third, Schlichter has relevant knowledge to act as Class Counsel. They are "experts in ERISA

litigation," *Krueger v. Ameriprise Fin., Inc.*, 2015 WL 4246879, at *2 (D.Minn. July 13, 2015) (citation omitted), and "highly experienced," *Waldbuesser v. Northrop Grumman Corp.*, 2017 WL 9614818, at *4 (C.D.Cal. Oct. 24, 2017). Moreover, the firm was class counsel in *Tibble v. Edison Int'l*, in which the Supreme Court held in a unanimous 9–0 decision that ERISA fiduciaries have "a continuing duty to monitor investments and remove imprudent ones[.]" 575 U.S. 523, 135 (2015).

Fourth, the firm will continue to devote resources to this case. It continues to represent a class in claims against the Banner Defendants, and it is committed to devoting all necessary resources to representing the class and vigorously prosecuting this action.

Thus, Schlichter Bogard & Denton is a highly qualified legal representative of the Settlement class and should be appointed Class Counsel under Rule 23(g).

III. The Court Should Grant Preliminary Approval To The Settlement.

Rule 23(e) requires judicial approval for class-wide settlements, which is subject to the Court's sound discretion. *United States v. Hardage*, 982 F.2d 1491, 1495 (10th Cir. 1993). The law favors and encourages settlements, especially in complex actions. *See Amoco Prod. Co. v. Fed. Power Comm'n*, 465 F.2d 1350, 1354 (10th Cir. 1972); *Big O Tires, Inc. v. Bigfoot 4x4, Inc.*, 167 F. Supp. 2d 1216, 1229 (D. Colo. 2001). At the preliminary approval stage, a court "makes a preliminary determination on the fairness, reasonableness, and adequacy of the settlement terms." *Rhodes v. Olson Assocs., P.C.*, 308 F.R.D. 664, 666 (D. Colo. 2015). The Court must find that the settlement is "likely" to be approved. Fed. R. Civ. P. 23(e)(1)(B).

In order to determine whether a proposed settlement is fair, reasonable, and adequate, courts consider the following factors:

> (1) whether the proposed settlement was fairly and honestly negotiated; (2) whether serious questions of law and fact exist, placing the ultimate outcome of the litigation in doubt; (3) whether the value of an immediate recovery outweighs the mere possibility of future relief after protracted and expensive litigation; and (4) the judgment of the parties that the settlement is fair and reasonable.

Rutter & Wilbanks Corp. v. Shell Oil Co., 314 F.3d 1180, 1188 (10th Cir. 2002)). The Agreement in this case easily satisfies each of these four prongs and Rule 23's requirements.

A. The Settlement Is Fair and Reasonable, And The Product of Informed, Fair, Honest, and Non-Collusive Negotiations.

There is a presumption that settlements are informed and non-collusive if the class is represented by experienced counsel, the settlement is the result of arms-length negotiation before an experienced mediator, and substantial discovery occurs prior to the settlement. *See* Newberg on Class Actions 5th § 13:14, n.6 (collecting cases).

Such is the case here. The parties have "'vigorously advocated their respective positions throughout the pendency of the case.'" *Lucas v. Kmart Corp.*, 234 F.R.D. 688, 693 (D. Colo. 2006) (quoting *Wilkerson v. Martin Marietta Corp*., 171 F.R.D. 273, 284 (D. Colo. 1997)). Over the past three-plus years of litigation, the parties have exchanged ample discovery, engaged in substantial motion practice, and have investigated their claims thoroughly. *See Aragon v. Clear Water Prods. LLC,*, 2018 WL 6620724, at *3 (D. Colo. Dec. 18, 2018) ("no evidence of collusion" where case had been "pending for nearly three years, during which time the parties have briefed several motions and engaged in formal discovery, including written discovery and depositions"); *see also Wal-Mart Stores, Inc. v. Visa U.S.A., Inc*., 396 F.3d 96, 116 (2nd Cir. 2005) (holding that "'presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery'") (quoting Manual for Complex Litigation (Third) §30.42 (1995)).

In addition, Plaintiffs and Slocum have been discussing settlement for months. All parties engaged in mediation with the assistance of respected mediator Hunter Hughes in Atlanta, Georgia, in July 2019. Following the unsuccessful mediation, Slocum and Plaintiffs exchanged settlement offers over the course of the summer. Finally, counsel for Plaintiffs and Slocum exchanged multiple phone calls and email correspondence over the past week, discussing the strengths and weakness of Plaintiffs' case against Slocum.

Because the settlement was a product of "arms' length" negotiation by experienced counsel, with the help of "an experienced and respected mediator," this factor weighs in favor of the settlement being "fair, reasonable, and adequate." *Decoteau v. Raemisch*, 2016 WL 8416757, at *7 (D. Colo. July 6, 2016) (Martinez, J.).

B. Questions of Law and Fact Exist, Placing the Ultimate Outcome of Plaintiffs' Claims Against Slocum in Doubt.

Although it is not appropriate at this stage of the litigation to evaluate the merits, *see Carson v. American Brands, Inc*., 450 U.S. 79, 88 n. 14 (1981), "a court cannot truly consider whether serious questions of law or fact exist in a case without assessing the strength of each party's claims. This assessment necessarily requires some evaluation of the case's underlying merits." *Bailes v. Lineage Logistics, LLC*, 2016 WL 4415356, at *5 (D. Kan. Aug. 19, 2016).

Here, the Court has entered judgment for most of the claims as to Slocum; only the seven Plaintiffs' claim regarding the Freedom Funds remains. Given Slocum's limited role and authority in the Plan, Plaintiffs face an uphill battle and the risk of no recovery for the Plan at all against Slocum, as illustrated by the judgement recently entered in favor of defendants in another 401(k) class action. *See Wildman v. Am. Cent. Servs., LLC*, 2017 WL 6045487 (W.D. Mo. Dec. 6, 2017). What is more, for the Settlement Class to have recovered from Slocum at all, Plaintiffs would have

had to appeal the Court's denial of class certification, prevail on appeal, and then relitigate issues as to Slocum. In light of the risks, cost, and delay of future litigation, in addition to the "real prospect that plaintiffs would not have obtained any recovery had the case proceeded to trial," *Aragon*, 2018 WL 6620724, at *3, it was reasonable and appropriate for Plaintiffs to reach a settlement on the terms that were negotiated and this factor weighs in favor of preliminary approval. *See Kruger v. Novant Health, Inc.*, 2016 WL 6769066, at *5 (M.D.N.C. Sept. 29, 2016) (settlement of a 401(k) class action "benefits the employees and retirees in multiple ways.")

C. The Value of Immediate Recovery Outweighs the Mere Possibility of Future Relief After Years of Protracted and Expensive Litigation.

This action has already been pending for over four years. As noted, for the Settlement Class to recover anything at all from Slocum, Plaintiffs would need to appeal the Court's class certification ruling, prevail on appeal, and then relitigate the matter as to Slocum—all of which would take a number of years. "By contrast, the proposed settlement agreement provides the class with substantial, guaranteed relief." *Lucas*, 234 F.R.D. 688 at 694*; see also McNeely v. Nat'l Mobile Health Care, LLC*, 2008 WL 4816510, at *13 (W.D. Okla. Oct. 27, 2008) (class "is better off receiving compensation now as opposed to being compensated, if at all, several years down the line, after the matter is certified, tried, and all appeals are exhausted"). The Settlement also provides a guaranteed source of payment from Slocum, while such guarantee still exists: Slocum ceased to exist in 2016, and Slocum's attorneys' have alerted Plaintiffs' attorneys that Slocum is operating on a limited insurance policy. Further litigation is almost sure to deplete these funds. Thus, this factor also weighs in favor of granting approval.

D. The Parties and Experienced Counsel on Both Sides Believe the Settlement is Fair and Reasonable.

"Counsels' judgment as to the fairness of the agreement is entitled to considerable weight." *Aragon*, 2018 WL 6620724, at *3. Here, Class Counsel is experienced in class action litigation generally and, in particular, class litigation arising from breaches of fiduciary duty under ERISA. They pioneered this area of litigation in 401(k) retirement plans, and are intimately familiar with this unique and complex area of law. *See Kruger*, 2016 WL 6769066, at *5 (noting "endorsements [from] the AARP and the Pension Rights Center" for Class Counsel's efforts in retirement plan litigation); *Ramsey v. Philips N. Am. LLC*, No. 18-1099, Doc. 27 at 7 (S.D. Ill. Oct. 15, 2018) ("Schlichter Bogard & Denton has left an indelible mark on the 401(k) industry by bringing comprehensive changes to fiduciary practices in order to ensure that employees and retirees have the opportunity to save for retirement through prudently administered retirement programs."); *Tussey v. ABB, Inc.*, 2012 WL 5386033, at *3 (W.D. Mo. Nov. 2, 2012), vacated on other grounds, 746 F.3d 327 (8th Cir. 2014) ("Plaintiffs' attorneys are clearly experts in ERISA litigation").

It is Class Counsel's opinion that the Settlement is fair and reasonable. See Declaration of Troy A. Doles at ¶¶ 4-5. As set forth above, absent the Settlement, and in the face of significant appellate practice, the Settlement Class would have significant challenges in obtaining *any classwide relief from Slocum*, even if Plaintiffs had prevailed at trial. This shows that Class Counsel and the named Plaintiffs have "adequately represented the class" and will continue to do so. Fed. R. Civ. P. 23(e)(2)(A). Moreover, the relief will defray only the Plan's reasonable administrative costs—costs that Plaintiffs continue to challenge in the continued litigation against Banner Defendants. And because the relief will be applied to the Plan's recordkeeping costs as a whole, it "treats class members equitably relative to each other." Fed. R. Civ. P. 23(e)(2)(D). Counsel is also mindful

that because Slocum has not operated for over three years, there are extremely limited funds available. Even if Plaintiffs were to prevail at trial against Slocum, Slocum's limited insurance policy may have been used up entirely at that point, leaving Plaintiffs with no choice but to continue in protracted litigation to recover any award.

Moreover, although the seven named Plaintiffs will request small "incentive awards" of $2,500, these types of awards of well-supported in existing case law. *See, e.g., Beesley v. Int'l Paper Co.*, 2014 WL 375432, at *4 (S.D. Ill. Jan. 31, 2014) (approving service awards of $25,000 each to six of the named plaintiffs and $15,000 to one of the named plaintiffs); *Krueger*, 2015 WL 4246879, at *3 (approving service awards of $25,000 each to five named plaintiffs). Plaintiffs' requested participation awards therefore do not undermine the fairness, reasonableness, and adequacy of the Settlement Agreement. In addition, these small awards do not affect their continued adequacy to represent the class for the claims against Banner Defendants.

Nor do the requested Attorneys' Fees. "[I]n a common fund case such as this, a reasonable fee is normally a percentage of the Class recovery." *Smith v. Krispy Kreme Doughnut Corp.*, 2007 WL 119157, at *1 (M.D.N.C. Jan. 10, 2007); *see also Boeing Co. v. VanGemert*, 444 U.S. 472, 478 (1980). The requested one-third of the Settlement Fund is in line with similar cases. *See, e.g.*, *Davis v. Crilly*, 292 F. Supp. 3d 1167, 1174 (D. Colo. 2018) (approving 37% in fees which was "well within the normal range for a contingent fee award"); *Whittington v. Taco Bell of Am., Inc*., 2013 WL 6022972, at *6 (D. Colo. Nov. 13, 2013) (39% of settlement fund as fees); *Vaszlavik v. Storage Tech. Corp*., 2000 WL 1268824, at *4 (D. Colo. Mar. 9, 2000) (fee "in the middle of the ordinary 20%–50% range . . . is presumptively reasonable").

There are thus "no grounds to doubt [the Settlement's] fairness and no other obvious deficiencies (such as unduly preferential treatment of class representatives or segments of the class, or excessive compensation for attorneys)[.]" *Reade-Alvarez v. Eltman, Eltman & Cooper, P.C.*, 237 F.R.D. 26, 33 (E.D.N.Y. 2006). All four factors thus weigh in favor of settlement.

IV. The Court Should Approve the Notice Plan.

The Court should also approve the form, content, and method of distributing the proposed Settlement Notice, attached hereto as Exhibit A. A class notice should be written in clear, straightforward language, and set out the key facts about the Settlement. Fed. R. Civ. P. 23(c)(2)(B); Fed. Judicial Ctr., Manual for Complex Litigation, § 21.312 (4th ed. 2004). The methods of notice must be the best "practicable." Fed. R. Civ. P. 23(c)(2)(B) & (e)(1)(B). Due process and Rule 23(e) do not require that each Class Member receive notice, but do require that the class notice 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 and Trust Co*., 339 U.S. 306, 314 (1950). "Individual notice must be provided to those class members who are identifiable through reasonable effort." *Eisen v. Carlisle and Jacquelin*, 417 U.S. 156, 175 (1974).

The proposed notice plan meets these standards, as it consists of multiple components designed to reach Class Members designed for their effectiveness. Fed. R. Civ. P. 23(e)(2)(c)(ii). First, the Settlement Notice will be sent by electronic email to all Settlement Class Members who have a current email address known to the Plan's recordkeeper, Fidelity, and/or Banner Health shortly after entry of the Preliminary Approval Order. Email addresses of the Class Members are maintained by Banner Health, as the Plan fiduciary, and/or the Plan's recordkeeper, Fidelity, who use

this information for, *inter alia*, delivering Plan notices and other plan-related information. Class Members include both current and former employees of Banner Health. In addition to the Settlement Notice, Class Counsel will develop a dedicated website solely for the Settlement, and a link to that website will appear on Class Counsel's website (www.uselaws.com). In addition, Class Counsel will disseminate the Settlement Notice via targeted publication on social media targeted to areas of significant Banner Health employees. This notice program will provide class members with the best notice practicable under the circumstances. Thus, the form of notice and proposed procedures for notice satisfy the requirements of due process and the Court should approve the notice plan as adequate.

CONCLUSION

For the foregoing reasons, the parties respectfully request that the Court: (1) certify the Settlement Class and appoint Schlichter Bogard & Denton Class Counsel; (2) grant preliminary approval of the Settlement; (3) find that the proposed plan to provide notice to the class and proposed forms of notice satisfy the requirements of Rule 23 and due process; and (4) schedule a Fairness Hearing for the earliest convenient date approximately six months after preliminary approval to determine whether the proposed Settlement Agreement is fair, reasonable, and adequate and therefore should be approved.

DATED: December 31, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 31, 2019, I served this document on all parties via the Court's CM/ECF system.

/s/ Troy A. Doles