IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

MICHAEL J. IANNONE, JR., and NICOLE A. JAMES, as plan participants, on behalf of the AUTOZONE, INC. 401(k) Plan, and on behalf of others similarly situated,	)	
Plaintiffs,	)	CLASS ACTION
v.	)	Case No.: 2:19-cv-02779-MSN-tmp
AUTOZONE, INC., as plan sponsor, BILL GILES, BRIAN CAMPBELL, STEVE BEUSSINK, KRISTIN WRIGHT, MICHAEL WOMACK, KEVIN WILLIAMS, and RICK SMITH, individually and as members of the AUTOZONE, Inc. Investment Committee, and NORTHERN TRUST CORPORATION and NORTHERN TRUST, INC., as Investment fiduciaries,	)	
Defendants.	)	

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PRELIMINARY APPROVAL OF CLASS SETTLEMENT

COME NOW, the Class Representatives, Michael J. Iannone, Jr. and Nicole A. James, as plan participants, on behalf of the AutoZone, Inc. 401(k) Plan, and on behalf of others similarly situated, who hereby submit this Memorandum in Support of their Motion for Preliminary Approval of Class Settlement.

INTRODUCTION

On October 23, 2023, the Class Representatives and Defendants Northern Trust Corporation and Northern Trust, Inc. ("Northern Trust" or the "Northern Trust Defendants"), agreed to a Settlement[1] that provides $2.5 million dollars in monetary relief to the proposed Class.

The Class Representatives submit that this settlement meets the standards articulated by Fed. R. Civ. P. 23(e)(2) and is fair, reasonable, adequate, and likely to warrant final approval. *See Zaller v. Fred's, Inc*., 2022 U.S. Dist. LEXIS 51505, *5 ("The Court finds that (a) the Stipulation resulted from good faith, arm's-length negotiations, and (b) the Stipulation is sufficiently fair, reasonable, and adequate to the Class Members to warrant providing notice of the Settlement to Class Members and holding a Settlement Hearing"). In addition, the Class has already been certified under Rule 23.

The resolution was reached after four (4) years of litigation and numerous arms-length, intensely fought negotiation sessions including mediation. During the course of the litigation and settlement negotiations, hundreds of thousands of pages of documents involving financial data were reviewed by the parties and their experts, deposition work was conducted, and multiple motions were filed. The parties proceeded past class certification, expert challenges, and summary judgment. Ultimately, on the eve of trial, the Class Representatives and the Northern Trust Defendants ("the Settling Parties") were able to reach an arms-length agreement to resolve the litigation after years of protracted negotiations.

In light of the litigation risks further prosecution of this action would inevitably entail, the Class Representatives respectfully request this Court 1) preliminarily approve the settlement for the entire Class, 2) preliminarily approve the Plan of Allocation and Notice, and 3) set a Final Approval Hearing.

Plaintiffs submit the following Exhibits to assist the Court's review:

[1] The fully executed Settlement Agreement ("Settlement") is attached as Exhibit 1.

- **Exhibit 1**: Settlement Agreement
  - **Exhibit A**: Class Notice
  - **Exhibit B**: Proposed Final Approval Order
  - **Exhibit C**: Proposed Plan of Allocation
  - **Exhibit D**: Proposed Preliminary Approval Order
  - **Exhibit E**: Proposed Bar Order
- **Exhibit 2**: Declaration of D. G. Pantazis, Jr.
- **Exhibit 3**: Proposed Schedule of Events

BACKGROUND

I. Plaintiffs' Claims and Litigation History

Plaintiffs filed their Complaint against Defendant AutoZone, Inc. on November 13, 2019. Doc. 1. The Named Plaintiffs were participants in an ERISA defined contribution plan sponsored by their employer, AutoZone. *Id*. Plaintiffs filed their Amended Complaint naming Northern Trust Corporation and Northern Trust, Inc. as Defendants (among others)[2] on September 22, 2021. Doc. 85.

On November 15, 2021, the Northern Trust Defendants filed a motion to dismiss for failure to state a claim. Doc. 117. On December 1, 2021, the Plaintiffs and Northern Trust Defendants agreed to a stipulation of dismissal as to the breach of duty of loyalty claim filed against the Northern Trust Defendants and the Northern Trust Defendants also agreed to drop their Motion to Dismiss and simply file and Answer. Doc. 121. On December 17, 2021, the Northern Trust Defendants filed their Answer to Plaintiffs' Amended Complaint. Doc. 131.

[2] The "non-settling" Defendants are AutoZone, Inc. and the individual investment committee members named in the Amended Complaint (the "AutoZone Defendants").

On February 28, 2022, Plaintiffs file their Motion for Class Certification. Doc. 172-173. On April 1, 2022, the Northern Trust Defendants joined the AutoZone Defendants in opposing Plaintiffs' request for Class Certification. Doc. 181. On August 12, 2022, Judge Pham issued a Report and Recommendation to Certify a Class. Doc. 205. On August 26, 2022, the Northern Trust Defendants joined the AutoZone Defendants in objecting to Judge Pham's Report and Recommendation regarding Class Certification. Doc. 209. On December 7, 2022, Judge Norris adopted Judge Pham's Report and Recommendation regarding Class Certification. Doc. 239.

On January 13, 2023, the Northern Trust Defendants joined the AutoZone Defendants in filing a Motion to exclude the testimony of Plaintiffs' experts. Doc. 247-250. On February 3, 2023, the Northern Trust Defendants moved for Summary Judgment. Doc. 279-288. On August 9, 2023, Judge Pham issued a Report and Recommendation as to the Motions to exclude Plaintiffs' expert testimony which was not objected to by any party. Doc. 338.

On October 10, 2023, the Northern Trust Defendants filed various Motions in Limine. Doc. 370-372; 376-378. On October 11, 2023, Judge Pham issued a Report and Recommendation as to the Motions for Summary Judgment. Doc. 380.

On October 16, 2023, all parties attended a Pre-Trial Conference with the Court. Doc. 383. On October 16, 2023, the Northern Trust Defendants moved to continue trial. Doc. 382. On October 18, 2023, the Court denied the motions to continue trial but set a conference on October 20, 2023. Doc. 386. On October 20, 2023, the Court held a pre-trial status conference and entered a Pre-Trial Order. Doc. 389-390.

On October 22, 2023, the Class Representatives and Northern Trust reached a settlement. On October 23, 2023, the Class Representatives began trial against the AutoZone Defendants and the Northern Trust Defendants and Plaintiffs reported the settlement with the Northern Trust

Defendants to the Court. On October 31, 2023, the Class Representatives concluded their trial against the AutoZone Defendants.

Plaintiffs, through their counsel, responded to all motions filed on the docket, participated in multiple hearings with the Court, and engaged in voluminous discovery throughout. In doing so, Plaintiffs' counsel engaged qualified experts to prepare their case, reviewed tens of thousands of documents including extensive financial data and spreadsheets, issued subpoenas to multiple third-parties to connect the evidence, deposed multiple corporate and fact witnesses, and prepared to present their case against the Northern Trust Defendants at trial (and did proceed through trial against the non-settling Defendants).

II. Mediation and Settlement Negotiations

Throughout the intense litigation process outlined above, the parties engaged in consistent arms-length settlement negotiations. On October 27, 2022, the parties conducted a mediation with David Geronemus of JAMS Mediation Group. While this original session did not result in a resolution, it did lay the groundwork for future discussions. On September 6, 2023, the parties reconvened settlement discussions with David Geronemus and set a second mediation for October 3, 2023. Ultimately, this mediation was cancelled. However, the Plaintiffs and the Northern Trust Defendants continued settlement discussions informally, over multiple sessions, through the eve of trial, and on October 22, 2023, were able to reach a tentative resolution. The next day, Northern Trust and the Plaintiffs ("the Settling Parties") informed the Court of same.

III. The Terms of the Proposed Settlement

A. Monetary Relief and Release

In exchange for releases and for the dismissal of the action, Northern Trust will make a substantial monetary payment of $2,500,000.00 to pay recoveries to Class members (the

"Settlement Fund"). The Settlement Fund will be used to compensate Class members for their alleged losses, as well as to pay Class Counsel's attorneys' fees and expenses, Administrative Expenses of the Settlement, and the Class Representatives' incentive awards if ordered by the Court. All amounts deposited in the Settlement Fund will be distributed in accordance with the terms of the proposed Settlement. No residual monies will revert back to Northern Trust.

Class members still in the AutoZone 401(k) Plan will automatically receive distributions directly into their tax-deferred retirement accounts. Class Members who left the Plan and no longer have an active account in the AutoZone Plan, will be provided their distributions in the form of a check made out to them individually.

As described more fully in the Settlement Agreement, all Class Members are releasing Northern Trust, their employees, agents, and related companies from all claims asserted in this litigation related to the Plan. **Exhibit 1, pp. 8-9**. Since the AutoZone Defendants are not a party to this settlement, no claims have been released as to the AutoZone Defendants and the Class's claims against the AutoZone Defendants remain pending. A complete copy of the Release will be available on the settlement website.

B. Notice and Class Representatives Compensation

The Notice and Plan of Allocation meet the requirements of Rule 23. The standard for the adequacy of a settlement notice in a class action is measured by reasonableness. *See* Fed. R. Civ. P. 23(e). The "best notice" practicable under the circumstances includes individual notice to all class members who can be identified through reasonable effort. Fed. R. Civ. P. 23(c)(2)(B). That is precisely the type of notice proposed here.

The Settlement Administrator will provide notice to the Settlement Class via U.S. Mail. Settlement Agreement, ¶ 4.2.2. This type of notice is presumptively reasonable. *See Phillips*

Petroleum Co. v. Shutts, 472 U.S. 797, 812 (1985). Moreover, the Notice will be supplemented through the Settlement Website and telephone support line. This is more than sufficient to meet the standard under Rule 23 and is consistent with other ERISA settlements that have been approved. *See, e.g., In re Regions Morgan Keegan Sec., Derivative & ERISA Litig.*, 2014 WL 12808031, at *4 (approving substantially similar notice plan).[11]

The content of the Notice is also reasonable. The Notice includes, among other things: (1) a summary of the lawsuit; (2) a clear definition of the Settlement Class; (3) a description of the material terms of the Settlement; (4) a description of the claims being released; (5) instructions as to how to object to the Settlement and a date by which Settlement Class Members must object; (6) the date, time, and location of the final approval hearing; (7) contact information for the Settlement Administrator; (8) information regarding Class Counsel; and (9) a statement regarding Administrative Costs that may be deducted in connection with the Settlement. Settlement Agreement, **Exhibit 1**. Thus, the proposed Notice attached hereto as **Exhibit A** to the Settlement Agreement, meets the requirements of Rule 23 and of constitutional due process. *See*, Fed. R. Civ. P. 23(c)(2)(B) & (A).

Northern Trust will provide all Notice required by CAFA. Plaintiffs' counsel will select a Settlement Administrator who will maintain a database with all relevant settlement participant information, create and maintain a website with all necessary case and settlement information, disseminate Notice via mail, and maintain a hotline to field calls and inquiries. *See* **Exhibit A**. The

[11] *See also, e.g., Amos v. PPG Indus., Inc.,* 2019 WL 3889621, at *6 (S.D. Ohio Aug. 16, 2019), report and recommendation adopted, 2019 WL 3980570 (S.D. Ohio Aug. 22, 2019); *Sims v. BB&T Corp.*, Nos. 1:15-cv-732, 1:15-cv-841, ECF No. 439 (M.D.N.C. Dec. 13, 2018); *Moreno v. Deutsche Bank*, No. 1:15 cv-09936-LGS, ECF No. 335 (S.D.N.Y. Oct. 9, 2018), *Urakhchin v. Allianz Asset Mgmt. of Am., L.P.*, 2018 WL 3000490, at *6-7 (C.D. Cal. Feb. 6, 2018).

parties expect the Notice to be widely viewed as the plan recordkeepers typically maintain mailing address information for all members of the Class. The Settlement Administrator will perform skip-tracing functions, if necessary, should any contact information prove outdated and will also cross check any change of address information prior to mailing the Notice. *Id*.

C. Settlement Administration

All the Administrative Expenses to administer the proposed Settlement will be paid from the Settlement Fund except for the fees necessary to procure the evaluation from the Independent Fiduciary (which will be paid for by Northern Trust). Although potentially unnecessary in this instance[3], the Settlement will be subject to review by an Independent Fiduciary acting on behalf of the Plan. *Id.,* p. 8; *see also* Prohibited Transaction Exemption 2003-39, 68 Fed. Reg. 75632, as amended, 75 Fed. Reg. 33830 ("PTE 2003-39"). The Independent Fiduciary will issue its report to Plaintiffs' counsel at least twenty (20) days prior to the final Fairness Hearing. *Id*.

Plaintiffs' counsel will select a Settlement Administrator whose pay and expense will be deducted from the Settlement Fund. The Settlement Administrator will be tasked with reviewing the Class data, administering Notice to the Class, maintaining a settlement website and phone hotline, maintaining the Qualified Settlement Fund, handling any escrow fees and taxes associated with maintaining said fund, and ultimately administering settlement payout to Class members if final approval is granted (which includes handling all tax related issues for said payouts).

[3] Plaintiffs acknowledge that because Northern Trust is no longer an investment advisor nor fiduciary to the Plan, the independent review may not be necessary. However, the parties, in the interest of transparency to the Class, agreed to proceed with the review, and Northern Trust agreed to fund said review as part of the settlement.

D. Incentive Awards

Plaintiffs intend to seek incentive awards for the Class Representatives in an amount approved by the Court. These awards will be paid from the Settlement Fund. Plaintiffs' counsel requests $10,000 each to be paid to Michael Iannone and Nicole James. This amount is consistent with prior precedent[4] 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 and the risk of alienation from the employers and peers. *E.g., Champs Sports Bar & Grill Co. v. Mercury Payment Sys., LLC*, 275 F. Supp. 3d 1350, 1356 (N.D. Ga. 2017) (Cohen, J.); *Ingram v. The Coca-Cola Co*., 200 F.R.D. 685, 694 (N.D. Ga. 2001) (Story, J.); *In re Dun & Bradstreet Credit Servs. Customer Litig*., 130 F.R.D. 366, 374 (S.D. Ohio 1990); *see also Troudt v. Oracle Corp*., No. 16-175, Doc. 236 at 9 (D. Colo. July 10, 2020); *Kelly v. Johns Hopkins Univ*., No. 16-2835, 2020 WL 434473, at *8 (D. Md. Jan. 20, 2020); *Cassell v. Vanderbilt Univ*., No. 16- 2086, Doc. 174 at 5 (M.D. Tenn. Oct. 22, 2019); *Tussey v. ABB, Inc*., No. 06-4305, 2019 WL 3859763, at *6 (W.D. Mo. Aug. 16, 2019); *Clark v. Duke Univ*., No. 16- 1044, 2019 WL 2579201, at *5 (M.D. N.C. June 24, 2019); *Kruger v. Novant Health, Inc.*, No. 14-208, 2016 WL 6769066, at *6 (M.D. N.C. Sept. 29, 2016); *Spano v. Boeing Co*., No. 06-743, 2016 WL 3791123, at *4 (S.D. Ill. Mar. 31, 2016).

[4]*See Hadix v. Johnson,* 322 F.3d 895, 898 *("when a class-action litigation has created a communal pool of funds to be distributed to the class members, courts have approved incentive awards to be drawn out of that common pool."); see also Robles v. Comtrak Logistics, Inc*., 2022 U.S. Dist. LEXIS 225283, at *33-37.

E. Attorneys' Fees and Costs

Plaintiffs' counsel will request attorneys' fees to be paid out of the Settlement Fund in an amount not more than 33.3% of the Settlement Fund, or $833,325.00, as well as reimbursement for costs incurred to prosecute this lawsuit. The Sixth Circuit has permitted fee awards ranging up to 50% of the common fund recovered for the Class. *Walls v. JPMorgan Chase Bank, N.A.*, No. 3:11-CV-673-DJH, 2016 WL 6078297, at *5 (W.D. Ky. Oct. 14, 2016). Pursuant to the common fund doctrine and/or any applicable statutory fee provision, Class Counsel may apply to the Court for an award of attorneys' fees not to exceed 33 1/3 percent of the Settlement Amount and reimbursement of reasonable expenses to Class Counsel, to be paid solely from the Settlement Fund. Class Counsel also may apply to the Court for compensation to Named Plaintiffs and the Former Named Plaintiffs in amounts not to exceed $10,000 for each Named Plaintiff and Former Named Plaintiff for their contributions to the Action and Named Plaintiffs and the Former Named Plaintiffs shall be entitled to receive such compensation from the Settlement Fund to the extent awarded by the Court. **Exhibit 1**, pp. 16-17.

Although Plaintiffs' counsel will not request a fee greater than 33.3% of the monetary recovery, as part of their fee request as to this particular settlement, counsel will not seek compensation for time associated with communicating with Class members or Defendants during the Settlement Period, or work required to enforce the proposed settlement.

IV. Settlement Approval Process and Legal Standard

While the Court is undoubtedly aware of the process for settlement approval in cases such as this, for the sake of clarity, Plaintiffs highlight the following steps necessary to reach final approval. Federal Rule of Civil Procedure 23(e) requires judicial approval of any settlement agreement that will bind absent class members.

The standard for approval is whether the settlement is "fair, reasonable, and adequate." *People First of Tenn. v. Clover Bottom Developmental Ctr.*, 2015 WL 404077, at *2 (M.D. Tenn. Jan. 29, 2015) (quoting Fed. R. Civ. P. 23(e)(2)). The district court has discretion in determining whether this standard has been met. *See Johnson v. W2007 Grace Acquisition I, Inc.*, 2015 WL 12001268, at *4 (W.D. Tenn. Apr. 30, 2015) ("Preliminary approval of a proposed settlement to a class action lies within the sound discretion of the Court.") (quoting *In re Vitamins Antitrust Litig.*, 2001 WL 856292, at *4 (D.D.C. July 25, 2001)). However, the Sixth Circuit has recognized that "federal policy favor[s] settlement of class actions'" such as this. *Int'l Union, United Auto., Aerospace, & Agr. Implement Workers of Am. v. Gen. Motors Corp.*, 497 F.3d 615, 632 (6th Cir. 2007).

The process for settlement approval involves three stages: (1) preliminary approval; (2) notice to the Class; and (3) a fairness hearing and final approval. *Tenn. Assoc. of Health Maintenance Orgs., Inc. v. Grier*, 262 F.3d 559, 565-66 (6th Cir. 2001). At the preliminary approval stage, courts examine the proposed settlement for "obvious deficiencies" before determining whether it is in the "range of possible approval." *W2007 Grace Acquisition I, Inc.*, 2015 WL 12001268, at *4. "A court should base its preliminary approval of the proposed settlement agreement '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.'" *Kizer v. Summit Partners, L.P.*, 2012 WL 1598066, at *7 (E.D. Tenn. May 7, 2012) (quoting *Brotherton v. Cleveland*, 141 F.Supp.2d 894, 903 (S.D. Ohio 2001)).

The ultimate fairness determination is left for final approval, after class members receive notice of the settlement and have an opportunity to be heard. Plaintiffs have provided a "Proposed Schedule of Events" to assist the Court in this analysis and process. *See* **Exhibit 3**.

In 2018, Rule 23(e) was amended to specify uniform standards for settlement approval. See Fed. R. Civ. P. 23(e) advisory committee note (2018). The amended rule states that, at the preliminary approval stage, the court must determine whether it "will likely be able to: (i) approve the proposal under Rule 23(e)(2); and (ii) certify the class for purposes of judgment on the proposal." Fed. R. Civ. P. 23(e)(1)(B). Rule 23(e)(2), in turn, specifies the following factors the court must ultimately consider at the final approval stage in determining whether a settlement is "fair, reasonable, and adequate":

> (A) the class representatives and class counsel have adequately represented the class;
>
> (B) the proposal was negotiated at arm's length;
>
> (C) the relief provided for the class is adequate, taking into account:
>
> (i) the costs, risks, and delay of trial and appeal;
>
> (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
>
> (iii) the terms of any proposed award of attorney's fees, including timing of payment; and
>
> (iv) any agreement required to be identified under Rule 23(e)(3); and
>
> (D) the proposal treats class members equitably relative to each other.

Fed. R. Civ. P. 23(e)(2).

Courts within the Sixth Circuit have generally continued to apply the same "within the range of possible approval" standard to preliminary approval after the 2018 amendments. *See Garner Properties & Mgmt., LLC v. City of Inkster*, 333 F.R.D. 614, 626 (E.D. Mich. 2020); *Wallburn v. Lend-A-Hand Servs., LLC*, 2019 2020 WL 2744101, at *7 (S.D. Ohio May 26, 2020). "The goal of this amendment is not to displace any [existing] factor, but rather to focus the court .

. . on the core concerns of procedure and substance that should guide the decision whether to approve the proposal." Fed. R. Civ. P. 23(e) advisory cmt note (2018).

The Sixth Circuit also considers seven factors to determine whether a class action settlement is "fair, reasonable, and adequate," many of which overlap with the Rule 23(e) factors. *UAW v. Gen. Motors Corp.*, 497 F.3d 615, 631 (6th Cir. 2007). These factors are:

1. the risk of fraud or collusion;
2. the complexity, expense, and likely duration of the litigation;
3. the amount of discovery engaged in by the parties;
4. the likelihood of success on the merits;
5. the opinions of class counsel and class representatives;
6. the reaction of absent class members; and
7. the public interest.

(*Id*.) Evaluation of each of these factors here demonstrates that preliminary approval of the Settlement is warranted.

V. The Court Should Grant Preliminary Approval to the Settlement Agreement and Release

As discussed below: (1) the settlement was negotiated at arm's length by experienced counsel after extensive discovery; (2) the Class was adequately represented by the Class Representatives and Class Counsel; and (3) the relief provided is adequate and equitable to all Class Members. Accordingly, this Court should grant preliminary approval of the Settlement.

A. The Plaintiffs Obtained Class Certification and the Class Certified is the Same as the Settlement Class

Often, the first step in a class settlement is to certify a settlement class, but here, the Court has already certified the Class, appointed Class Representatives, and Class Counsel. Doc. 239.

The parties have agreed that the Settlement Class should not differ from the Class previously certified by the Court. *See* Settlement Agreement at p. 6. Thus, there is no need for the Court to perform the class certification analysis again for the purposes of the Settlement Class, as it has already granted Class Certification to the same group of class members participating in this settlement. To the extent the Court deems it necessary to perform a formal analysis for the Settlement Class, Plaintiffs incorporate by reference all arguments they made in support of Class Certification, and the analysis contained in the Report and Recommendation Granting Class Certification, adopted by the Court.

B. Class Representatives and Lead Counsel Have More than Adequately Represented the Settlement Class

The Sixth Circuit has long recognized that the opinion of experienced and informed counsel supporting the settlement is entitled to considerable weight. *Gokare v. Fed. Express Corp*., 2013 WL 12094870, at *6 (W.D. Tenn. Nov. 22, 2013) (*quoting Williams v. Vukovich*, 720 F.2d 909, 922-23 (6th Cir.1983)). That is especially true in this case.

"Plaintiffs' counsel are experienced litigators who serve as class counsel in ERISA actions involving defined-contribution plans[.]" *Moreno v. Deutsche Bank Americas Holding Corp*., 2017 WL 3868803, at *11 (S.D.N.Y. Sept. 5, 2017). As detailed in the attorney declaration of Plaintiffs' counsel, D.G. Pantazis, Jr., Plaintiffs' counsel has participated in multiple ERISA lawsuits throughout the country, negotiated multiple settlements in this context, and most recently tried this very case to completion before the Court. *See* **Exhibit 2**, Pantazis Declaration, at ¶ 26. This Court has already found Plaintiffs' counsel to be adequate representatives of the Class, by appointing them as Class Counsel. Doc. 205 at p. 44. Class Counsel have concluded that the relief provided by this Settlement is fair, reasonable, and adequate. *See* **Exhibit 2**, Pantazis Declaration, at ¶ 16.

The Settlement Class Members also have been adequately represented by the class representatives in this case. As the Court noted in its Report and Recommendation, "the putative class representatives are adequate class representatives and satisfy the requirements of Rule 23(a)(4)". Doc. 205, pp. 39-40. Specifically, the Class Representatives have fulfilled their duties to the class by (among other things) selecting Class Counsel, reviewing the Complaint, producing documents, reviewing written discovery responses, communicating regularly with Class Counsel, participating in depositions, and most recently, participating in trial and reviewing the terms of this very settlement (and signing the Settlement Agreement itself). These are the type of actions that constitute adequate representation. *See Fitzgerald v. P.L. Mktg., Inc.*, 2020 WL 3621250, at *8 (W.D. Tenn. July 2, 2020) (class representatives adequately represented class "by participating in client interviews and conferences with Class Counsel and by providing relevant documents"); *Willis v. Big Lots, Inc*., 242 F. Supp. 3d 634, 649-50 (S.D. Ohio 2017) (finding class representatives adequately represented class by reviewing pleadings, assisting counsel in responding to requests for production and interrogatories, and being available for depositions).

Plaintiffs' Counsel and the Class Representatives have invested significant time and resources to prosecute these claims against well-funded Defendants for over four (4) years of litigation. With respect to discovery, Plaintiffs obtained hundreds of thousands of pages of documents comprised of meticulous financial data, contracts, and correspondence. The parties conducted over twenty (20) depositions, argued class certification, engaged in expert discovery, filed for summary judgment, and ultimately conducted trial (while not an active Defendant at trial, Northern Trust still participated and provided testimony). Through those efforts, the Class Representatives and their counsel were able to gain a thorough understanding of the facts and legal theories applicable to their claims, along with the relevant risks, before agreeing to the Settlement.

Class Representatives and their counsel have more than adequately represented the interest of the Class throughout the extended duration of this case and request approval of this settlement.

C. The Proposed Settlement Is the Result of Arm's-Length Negotiations

Rule 23(e)(2)(B) requires the court to determine whether a proposed settlement "was negotiated at arm's length." Courts consistently approve class action settlements reached through arms-length negotiations after meaningful discovery. *See Johnson v. W2007 Grace Acquisition I*, Inc., 2015 WL 12001269, at *6 (W.D. Tenn. Dec. 4, 2015) ("Discovery provides a level playing field for negotiations and ensures that the negotiations are informed rather than the product of uneducated guesswork."); *Koenig v. USA Hockey*, 2012 WL 12926023, at *4 (S.D. Ohio Jan. 10, 2012) (documents provided to plaintiffs in advance of settlement provided a "clear picture of the strengths and weaknesses of this case and the sufficiency of the legal and factual defenses the Defendants would raise.").

That is precisely the situation presented here. At all times, the parties negotiated at arm's length. *See* **Exhibit 2**, Pantazis Declaration, at ¶ 14. Moreover, the parties engaged in extensive discovery before engaging in settlement discussions. *Id., at*. The settlement was ultimately reached the evening before trial. This gave the parties a clear view of the facts and law, and the strengths and weaknesses of their case.

Specifically, Plaintiffs observed that Northern Trust and AutoZone were in lock step until the filing of motions for summary judgment. In Northern Trust's motion for summary judgment, Northern Trust presented, for the first time, a detailed and comprehensive chronology of the advice that Northern Trust gave to AutoZone during the time that Northern Trust served as AutoZone's ERISA 3(21) fiduciary investment advisor. [Northern Trust Statement of Facts (Dkt. 280), ¶¶74-79, 114, 117-125, 127-138]. Northern Trust repeatedly gave AutoZone advice that AutoZone did

not follow relating to: the adoption of an investment policy statement [NTSoF ¶¶76-79], the elimination of revenue share [NTSoF ¶¶119, 121-124, 127-131], use of lower cost share classes [NTSoF ¶¶117, 123], consideration of lower-cost passively-managed index funds [NTSoF ¶¶118, 120-123, 131-136], and the replacement of GoalMaker with target date funds. [NTSoF ¶¶74-75, 131-133]. Northern Trust ultimately resigned when AutoZone did not follow Northern Trust's advice. [NTSoF ¶139]. The resignation was effective June 30, 2018, mid-way through the Class Period. These facts, which were well documented in Northern Trust's summary judgment filings, were a significant consideration in Plaintiffs' evaluation of the claims against Northern Trust.

Courts in this district have approved settlements at much earlier stages of proceedings. *See W2007 Grace Acquisition I, 2015 WL 12001269*, at *3 (approving settlement reached while motion to dismiss pending); *Gokare v. Fed. Express Corp*., 2013 WL 12094870, at *4 (W.D. Tenn. Nov. 22, 2013) (same); *In re Regions Morgan Keegan Sec., Derivative & ERISA Litig*., 2013 WL 12329512, at *4 (W.D. Tenn. Sept. 5, 2013) (granting final approval of settlement reached while motion to dismiss pending, although plaintiffs admitted they "do not have many of the important documents necessary to prove their claims."); *Garland v. Memphis-Shelby Cty. Airport Auth*., 2011 WL 13090678, at *3 (W.D. Tenn. July 19, 2011) (granting final approval to settlement reached while motion to dismiss was pending, prior to formal discovery).

Based on the extensive record that was developed in this instance, the parties had more than sufficient information to evaluate settlement. The 2018 amendments to Rule 23 also make clear that use of a neutral mediator should be considered in determining "whether [negotiations] were conducted in a manner that would protect and further the class interest." Fed. R. Civ. P. 23 advisory committee's note to 2018 amendment. Here, the settling parties consistently engaged with a neutral, nationally renowned mediator. While the ultimate agreement was reached without his

involvement, his assistance leading up to the eventual settlement was vital and again, suggests that the settlement was reached at arm's length. *See, e.g., Andrews v. State Auto Mut. Ins. Co*., U.S. Dist. LEXIS 191571, *11 ("The participation of an independent mediator in settlement negotiations virtually [e]nsures that the negotiations were conducted at arm's length and without collusion between the parties."); *Saccoccio v. JP Morgan Chase Bank, N.A*., 297 F.R.D. 683, 692 (S.D. Fla. 2014)(holding that "[i]t is clear that the negotiations between the parties proceeded at arms' length" after the parties "worked extensively with a mediator" and after the defendants "filed numerous dispositive motions that could have completely absolved themselves of liability").

D. The Relief Provided to the Settlement Class is More than Adequate, Taking into Account the Considerations Set Forth in Rule 23(e)(2)(C)

Rule 23(e)(2)(C) asks courts to consider whether the "relief provided for the class is adequate, taking into account:(i) the costs, risks, and delay of trial and appeal; (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims; (iii) the terms of any proposed award of attorney's fees, including timing of payment; and (iv) any agreement required to be identified under Rule 23(e)(3)."A review of those factors at this stage shows that the Settlement warrants preliminary approval.

1. The Costs, Risks, and Delay of Trial and Appeal

In the absence of a Settlement, Plaintiffs would have faced significant litigation risk. *See In re Regions Morgan Keegan Sec., Derivative & ERISA Litig.*, 2014 WL 12808031, at *3 (W.D. Tenn. Dec. 24, 2014) (noting the risks of continued litigation, including "further uncertainty given the evolving case law in *ERISA* cases."); *Todd v. Retail Concepts, Inc*., 2008 WL 3981593, at *4 (M.D. Tenn. Aug. 22, 2008) ("It is also pertinent for the Court to consider the risk, expense and delay of further litigation."); *Shanechian v. Macy's*, 2013 WL 12178108, at *4 (S.D. Ohio June 25,

2013) (noting difficulty of proving both liability and damages at trial even where plaintiffs prevailed on previous motion to dismiss and class certification rulings).

Here, the "costs, risks, and delay of trial and appeal," Fed. R. Civ. P. 23(e)(2)(C)(i), strongly support preliminary approval. The Court in this case in particular is keenly aware of the additional work and risk involved in continuing the litigation, as the remaining non-settling parties are continuing to provide filings to the Court, even a month after a week and a half of trial thus demonstrating that continued litigation would be costly, risky, and protracted. As other courts have recognized, "ERISA is a complex field that involves difficult and novel legal theories and often leads to lengthy litigation." *Krueger v. Ameriprise, 2015 WL 4246879, at *1 (D. Minn. July 13, 2015)*; *see also In re Marsh ERISA Litig., 265 F.R.D. 128, 138 (S.D.N.Y. 2010)* ("Many courts have recognized the complexity of ERISA breach of fiduciary duty actions."). Indeed, it is not unusual for these cases to extend for a decade or longer before final resolution. *See Shanechian,* 2013 WL 12178108*, at *5* (discussing how ERISA case that had lasted for six years could last for six more years absent a settlement); *Tussey v. ABB Inc., 2017 WL 6343803, at *3 (W.D. Mo. Dec. 12, 2017)* (requesting proposed findings more than ten years after suit was filed on December 29, 2006); *Tibble v. Edison Int'l, 2017 WL 3523737, at *15 (C.D. Cal. Aug. 16, 2017)* (outlining remaining issues ten years after suit was filed on August 16, 2007); *Abbott v. Lockheed Martin Corp., 2015 WL 4398475, at *4 (S.D. Ill. July 17, 2015)* (noting that the case had originally been filed on September 11, 2006).

The Settlement resolves the case without any further delay and will, if finally approved, offer the Settlement Class an immediate and certain recovery. The Settlement provides immediate tangible benefits to the Class and eliminates the risk, delay, and expense associated with continued litigation. Given the risks, cost, and delay of further litigation, it was reasonable and appropriate

for Plaintiffs to reach a settlement on the terms that were negotiated. *See Kruger v. Novant Health, Inc., 2016 WL 6769066, at *5 (M.D.N.C. Sept. 29, 2016)* (stating that settlement of a 401(k) class action "benefits the employees and retirees in multiple ways"). Rule 23(e)(2)(B) therefore weighs heavily in favor of preliminary approval.

2. The Effectiveness of Any Proposed Method of Distributing Relief to the Class, Including the Method of Processing Class Member Claims

The proposed method of processing the Settlement Class Members' claims and distributing relief to eligible claims is efficient and effective. The Plan of Allocation will efficiently distribute the settlement monies to Class Members based on data available from the AutoZone 401(k) Plan recordkeeper rather than requiring every Class Member to provide years of information about their 401(k) Plan.

Plaintiffs will select a qualified Settlement Administrator to process the distributions. Plaintiffs will select a Settlement Administrator with a proven track record that has been chosen as the administrator in a number of large, complex, and high-profile class action settlements.

"The goal of any distribution method is to get as much of the available damages remedy to class members as possible and in as simple and expedient a manner as possible." *Fitzgerald v. P.L. Mktg., Inc*., No. 2:17-cv-02251-SHM-cgc, 2020 WL 3621250, at *9 (W.D. Tenn. July 2, 2020)). The Plan of Allocation allows for an efficient process to expediently provide payment in a quick and equitable manner.

E. The Terms of Any Proposed Award of Attorneys' Fees and Expenses, Including Timing of Payment

Class Counsel will be applying for a fee award of 33.3% of the $2.5 million common fund, in addition to recovering their expenses. "[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*., No.

1:05CV00187, 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 Sixth Circuit has permitted fee awards ranging up to 50% of the common fund recovered for the Class. *Walls v. JPMorgan Chase Bank, N.A.*, No. 3:11-CV-673-DJH, 2016 WL 6078297, at *5 (W.D. Ky. Oct. 14, 2016). With regard to ERISA cases in particular, the standard rate for attorneys' fees is one-third of the common fund established. *See e.g., Kelly v. Johns Hopkins Univ.*, 2020 U.S. Dist. LEXIS 14772, *8 (M.D.C. 2020) (collecting cases). In this case, Plaintiffs' counsel will request attorneys' fees to be paid out of the Settlement Fund in an amount not more than 33.3% of the Settlement Fund, or $833,325.00, as well as reimbursement for costs incurred to prosecute this lawsuit.

The fees requested would not be due and payable until after the Final Order Approving the Settlement. As to Rules 23(e)(2)(C)(iv) and (e)(2)(D), requiring that "any agreement made in connection with the [settlement] proposal" be identified, the attached Class Counsel Declaration makes clear that all such agreements are set forth in the Settlement itself. **Exhibit 2**, ¶ 10. Class Members will receive notice of the proposed fee and expense request and will have an opportunity to object to any such award prior to Final Approval. Accordingly, Rule 23(e)(2)(C) is satisfied.[5]

F. The Settlement Agreement is the Controlling Document Made in Connection with the Parties Settlement Proposal

Rule 23(e)(3) requires the parties seeking approve to "file a statement identify any agreement made in connection with the proposal". Per the terms of the Settlement Agreement, the Settlement Agreement itself is the only document that controls the terms of the agreed to

[5] Class Counsel will address the basis for a fee and expense award at greater length in a separate brief before final approval. For now, it should be sufficient to show that an award of 33.3% of the common fund is comfortably within the range permitting preliminary approval.

Settlement. This is consistent with the declaration provided by Plaintiffs' counsel as well. **Exhibit 2**, ¶ 10. Thus, the Settling Parties have produced all documentation required under Rule 23(e)(3).

G. The Proposed Settlement Treats Class Members Equitably Relative to One Another

The Court's analysis under this Rule 23(e)(2) factor includes "whether the apportionment of relief among class members takes appropriate account of differences among their claims, and whether the scope of the release may affect class members in different ways that bear on the apportionment of relief." Fed. R. Civ. P. 23 advisory committee's note to 2018 amendment; *see also In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, No. 05MD1720MKBJO, 2019 WL 6875472, at *27 (E.D.N.Y. Dec. 16, 2019).

Here, the claims of each Class Member are relatively straightforward, and require little differentiation, thus all Class Members are treated equitably under the Plan of Allocation and will receive an equal payment. Each Class Member that participated in the Plan during the statute of limitations has a claim. While true that in larger settlements in the 401(k) litigation context, a pro-rata settlement reflecting specific participant investments and fund balances may be more appropriate, in the context of a smaller settlement such as this[6], the additional administrative expense in making such an allocation is unwarranted. Thus, the most equitable way to ensure recoveries for all Class Members is the method proposed in the Plan of Allocation. The Plan of Allocation also explains how each Class Members payment will be distributed, and every Class Member will be treated the same in that regard from a process perspective. *See* **Exhibit C, ¶ ¶ C and D**.

[6] As the Court is aware, Class Counsel seeks far greater damages against the non-settling Defendants.

Further, the scope of the release does not affect apportionment of the Settlement Fund to Class Members. Every Class Member is subject to the same release, and the release does not affect the apportionment of relief to other class members. *See In re GSE Bonds Antitrust Litig*., 414 F. Supp. 3d 686, 699 (S.D.N.Y. 2019)(finding this element satisfied when all settlement class members sign the same release and where the release "does not appear to affect the apportionment of relief to other class members"); *In re Payment Card Litig*., 330 F.R.D. at 47 ("Further, the scope of the release applies uniformly to putative class members, and does not appear to affect the apportionment of the relief to class members, apart from securing the opportunity to participate in the (b)(2) action. Accordingly, the Court finds that this factor will likely weigh in favor of granting final approval."). As such, this factor also supports approval of the Settlement.

H. Additional Sixth Circuit Factors Also Warrant Preliminary Approval

1. The Risk of Fraud or Collusion

"Courts presume the absence of fraud or collusion in class action settlements unless there is evidence to the contrary." *Leonhardt v. ArvinMeritor, Inc*., 581 F. Supp. 2d 818, 838 (E.D. Mich. 2008). Here, there is no evidence in the record to reflect any fraud or collusion on behalf of the parties, quite the opposite. As referenced in the procedural history of the case above, it is quite clear that the settlement process was procedurally fair and only arose after a prolonged adversarial process. *Fusion Elite All Stars v. Varsity Brands, LLC*, 2023 U.S. Dist. LEXIS 179316, *14 ("The settlement was reached after fact and expert discovery, evidencing that it was the result of an adversarial process.")

2. The Complexity, Expense, and Likely Duration of Continued Litigation

This factor has been addressed in § D(1) above and warrants preliminary approval. *Fusion Elite All Stars v. Varsity Brands, LLC*, 2023 U.S. Dist. LEXIS 179316, *15 ("The complexity, cost, and likely duration of this case also supports approval.").

3. The Amount of Discovery the Parties Undertook

As addressed in the procedural history section above, this litigation has lasted for over four (4) years and the settlement was only reached on the eve of trial, after the Plaintiffs survived challenges such as motions to dismiss, class certification, *Daubert*, and summary judgment. Throughout, the parties conducted over twenty (20) depositions of parties and third parties. Plaintiffs reviewed tens of thousands of electronic documents, including intricate financial data. Plaintiffs engaged multiple high-level experts. And the settling Defendants did the same. S*ee* **Exhibit 2**, Pantazis Declaration, at ¶ 8. Thus, the amount of discovery undertaken by the Settling Parties favors preliminary approval. *Fusion Elite All Stars v. Varsity Brands, LLC*, 2023 U.S. Dist. LEXIS 179316, *15 (granting settlement approval when "the settlement was reached after the conclusion of fact and expert discovery, which featured significant motion practice concerning discovery disputes.").

4. The Likelihood of Success on the Merits

This factor has been addressed in § D(1) above, as well as in the procedural history. Since the beginning, Plaintiffs' claims have been vigorously challenged by both settling and non-settling Defendants. The Class is currently still litigating with non-settling Defendants and no outcome at trial or on appeal is certain. Thus, the security and finality of this settlement favors approval. *Fusion Elite All Stars v. Varsity Brands, LLC*, 2023 U.S. Dist. LEXIS 179316, *16 ("Altogether, the Court cannot readily determine what the outcome of this case would be if it were fully litigated.

The uncertainty as to the outcome supports approving the settlement."); *see also Moore v. Medical Fin. Servs*., 2021 U.S. Dist. LEXIS 249719, *8 ("Class actions are inherently difficult. By settling, Class Counsel removed the potential risks and secured monetary relief for class members.").

5. The Opinion of Class Counsel and Class Representatives

This factor has been addressed in § B above and warrants preliminary approval. *Fusion Elite All Stars v. Varsity Brands, LLC*, 2023 U.S. Dist. LEXIS 179316, *16 ("Because Co-Lead Class Counsel and the Class Representatives all support the settlement, this factor weighs in favor of approving it.".

6. The Reaction of Absent Class Members

At the preliminary approval stage, this factor remains to be determined as Notice has yet to be disseminated. Class Counsel will make sure to provide the Court with enough information to assess the reaction in a request for Final Approval.

7. Public Interest

The public interest weighs in favor of preliminary approval of this settlement. Society generally has an interest in encouraging private litigants to investigate the propriety of their retirement investments made by their employers. This is particularly true in the class action context in that it is beneficial to society at large for qualified counsel to undertake legitimate but difficult complex litigation. "[C]lass actions . . . have value to society more broadly, both as deterrents to unlawful behavior—particularly when the individual injuries are too small to justify the time and expense of litigation—and as private law enforcement regimes that free public sector resources." *Gascho v. Glob. Fitness Holdings, LLC,* 822 F.3d 269, 287 (6th Cir. 2016); *see also In re Skechers Toning Shoe Prods. Liab. Litig.*, 2013 U.S. Dist. LEXIS 67441, 2013 WL 2010702, at *9 (W.D. Kent. May 13, 2013) ("Encouraging qualified counsel to bring inherently difficult and

risky but beneficial class actions . . . benefits society.")). Thus, public interest is served by this settlement.

CONCLUSION

For all the foregoing reasons, the Class Representatives respectfully request that the Court,

a. certify the Settlement Class consistent with Doc. 239;

b. grant Preliminary Approval of the Class Action settlement and Plan of Allocation;

c. order that the Notice in the form contained in **Exhibit A** to the Settlement Agreement be disseminated;

d. order that non-settling Defendant AutoZone, Inc., within thirty (30) days of the entry of the Preliminary Approval Order, is to 1) obtain and produce to Plaintiffs the list of Settlement Class Members along with their contact information in a usable database, which shall include the most recent mailing addresses, full names, and social security numbers, and 2) obtain and produce to Plaintiffs the Plan participant data described in the Plan of Allocation via its Plan recordkeepers; and

e. that the Court set the Fairness Hearing Date for determination of whether this Class Action Settlement should be finally approved.

RESPECTFULLY SUBMITTED,

/s/ D G. Pantazis, Jr.
D. G. Pantazis
Counsel for Plaintiffs

OF COUNSEL:
WIGGINS CHILDS PANTAZIS
FISHER GOLDFARB, LLC
The Kress Building
301 Nineteenth Street North
Birmingham, Alabama 35203
(205) 314-0557
dgpjr@wigginschilds.com

James H. White, IV
JAMES WHITE, LLC
2100 1st Ave North, Suite 600
Birmingham, Alabama 35203
(205) 383-1812
james@whitefirmllc.com

Lange Clark
LAW OFFICE OF LANGE CLARK, P.C.
301 19th Street North, Suite 550
Birmingham, Alabama 35203
(205) 939-3933
langeclark@langeclark.com

CERTIFICATE OF SERVICE

I hereby certify that on December 7, 2023, the above and foregoing document was filed and served via the Court's CM/ECF system, which will automatically send email notification of such filing to all attorneys of record.

Brian T. Ortelere, Esquire
Jeremy P. Blumenfeld, Esquire
Emily C. Reineberg Byrne, Esquire
MORGAN, LEWIS & BOCKIUS LLP
1701 Market Street
Philadelphia, PA 19103
Telephone: (215) 963-5000
Facsimile: (215) 963-5001
jeremy.blumenfeld@morganlewis.com
brian.ortelere@morganlewis.com
emily.reineberg@morganlewis.com

Abbey M. Glenn, Esquire
Mathew J. McKenna, Esquire
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue NW
Washington, DC 20001
Telephone: (202) 739-3000
Facsimile: (202) 739-3001
abbey.glenn@morganlewis.com
Mathew.mckenna@morganlewis.com

Samuel D. Block, Esquire
MORGAN LEWIS & BOCKIUS LLP
110 North Wacker Drive, Suite 2800
Chicago, IL 60606
Tel: (312) 324-1000
Fax: (312) 324-1001
samuel.block@morganlewis.com

David A. Thornton, Esquire
John S. Golwen, Esquire
Jonathan E. Nelson, Esquire
BASS, BERRY & SIMS, PLC
100 Peabody Place, Suite 1300
Memphis, TN 38103
Telephone: (901) 543-5900
Facsimile: (901) 543-5999
dthornton@bassberry.com
jgolwen@bassberry.com
jenelson@bassberry.com

Counsel for Defendant AutoZone, Inc., Steve Beussink, Brian Campbell, Bill Giles, Rick Smith, Kevin Williams, Michael Womack and Kristen Wright

Patrick G. Walker, Esquire
HARRIS SHELTON HANOVER WALSH, PLLC
6060 Primacy Parkway, Suite 100
Memphis, Tennessee 38119
pwalker@harrisshelton.com

David Tetrick, Jr., Esquire
Darren A. Shuler, Esquire
Danielle Chattin, Esquire
KING & SPALDING LLP
1180 Peachtree Street
Atlanta, Georgia 30309
dtetrick@kslaw.com
dshuler@kslaw.com
dchattin@kslaw.com

Amanda Sonneborn, Esquire
KING & SPALDING LLP
110 N Wacker Drive, Suite 3800
Chicago, Illinois 60606
asonneborn@kslaw.com

Attorneys for Northern Trust Corporation and Northern Trust Investments, Inc.

/s/ D.G. Pantazis
Of Counsel