

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

CALVIN McCUTCHAN,

Plaintiff,

vs.

CORIAN OPERATIONS, INC.,
INFINERA CORPORATION, CORIAN
401(k) PLAN, and DOES 1-20,

Defendants.

Case No. 1:20-cv-00561 (CPK)

MOTION FOR FINAL CERTIFICATION OF CLASS FOR SETTLEMENT PURPOSES

Plaintiff Calvin McCutchan hereby submits this Unopposed Motion for Final Certification of the Class for Settlement Purposes pursuant to Fed. R. Civ. P. 23(b)(1) (the “Class Motion”).^{1 2}

I. INTRODUCTION AND BACKGROUND

On November 3, 2022, Plaintiff presented the proposed Settlement to the Court for preliminary approval, and requested, for purposes of the Settlement only, that the Court preliminarily certify the Settlement Class under Fed. R. Civ. P. 23(b)(1) (“Preliminary Class Motion”). ECF 64. Therein, Plaintiff articulated how the proposed Class satisfied the requirements of Rule 23. On November 18, 2022, the Court granted the Motion, and issued its Preliminary Class Certification. Order (“Preliminary Class Order”), which preliminarily certified the non-opt out Class for Settlement purposes only. ECF 68. The Preliminary Class Order found that the proposed Settlement Class satisfied Fed. R. Civ. P. 23(a) and (b), and specifically found: (1) the Class is

¹ Unless otherwise defined herein, all capitalized terms have the same meaning as those set forth in the Settlement Agreement.

² Attached hereto as Exhibit A is the Proposed Order Certifying the Class for the Purpose of Settlement, Appointment of Class Representative and Class Counsel.

ascertainable from the Plan's records and that the number of Class members is such that joinder would be impracticable; (2) there are one or more questions of fact and/or law common to the Class; (3) Plaintiff Calvin McCutchan's claims are typical of the Class's claims; (4) Plaintiff will adequately protect the Class's interests; (5) prosecution of separate actions by individual Class members would create a risk of inconsistent or varying adjudications or individual awards could be dispositive of other members' claims and/or impair or impede those persons' ability to protect their interests; (6) and that Rosca Scarlato LLC and McCarthy, Lebit, Crystal & Liffman Co., LPA ("Class Counsel") are capable of fairly and adequately representing the Class's interests.

Since then, the Parties have complied with the Court's Order, including providing notice to the Class via first-class mail and email,³ posting notice on a dedicated website, and mailing the Class Action Fairness Act ("CAFA") notices to the requisite officials pursuant to the CAFA statute, 28 U.S.C. § 1715 (2005). Joint Dec. ¶¶ 35-38; Viera Dec. ¶ 3.

Nothing has changed to alter the propriety of the Court's certification, and no Class Member has objected to the Class certification to date. Therefore, for all the reasons stated below, and in Plaintiff's Preliminary Class Motion, [ECF No. 64] which is incorporated by reference, as well as findings in the Court's Preliminary Class Order [ECF No. 68], Plaintiff respectfully requests that the Court reaffirm its determinations and finally certify the Class for purposes of carrying out the Settlement pursuant to Fed. R. Civ. P. 23(b)(1).⁴

³ See Joint Declaration of Berkson and Rosca, Exhibit F, Declaration of Cornelia Viera Concerning Notice to the Class, Mailing of CAFA Notice, and Objections ("Viera Dec."), filed contemporaneously herewith, ¶¶ 3-6.

⁴ Contemporaneously with this Motion, Plaintiff also filed a Motion for Final of Approval of Settlement, which is also incorporated by reference and lends additional support.

II. DISCUSSION

A. The Requirements for Certification of a Settlement Class Are Satisfied

Plaintiff respectfully requests that the Class be finally certified for purposes of settlement. The Seventh Circuit has long acknowledged the propriety of certifying a class solely for purposes of a class action settlement. “Federal courts naturally favor the settlement of class action litigation,” and certification of a settlement class is a necessary part of approving a class action settlement. *Isby*, 75 F.3d at 1196. Indeed, the certification of a settlement class “has been recognized throughout the country as the best, most practical way to effectuate settlements involving large numbers of claims by relatively small claimants.” *In re Prudential Sec. Inc. Ltd. P’ships Litig.*, 163 F.R.D. 200, 205 (S.D.N.Y. 1995). “[S]ettlement classes are favored when there is little or no likelihood of abuse, and the settlement is fair and reasonable and under the scrutiny of the trial judge.” *Id.* (quoting *In re Beef Indus. Antitrust Litig.*, 607 F.3d 167, 174 (5th Cir. 1979)). A settlement class, like other certified classes, must satisfy all the requirements of Rule 23(a) and (b). Here, those requirements are easily met.

B. The Settlement Class Meets the Requirements of Rule 23(a)

Numerosity. Rule 23(a)(1) requires that the class be “so numerous that joinder of all members is impracticable.” Fed. R. Civ. P. 23(a)(1). The Court Preliminarily found that the joinder would be impractical in its Preliminary Class Order. ECF 68. Since then, Defendants have identified, and the Notice has been sent to 967 members of the Settlement Class. Viera Dec. ¶¶ 4-5. Thus, the element of numerosity is met. See, e.g., *Jackson v. Sheriff of Cook Cty.* No. 06 C 0493, 2006 WL 3718041, at *3 (N.D. Ill. Dec. 14, 2006) (“Courts have generally recognized that joinder is impracticable where a class contains more than 40 members”).

Commonality. Rule 23(a)(2) requires that there be “questions of law or fact common to the class,” and “[a] common nucleus of operative fact is usually enough to satisfy” this requirement. *Keele v. Wexler*, 149 F.3d 589, 594 (7th Cir. 1998) (quoting *Rosario v. Livaditis*, 963 F.2d 1013, 1018 (7th Cir. 1992)). Plaintiff’s and the Class’s allegations all unquestionably stem from the same occurrence (failing to timely notify participants of the GGF termination), and the questions of fact therefore are the same as to every Class member. These questions include, e.g., (1) whether Defendant was a fiduciary to the Plan, (2) whether Defendant violated ERISA fiduciary duties in its notice to Plan participants, (3) whether Defendant engaged in prohibited transactions by not sending timely notice, and (4) whether the Plan suffered losses as a result.

Typicality. The typicality element broadly requires “that the claims or defenses of the representative part[y] [be] typical of the claims or defenses of the class.” *Muro v. Target Corp.*, 580 F.3d 485, 492 (7th Cir. 2009) (alterations in original) (citation omitted). “A claim is typical if it ‘arises from the same event or practice or course of conduct that gives rise to the claims of other class members and . . . [the] claims are based on the same legal theory.’” *Oshana v. Coca-Cola Co.*, 472 F.3d 506, 514 (7th Cir. 2006) (citation omitted). Here, Plaintiff’s claims arise from the same course of events as the claims of the Settlement Class—Defendant’s alleged wrongful conduct by failing to timely send notice of the GGF termination.

Adequacy. Rule 23(a)(4) requires that “the representative parties will fairly and adequately protect the interests of the class,” which “serves to uncover conflicts of interest between named parties and the class they seek to represent.” *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 607 n.11, 625 (1997). The “adequacy” test is also easily met here. Plaintiff’s claims are identical to those of the proposed Class—whether Defendant’s notice violated ERISA. There can be no question that the Plaintiff’s interests are aligned with those of the Settlement Class and that

Plaintiff has retained qualified counsel with extensive experience representing plaintiffs in class litigation. Joint Dec. ¶¶ 29-31, 40-42.

C. The Settlement Class Satisfies the Requirements of Rule 23(b)(1)

A class may be certified under Rule 23(b)(1) if, in addition to meeting the requirements of Rule 23(a), the prosecution of separate actions by individual class members would create the risk of inconsistent adjudications, which would create incompatible standards of conduct for the defendant, or would as a practical matter be dispositive of the interest of absent members. Fed. R. Civ. P. 23(b)(1)(A), (B). The Court gave conditional approval to the Class under Rule 23(b)(1) and should now finally certify it.

As Judge Pallmeyer has explained, “ERISA class actions are commonly certified under either or both subsections of [Rule] 23(b)(1) because recovery for a breach of the fiduciary duty owed to an ERISA plan, as is the predominant claim here, will inure to the plan as a whole, and because defendant-fiduciaries are entitled to consistent rulings regarding operation of the plan.” *Neil v. Zell*, 275 F.R.D. 256, 267 (N.D. Ill. 2011). While Plaintiff and Class Counsel continue to believe that any court and trier of fact would ultimately find in Plaintiff’s favor, they recognize the risk of inconsistent adjudication and incompatible standards here, i.e. the risk that, in the absence of certification, two participants could bring identical actions and potentially achieve different results, with one court holding that Defendant’s notification violated their duties under ERISA, and the other possibly holding that it did not. As this Court preliminarily found, certification of the proposed class under Rule 23(b)(1) is appropriate here.

D. Class Counsel Meet the Requirements of Rule 23(g)

Rule 23(g) requires the Court to examine the capabilities and resources of Class Counsel. Class Counsel have detailed the claims brought in this action, and the time and effort already

expended in connection with this litigation. *See generally*, Motion for Final Approval. Moreover, Class Counsel are among the leading plaintiffs' firms. Joint Dec. ¶¶ 40-42. Class Counsel thus satisfy the requirements of Rule 23(g).

E. Notice to the Class Satisfies Rule 23 and Due Process Requirements

Constitutional due process and Federal Rule of Civil Procedure 23(c)(2)(B) require that class members receive "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." *Schulte v. Fifth Third Bank*, 805 F. Supp. 2d 560, 595 (N.D. Ill. 2011). What comprises the best notice possible depends on various elements, including the size of the class, whether the class members can be easily identified, and the probability notice will reach the intended audience. *See, e.g. Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 166-67, 94 S. Ct. 2140, 40 L. Ed. 2d 732 (1974) (considering the size, ease of identifying the class, and probability of receiving notice).

Here, the Notice of the proposed Settlement Class was delivered to Class members individually through first-class mail and email, and was also provided on the Settlement Administrator's website. Viera Dec. ¶¶ 5-6. Class members were easily identified with reasonable accuracy because the 401(k) Plan participants were comprised of current and former employees of the Defendant, and their respective beneficiaries. A list of the Class members was provided by the Defendant to the Settlement Administrator who also used a national database to update necessary addresses. Viera Dec. ¶ 4. To date, there has been no objection concerning the sufficiency of the Notice. Viera Dec. ¶ 7. Given the manner in which notice was provided, and the lack of objection thereto, the Notice should be deemed appropriate and due process requirements met. *Schulte v. Fifth Third Bank*, 805 F. Supp. 2d 560, 595 (N.D. Ill. 2011).

III. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court grant this Motion, and certify the Class for the purpose of the Settlement, and appoint Calvin McCutchan as Class Representative and Rosca Scarlato LLC and McCarthy, Lebit, Crystal & Liffman Co., LPA as Class Counsel for the Settlement Class.

Dated this 9th day of January 2023.

Respectfully submitted,

**MCCARTHY, LEBIT, CRYSTAL
& LIFFMAN CO., L.P.A.**

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Local Counsel for the Class

CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of January 2023, a copy of the foregoing was filed electronically with the Court. Notice of this filing will be sent to all parties registered for electronic service by operation of the Court's electronic filing system. The parties may access the filing through the Court's system.

Respectfully submitted,

/s/ Hugh D. Berkson
Hugh D. Berkson (OH 0063997)

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CALVIN McCUTCHAN,

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CORIAN OPERATIONS, INC.,
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401(k) PLAN, and DOES 1-20,

Defendants.

Case No. 1:20-cv-00561 (CPK)

**[PROPOSED] ORDER CERTIFYING THE CLASS FOR THE PURPOSE OF
SETTLEMENT, APPOINTMENT OF CLASS REPRESENTATIVE
AND CLASS COUNSEL**

This litigation involves claims for alleged violations of the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. §§ 1001, et seq. (“ERISA”), set forth in Plaintiff’s Class Action Complaint, dated January 24, 2020, with respect to the Coriant’s 401(k) Plan (the “Plan”) with an investment option known as the Gibraltar Guaranteed Fund (“GGF”). On behalf of the Class, Plaintiff, and Infinera Optical Networks, Inc. (formerly known as Coriant Operations, Inc.) (“Defendant”) (the Class, Plaintiff, and Defendant are collectively referred to as the “Parties”) have entered into a proposed Settlement of the litigation, and the terms of which are set forth in the Settlement Agreement and Release (“Settlement Agreement” or “Agreement”).¹ Pursuant to

¹ This Order incorporates by reference the definitions in the Settlement Agreement, and all terms used herein shall have the same meanings as set forth in the Settlement Agreement unless set forth differently herein. The terms of the Settlement are fully incorporated in this Order as if set forth fully herein.

the Agreement the Parties have stipulated to a proposed Class for the purpose of Settlement only.²

Presented to the Court for final approval is Plaintiff's Unopposed Motion for Certification of the Class for Purposes of Settlement pursuant to Fed. R. Civ. P. 23(b)(1) (the "Class Motion"), which was filed contemporaneously with Plaintiff's Unopposed Motion for Final Approval of Settlement, ("Final Approval Motion"), pursuant to which the Court has considered, among other things, whether to certify a Class for settlement, to appoint Plaintiff as Class Representative, and to appoint Plaintiff's Counsel as Class Counsel.

The Court previously entered an Order Preliminarily Approving the Class Action Settlement ("Preliminary Approval Order") and an Order Preliminarily certifying the Class for Settlement Purposes ("Preliminary Class Order") on November 18, 2022, preliminarily approving the Settlement, certifying the putative Class for settlement purposes, granting leave to amend the Complaint, approving retention of a Settlement Administrator, ordering Class Notice, scheduling a Final Approval Hearing, and providing members of the Class with an opportunity to object to the proposed Settlement. ECF 67 and 68.

The court held a Final Hearing on ____, at ____, to determine whether to give final approval to the proposed Settlement.

Due and adequate notice having been given to the Class as required in the Preliminary Approval Order, and the Court having considered the Settlement, the Class Certification Motion, the documents submitted in support of the Class Certification Motion and Settlement Approval Motion, and the record in this action, **it is hereby ORDERED, ADJUDGED AND DECREED as follows:**

² Should the Settlement Agreement between the Parties be terminated for any reason, Defendant reserves its right to oppose class certification on any applicable basis.

1. **Class Findings.** The Court finds that the requirements of the Federal Rules of Civil Procedure, the United States Constitution, the Rules of the Court and any other applicable law have been met as to the “Class” defined below, in that:

- a. Rule 23(a)(1) is satisfied. The Court finds that the Class is ascertainable from records kept with respect to the Plan and from other objective criteria, and the members of the Class are so numerous that their joinder before the Court would be impracticable.
- b. Rule 23(a)(2) is satisfied. The Court finds that there are one or more questions of fact and/or law common to the Class.
- c. Rule 23(a)(3) is satisfied. The Court finds that the claims of Calvin McCutchan (the “Class Representative”) are typical of the claims of the Class.
- d. Rule 23(a)(4) is satisfied. The Court finds that the Class Representative will fairly and adequately protect the interests of the Class in that: (i) the Class Representative’s interests and the nature of claims alleged are consistent with those of the Class Members; (ii) there appear to be no conflicts between or among the Class Representative and the Class; and (iii) the Class Representative and Class Members are represented by qualified, reputable counsel who are experienced in preparing and prosecuting large, complicated ERISA class actions.
- e. Rule 23(b)(1) is satisfied. The Court finds that the prosecution of separate actions by individual members of the Class would create a risk of: (i) inconsistent or varying adjudications as to individual class members that would establish incompatible standards of conduct for Defendant; or (ii) adjudications as to individual Class Members that would, as a practical matter, be dispositive of the

interests of the other members not parties to the adjudications, or substantially impair or impede those persons' ability to protect their interests.

- f. Rule 23(g) is satisfied. The Court finds that Rosca Scarlato LLC and McCarthy, Lebit, Crystal & Liffman Co., LPA ("Class Counsel") are capable of fairly and adequately representing the interests of the Class. Class Counsel have done extensive work identifying and investigating potential claims in the action, successfully opposed motions to dismiss filed by Defendant, the Plan, and Infinera, reviewed documents produced to them by Defendant, and negotiated the Settlement through a several-month-long process, including mediation. Class Counsel are experienced in handling ERISA cases, class actions, and claims of the type asserted in this Action. Class Counsel are knowledgeable about the applicable law and have committed the necessary resources to represent the Class.

2. Service. The Court finds that Class members were provided proper Notice of the proposed Settlement, Final Approval Hearing concerning the Settlement, Motion for Attorney's Fees and Expenses, and Case Contribution Award (the "Notice") as it was sent via first-class mail to 967 Class Members and emailed to 5 Class members. Notice is also proper insofar as it was available via a website: www.strategicclaims.net/coriant401k, which website contained a toll-free number and email for Class members to use to make any inquiries. No Class member has presented any objection to the Court.

3. Class Certification. Based on the findings set forth above, the Court certifies the following non-opt out class under Federal Rule of Civil Procedure 23(b)(1) and 23(e) in this litigation (the "Class"):

All participants in the Plan who experienced a loss due to liquidation at market value of their GGF investments, any beneficiary of a deceased person who was such a participant in the Plan, and any alternate payee in the case of a person who

was such a participant in the Plan and whose account in the Plan was subject to a qualified domestic relations order (“QDRO”).

Excluded from the Class are the current officers and directors of Defendant Infinera Optical Networks, Inc. (formerly known as Coriant Operations, Inc.), and all individuals who were members of the Plan’s Investment Committee or Administrative Committee at any time from July 23, 2018, through October 15, 2018.

The Court appoints Calvin McCutchan as the Class Representative, and Rosca Scarlato LLC and McCarthy, Lebit, Crystal & Liffman Co., LPA as Class Counsel.

DATED this __day of _____, 2023.

Judge Charles P. Kocoras
UNITED STATES DISTRICT JUDGE
NORTHERN DISTRICT OF ILLINOIS