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

CALVIN McCUTCHAN, Plaintiff, vs. CORIANT OPERATIONS, INC., INFINERA CORPORATION, CORIANT 401(k) PLAN, and DOES 1-20, Defendants.	Case No. 1:20-cv-00561 (CPK)

PLAINTIFF'S UNOPPOSED MOTION FOR FINAL APPROVAL OF SETTLEMENT

Plaintiff ("Plaintiff" or "Class Representative"), by and through his attorneys, respectfully moves the Court for an Order: (1) granting final approval of the Class Action Settlement Agreement ("Settlement" or "Settlement Agreement") described herein and preliminarily approved by the Court on November 18, 2022 (ECF 67); and (2) granting final approval of the Plan of Allocation. Defendant Infinera Optical Networks, Inc. (formerly known as Coriant Operations, Inc.) does not oppose the relief sought herein.

For the reasons set forth in the accompanying Memorandum in Support of Plaintiff's Unopposed Motion for Final Approval of Settlement, and based on the accompanying Joint Declaration of Hugh Berkson and Alan Rosca in Support of (1) Plaintiff's Unopposed Motion for Final Approval of Settlement; (2) Plaintiff's Unopposed Motion for Class Certification and Appointment of Class Representative and Class Counsel; and (3) Plaintiff's Unopposed Motion for Award of Attorney's Fees and Expenses, Settlement Administration Costs, and Case Contribution Award, and on all the files and records in this action, Plaintiff respectfully requests

that the Court GRANT this motion and enter the attached Proposed Order, and also sent by e-mail pursuant to this Court's procedures, concluding this case.

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,

Plaintiff,

vs.

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Defendants.

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MEMORANDUM IN SUPPORT OF PLAINTIFF'S UNOPPOSED MOTION FOR FINAL APPROVAL OF SETTLEMENT

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Plaintiff Calvin McCutchan ("Plaintiff" or "Class Representative") by and through his attorneys, respectfully submits this Memorandum in support of Plaintiff's Unopposed Motion for Final Approval of Class Action Settlement (the "Final Approval Motion") requesting the Court enter a Final Approval Order: (1) approving the Settlement; and (2) the Plan of Allocation.[1]

I. INTRODUCTION

Plaintiff, individually and on behalf of the Class and the Coriant 401(k) Plan (the "Plan"), and Infinera Optical Networks, Inc. (formerly known as Coriant Operations, Inc.) ("Defendant") have entered into a Settlement Agreement (the "Settlement" or "Agreement") to resolve all claims asserted in this Action in exchange for a $1,000,000 cash payment.[2] The Settlement was reached after vigorous motion practice, certain discovery and other document and information exchanges, in-depth investigation by Class Counsel, and extensive arm's-length negotiations, including an in-person mediation session conducted by an experienced mediator. The Settlement will provide significant benefits to the Class, while removing the risks, uncertainty, costs, and delays associated with further litigation. *See* Joint Declaration of Hugh Berkson and Alan Rosca in Support of Plaintiff's Unopposed Motion for Final Approval of Settlement ("Joint Dec."), ¶ 27.

On November 18, 2022, the Court entered an order: (1) preliminarily approving the Settlement; (2) approving Class Notice; and (3) setting the date of a Final Approval Hearing (the "Final Approval Hearing") for consideration of final approval of the Settlement, Plaintiff's counsels' application for an award of attorney's fees and reimbursement of litigation expenses, and a Case Contribution Award to the Plaintiff ("Preliminary Approval Order").[3] ECF 67. Since

[1] The Proposed Final Order is attached as Exhibit A.
[2] Capitalized terms not defined herein have the same meaning as in the Agreement. Joint Dec, Ex. A.
[3] Contemporaneously, the Court also entered an Order preliminarily certifying a Class for settlement, appointing Plaintiff Calvin McCutchan as Class Representative, and appointing Class Counsel. ECF 68.

then, the Parties have complied with the terms of the Preliminary Approval Order, including providing notice to the Class via first-class mail and email,[4] 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. ¶¶ 35-36; Vieira Dec. ¶ 3. As required, an Independent Fiduciary will review and determine whether to authorize the proposed Settlement on behalf of the Plan, after the filing of these papers, and prior to the Final Approval Hearing.

Under the standards for evaluating class action settlements in this Circuit and pursuant to Federal Rule of Civil Procedure 23(e)(2), this Settlement is fair, reasonable, and adequate, and Plaintiff respectfully requests that the Court grant final approval.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Procedural History and Settlement Negotiations

On January 24, 2020, Plaintiff filed a Complaint[5] alleging that on July 23, 2018, Infinera publicly announced its intention to acquire Coriant. A condition of the acquisition was that Coriant would terminate the Plan before finalization of the acquisition because Infinera maintained its own 401(k) plan. Infinera's acquisition of Coriant became final on October 1, 2018, and the Plan was terminated the day prior, September 30, 2018. On October 10, 2018, Coriant mailed a notice and sent an email to Plan participants that a certain investment option offered by the Plan, the Gibraltar Guaranteed Fund ("GGF" or the "Fund"), would terminate on October 15, 2018, and on October 15, 2018, sent an email to Plan participants that the GGF option would terminate that day. Both communications told Plan participants that they could elect to liquidate their GGF investments by

[4] *See* Declaration of Cornelia Vieira Concerning Notice to the Class, Mailing of CAFA notice, and Requests for Objections ("Vieira Dec."), filed contemporaneously herewith, ¶¶ 3-6.
[5] All references to the Complaint refer to the operative complaint at the time.

October 15, 2018, and thereby receive the book value of the investments. If they failed to do so, Plan participants would receive the lower, market value of their investments.

At the outset, Class Counsel conducted an in-depth investigation, including extensive debriefing of Plaintiff, a Plan participant, and review of his Plan-related records, as well as review and analysis of: (i) publicly available information concerning the Plan and the GGF; (ii) governing Plan documents; (iii) annual Plan financial reports; and (iv) communications to Plan participants. Joint Dec. ¶¶ 20-21, 29-31. Plaintiff's Complaint alleged that he did not receive the mailed or emailed notices prior to October 15, 2018. And as a result, he and the Class were not able to liquidate their GGF investments to receive the book value, but instead received the substantially lower market value. Plaintiff alleged that defendants, as fiduciaries of the Plan, breached their fiduciary duties and engaged in actions prohibited under ERISA by failing to timely and adequately notify Plan participants that the Plan's GGF investment option was slated for termination, so that Plan participants could avoid losses. The Complaint sought damages and equitable relief against Coriant and Infinera under ERISA §§ 502(a)(2), 29 U.S.C. §§ 1132(a)(2). *Id.* ¶ 14.

On July 23, 2020, Defendant, the Plan, and Infinera filed a Motion to Dismiss. Plaintiff filed an Opposition on September 21, 2020, and Defendant, the Plan, and Infinera filed their Reply on October 5, 2020. ECF 33, 35, 36. On January 11, 2021, the Court issued an Order granting in part and denying in part the Motion to Dismiss, which dismissed Count I and the claims against Infinera, but sustained Plaintiff's claim of breach of fiduciary duty against Defendant. The case proceeded to discovery and the Court held multiple Status Conference Hearings to discuss the progress between the parties on their discovery obligations and whether settlement discussions were warranted. *See generally* ECF 40–52. The case was referred to Magistrate Young Kim for

settlement conference proceedings on March 1, 2022. ECF 53. The parties agreed to submit to private mediation for settlement, so the case was then referred back to this Court. ECF 59.

Thereafter, the parties engaged JAMS mediator Robert Meyer for an in-person mediation, and prepared competing mediation statements outlining their respective positions. During a July 6, 2022 mediation, after a full day of negotiations, the parties reached an agreement in principle as to the monetary component of the Settlement and signed a term sheet ("Term Sheet"). After months of negotiations over numerous non-monetary terms, the parties finally reached a compromise, and on November 2, 2022, signed the comprehensive Agreement that is now before the Court. Joint Dec. ¶¶ 22-26. During the settlement negotiations and mediation, Class Counsel continued to investigate the facts, circumstances, and legal issues. This included, inter alia: (a) inspecting, reviewing, and analyzing documents produced by or publicly available relating to Defendant and the Plan; (b) further researching the applicable law; and (c) further researching and analyzing governmental and other publicly available sources concerning Defendant and the Plan. Joint Dec. ¶ 25.

Lastly, to effect the terms of the Settlement, Plaintiff filed a Second Amended Complaint ("SAC") amending the putative Class to a non-opt out Class as defined by the terms of the Settlement Agreement. *See* ECF 65, Exhibit A-1.

B. Overview of the Settlement Agreement

The following summarizes the principal terms of the Settlement.

1. Settlement Consideration

Defendant or its insurer will pay a total of $1,000,000 cash to the Settlement Fund, which includes the amounts to be distributed to the Class Members as well as the Settlement Administration Costs, Attorney's Fees and Expenses, Case Contribution Award to the Class Representative, and Independent Fiduciary Fees and Costs. *See* SA §1.26. The "Net Settlement

Fund," after the subtraction of fees, expenses, contribution award, and costs, will be distributed to the Class members pursuant to the terms of the Plan of Allocation, (Joint Dec., Exhibit A.), or such other allocation plan as may be ordered by the Court. *Id.* § 3.2.

Under the terms of the Settlement Agreement, $50,000 of the Settlement Amount was deposited into the Escrow Account to fund Administrative Costs. The Settlement Amount balance of $950,000 will be deposited into the Escrow Account within fifteen (15) calendar days of the Effective Date. *Id.* §3.1(b). The Settlement Fund will be administered by the Court-approved Settlement Administrator. *Id.* §4.1. If any of the Net Settlement Fund remains by reason of uncashed checks or otherwise ninety (90) calendar days after the initial distribution, then any remaining balance shall be used: (i) to pay any amounts mistakenly omitted from the initial distribution; (ii) to pay any additional Notice and Administrative Expenses; (iii) to make a second distribution to Class Members who cashed their checks from the initial distribution and who would receive at least $10.00 from such distribution; and (iv) donate any remaining funds to a non-profit charitable organization(s) selected by Class Counsel and approved by the Court. *Id.* § 3.4.

2. The Class

The Settlement contemplates that the Court will certify a non-opt-out class under Fed. R. Civ. P. 23(b)(1), defined as follows: 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"). *See* SA § 2.1. Excluded from the Class are Defendant's current officers and directors, 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.

3. Released Claims

The Settlement Agreement provides for releases by and among Plaintiff, Defendant, and certain non-parties related to the litigation. *Id*. §§ 5.1-5.4. The persons to be released by Plaintiff are defined as the "Defendant Released Parties" and are enumerated at § 1.12 of the Settlement Agreement. The Defendant Released Parties will be released from the "Released Claims," which generally include all claims that were asserted in the Action, or that might have been asserted in the Action, as defined under the terms of the Settlement Agreement. *Id.* § 1.33. The Class Representative and Class Counsel will be released from claims relating to the institution and prosecution of this case. *Id.* § 5.3.

4. Class Notice

The Preliminary Approval Order provided that the Settlement Administrator shall give notice (a) by electronic mail (if available) and first-class mail to the last known electronic mail address and last known mailing address of the Class Members;[6] and (b) by internet publication of the Agreement and Class Notice on a case landing page on its website. *Id.* § 2.6. Additionally, Class Counsel will make Notice available on its website. *Id.* § 1.25. The Settlement Administrator and Class Counsel have provided notice as required under the Settlement Agreement and Preliminary Approval Order.

5. Attorneys' Fees and Class Representative Case Contribution Award

As described under § 7.2 of the Agreement, Class Counsel are filing contemporaneous Motion for Award of Attorney's Fees and Expenses, Settlement Administration Costs, and Case Contribution Award ("Motion for Attorney's Fees and Expenses"), which seeks the Court's approval of an award of reasonable attorney's fees and out-of-pocket expenses, costs attendant the

[6] Defendant provided these addresses to the best of its knowledge. Given that the Class consists of current and past Infinera employees during the past two years, the addresses were substantially current, and the Settlement Administrator was able to obtain more current addresses, where needed.

Settlement administration, and a Case Contribution Award to Plaintiff, in light of his substantial contributions to the litigation, as detailed in counsel's declaration submitted herewith. Joint Dec. ¶¶ 29, 30; *See generally* Joint Dec. Exhibit E, Declaration of Calvin McCutchan ("McCutchan Dec."). The requested award will be paid from the Settlement Fund and the Class has been informed of these details by the notices described above. Joint Dec. ¶¶ 35, 38.

6. Plan of Allocation

The Agreement further provides that the Settlement Amount, after payment of Class Counsel's Attorneys' Fees and Expenses, any Case Contribution Award, Independent Fiduciary Fees and Costs, and Settlement Administration Costs (the "Net Settlement Fund"), will be allocated to the Settlement Class members pursuant to a detailed Plan of Allocation. The Plan of Allocation was included in the Class Notice and posted on the Settlement Website. (ECF. 65, Exhibit A-2.).

Under the Plan of Allocation, the Net Settlement Fund will be distributed to the Settlement Class Members by check, on a pro rata basis such that the amount received by each Settlement Class Member will depend on his or her calculated loss, relative to the losses of other Settlement Class Members, as related to his or her liquidation of their GGF investment option. The Settlement Class consists of all participants in the Plan, or their beneficiaries, who experienced a loss due to liquidation at market value of their GGF investments. Any taxes associated with a Class Member's receipt of a Settlement Fund payment are the responsibility of the respective Class Member.

C. Reasons for the Settlement

As previously explained in Plaintiff's preliminary approval moving papers, Plaintiff has entered into the Settlement with a solid understanding of the strengths and weaknesses of his and the Class Members' claims. Plaintiff's understanding is based on: (1) the likelihood that Plaintiff and the Class would prevail on potential summary judgment motions and at trial, based, *inter alia*,

on an evaluation of the Court's ruling on the motion to dismiss in conjunction with documents subsequently produced by Defendant; (2) dialogue in the mediation and subsequent negotiations; (3) extensive investigation and research; (4) the range of possible recovery; and (5) the substantial complexity, expense, and duration of litigation necessary to prosecute these actions through trial, post-trial motions, and any appeal. In particular, protracted litigation could lead to a scenario where the costs associated with the continued litigation (including the fees of a testifying expert, deposition-related expenses for multiple witnesses, and e-discovery expenses) could consume a substantial portion of any recovery. Having undertaken this analysis, Class Counsel and Plaintiff have concluded that the Settlement is fair, reasonable, and adequate, and should be presented to the Court for approval. *See* Joint Dec. ¶ 27, 35.

III. DISCUSSION

A. The Settlement Warrants Final Approval

It is well-established that "there is an overriding public interest in favor of settlement," especially class actions. *Goldsmith v. Tech. Solutions Co.*, No. 92-4374, 1995 U.S. Dist. LEXIS 15093 (N.D. Ill. Oct. 10, 1995) at *6. The Seventh Circuit has observed, "[f]ederal courts naturally favor the settlement of class action litigation." *Isby v. Bayh*, 75 F.3d 1191, 1196 (7th Cir.1996).

> In the class action context in particu-lar [sic], there is an overriding public interest in favor of settlement. Settlement of the complex disputes often involved in class actions minimizes the litigation expenses of both parties and also reduces the strain such litigation imposes upon already scarce judicial resources.

In re Sears, Roebuck & Co. Front-Loading Washer Prods. Liab. Litig., No. 06 C 7023, 2016 WL 772785, at *6 (N.D. Ill. Feb 29, 2016) (quoting Seventh Circuit case). As a result, "[c]ourts do not easily disturb settlement agreements[.]" *Merrill Lynch, Pierce, Fenner & Smith, Inc. v.*

Adcock, 176 F.R.D. 539, 544 (N.D. Ill. 1997).[7] Therefore, in consideration of these principles and the below factors, the Settlement warrants final approval.

B. The Standards for Final Approval

Federal Rule of Civil Procedure 23(e) "requires court approval of any settlement that effects the dismissal of a class action." *In re Tiktok, Inc., Consumer Privacy Litig.*, 565 F. Supp. 3d 1076, 1083 (N.D. Ill. 2021) (citing *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 279 (7th Cir. 2002)). Such approval involves a two-step process: first, a "preliminary approval" order; and second, a "final approval" order or judgment after notice of the proposed settlement has been provided to the class and a hearing has been held to consider the fairness, reasonableness, and adequacy of the proposed settlement. *See* MANUAL FOR COMPLEX LITIGATION § 13.14 (4th ed. 2016). According to the 2018 amendments to Rule 23, the "court must direct notice" to the proposed Class if the parties show "that the court 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). After preliminary approval, Rule 23(e)(2), in turn, sets out nonexclusive criteria for a court to consider at the final-approval stage in deciding whether a proposed settlement is fair, reasonable, and adequate. Those factors include whether:

(A) class representatives and class counsel have adequately represented the class;
(B) the settlement "was negotiated at arm's length;"
(C) the settlement relief 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;
  (iii) "the terms of any proposed award of attorney's fees" to class counsel; and
  (iv) any agreement between the parties; and
(D) the settlement "treats class members equitably relative to each other."

[7] *See also Miksis v. Evanston Twp. High Sch. Dist. # 202*, 235 F. Supp. 3d 960, 987 (N.D. Ill. 2017), *as amended* (Feb. 2, 2017) (approving settlement and noting that "the Court also cannot ignore the strong federal policy favoring the voluntary resolution of disputes"); *Cannon v. Burge*, 752 F.3d 1079, 1104 (7th Cir. 2014) ("Public policy in Illinois favors settlements[.]") (citation omitted).

Fed. R. Civ. P. 23(e)(2)(A)-(D). The Advisory Committee Notes on the 2018 amendments observed that the various Circuits had adopted their own "lists of factors" for settlement approval, and the Committee made clear that "[t]he goal of this amendment is not to displace any factor," but only "to focus the court and the lawyers" on the "core concerns" flagged in Rule 23(e)(2)(A)-(D). Fed. R. Civ. P. 23(e)(2) Advisory Committee's Note to 2018 amendment.

Courts in the Seventh Circuit consider the "*Synfuel* factors" to evaluate whether a class action settlement meets this fairness requirement: "(1) the strength of plaintiffs' case compared to the terms of the proposed settlement; (2) the likely complexity, length and expense of continued litigation; (3) the amount of opposition to settlement; (4) the opinion of competent counsel; and (5) the stage of the proceedings and the amount of discovery completed." *In re AT&T Mobility Wireless Data Servs. Sales Litig.*, 270 F.R.D. 330, 346 (N.D. Ill. 2010) (citing *Synfuel Techs., Inc. v. DHL Express (USA), Inc.*, 463 F.3d 646, 653 (7th Cir. 2006) (citations omitted)).

1. The Strength of Plaintiff's Case Balanced Against the Settlement

The most important factor in determining whether a class action settlement is fair, reasonable, and adequate, is "the strength of the plaintiff's case on the merits balanced against the amount offered in the settlement." *Synfuel Techs., Inc.*, 463 F.3d at 653. Here, the Settlement represents an excellent outcome for the Class balanced against the merits, representing ***over 41%*** of the $2,403,156 difference between book value of the GGF and market value of the Class Members' investments (arguably, the maximum provable damages). Although Plaintiff and Class Counsel believe the Court's Order on Defendant's Motion to Dismiss reflects the strength of the case on the merits, they recognize that a denial of a motion to dismiss does not guarantee the outcome at summary judgment or trial. If the litigation were to continue, Defendant would raise numerous defenses, including that (1) Defendant had no fiduciary duty to issue the type of notice Plaintiff claims was required in the Action; (2) Defendant fully discharged all of its fiduciary duties

in a manner consistent with ERISA; and (3) no alleged breaches of fiduciary duties in this case caused the alleged harm. The Settlement obtains for Plan participants a significant portion of their estimated damages and thus is well balanced against the strength of the case.

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

The likely complexity, length, and expense of continued litigation is significant. Continued litigation would entail continued discovery, including expensive expert reports, fact and expert depositions, as well as substantial contested merits briefing, including class certification and summary judgment. The costs associated with those proceedings, and in particular the expert's fees, deposition-related costs, and costs associated with the e-discovery, would be substantial. Indeed, the case was at that very juncture where, had a settlement not been secured, those substantial expenses would have started accruing.

As noted above, Defendant has raised several potential defenses to liability. Additionally, even if the Settlement Class could recover a judgment at trial, the additional delay through trial, post-trial motions, and the appellate process could deny the Settlement Class, including retired class members, any actual recovery for years. Forgoing further delay and recovering a sizable settlement amount (which exceeds 41% of estimated damages), weighs heavily in favor of approval. For the Class, continued litigation carries with it a decrease in the time value of money, and "[t]o most people, a dollar today is worth a great deal more than a dollar ten years from now." *Reynolds*, 288 F.3d at 284.

3. Opposition to Settlement

The reaction of Class members to the Settlement strongly favors approval. First, the Settlement has the full support of Plaintiff Calvin McCutchan, who provided documents during the investigation phase, kept abreast of the different phases of litigation, attended mediation, was intimately involved in six months of post-mediation settlement negotiations, and reviewed and

approved the Settlement Agreement. Joint Dec. ¶¶ 31; McCutchan Dec. at ¶¶ 11-13. Additionally, there is no opposition from the Defendant or related parties regarding any aspect of the Settlement or Plaintiff's separately filed motion for class certification.[8]

Pursuant to the Preliminary Approval Order, ECF 67, the Administrator began mailing copies of the Notice to Class members on December 16, 2022, and sent that same notice by e-mail to Class Members for which it had e-mail addresses. Vieira Dec. ¶¶ 5-6. As of January 6, 2023, over 967 copies of the Class Notice have been disseminated. *Id*. ¶ 6. The Class Notice set out the terms of the Settlement and informed Class members where they could find all relevant documents. It also explained how to object to the settlement. Vieira Dec., Exhibit B. The deadline to object to the Settlement is February 5, 2023. *Id.* Here, despite targeted notice of the Settlement, no Class member had objected as of January 9, 2023. Joint Dec. ¶ 7. This reaction to date strongly supports approval of the Settlement. In this Circuit, even where only a relatively small number of class members object, it suggests that Class members deem the settlement to be fair. *In re Mex. Money Transfer Litig.*, 164 F. Supp. 2d 1002, 1020-21 (N.D. Ill. 2000). Should any objections be filed by the deadline, Class Counsel will file a response to them.

Finally, pursuant to the Settlement, Defendant, through the Settlement Administrator, served CAFA notices upon the Attorney General for each of the 36 states in which Class members reside, and the Attorney General of the United States, and the Securities and Exchange Chairman on November 12, 2022, more than 90 days prior to the Fairness Hearing. Vieira Dec. ¶ 3. No objections from any of these officials have been received in response to the CAFA notice, *Id.* at ¶ 7, which further indicates the reasonableness and adequacy of the Settlement. *Noll v. eBay, Inc.*,

[8] Defendant does not oppose Plaintiff's Motion for Class Certification or leave to file the SAC for settlement purposes only.

309 F.R.D. 593, 608 (N.D. Cal. 2015) (no response to CAFA notice "indicate[es] that such officials [] do not object to the Settlement… Thus, this factor favors the settlement.") (citation omitted).

4. The Opinion of Class Counsel That the Settlement Is Fair and Adequate

The opinion of competent counsel should also be considered in determining whether a settlement is fair, reasonable, and adequate under Rule 23. *Schulte v. Fifth Third Bank*, 805 F. Supp. 2d 560, 586 (N.D. Ill. 2011). As previously indicated in the context of preliminary approval, Class Counsel have extensive experience in class action litigation, and fiduciary claims. Joint Dec. ¶¶ 40-42. Class Counsel unreservedly support this settlement and are of the opinion that it is fair and adequate, and provides an excellent result for the Class. Joint Dec. ¶ 27. Courts recognize that the opinion of experienced counsel supporting a settlement deserves considerable weight. *See, e.g., Sears, Roebuck & Co. Front-loading Washer Prods. Liab. Litig.*, No. 06 C 7023, 2016 WL 772785, at *12 (N.D. Ill. Feb. 29, 2016). The fact that Class Counsel strongly endorse the Settlement as fair and reasonable also supports final approval. *See, e.g.*, Isby, 75 F.3d at 1200; *In re Mex. Money Transfer Litig.*, 164 F. Supp. 2d at 1020.

5. Class Counsel Adequately Represented the Class and Reached the Settlement After Conducting an Arm's Length Negotiation

Class Counsel believe that this Settlement is fair, reasonable, and adequate based upon their breadth of knowledge and overall practice experience. Their conclusion to recommend the Settlement is the product of extensive, informed, arm's-length negotiations. Joint Dec. ¶ 27. Counsel also relied on the views of experienced ERISA mediator Mr. Meyer after considering all relevant factors. *Id.* ¶ 23. The arm's-length nature of the settlement negotiations and the involvement of an experienced, highly-regarded JAMS mediator support the conclusion that the Settlement was achieved free of collusion and merits approval. *See In re ViroPharma Inc. Sec. Litig.,* No. 12-2714, 2016 WL 312108, at *8 (E.D. Pa. Jan. 25, 2016) ("[T]he participation of an

independent mediator in settlement negotiations virtually insures [sic] that the negotiations were conducted at arm's length and without collusion between the parties.") (citation omitted).

"A strong initial presumption of fairness attaches to the proposed settlement when it is shown to be the result of [an arm's-length] negotiating process." *Hispanics United v. Vill. of Addison,* 988 F. Supp. 1130, 1150 n.6 (N.D. Ill. 1997). Therefore, the Settlement is entitled to this strong presumption of fairness because the settling Parties in this action are represented by counsel experienced in litigating ERISA class action cases; the Settlement was the result of arm's-length negotiations before an experienced mediator; and the settling Parties understood the strengths and weakness of the claims and defenses before the Settlement was reached. Joint Dec. ¶¶ 22-27.

6. Stage of the Proceedings and Amount of Discovery Completed

Class Counsel have conducted an extensive investigation of Defendant's conduct and the alleged losses suffered by the Class as a result of the alleged breaches of fiduciary duty. Joint Dec. ¶¶ 29-30. The parties also engaged in discovery, in which Defendant produced documents necessary for Class Counsel to assess the benefits of settling the case when balanced against the merits and the risks of further litigation. *Id.* Thus, Class Counsel have reviewed many publicly available documents and documents produced by Defendant, including documents and materials governing the Plan, communications with Plan participants, documents describing the process by which the GGF investment option was terminated, Defendant's internal documents, and Coriant's Securities and Exchange Commission and state insurance regulatory filings. Joint Dec. ¶¶ 20-21, 25, 30-31.

As described above, the Settlement was derived only after procuring the information that Class Counsel needed to intelligently evaluate the risks and benefits of continued litigation, drawing from their extensive experience and best judgment. Considering the stage of the proceedings, the likely complexity, length, and expense of continued litigation, the opinion of

Class Counsel, and the Class Members' interest in receiving a timely recovery, the Settlement should be approved. As a court aptly summarized in approving another ERISA class action, "[t]he settlement at this point would save great expense and would give the Plaintiffs hard cash, a bird in the hand." *Tittle v. Enron*, 228 F.R.D. 541, 566 (S.D. Tex. 2005).

C. The Proposed Class Satisfies the Requirement for Certification

As requested by the Court, Plaintiff concurrently filed a Motion for Class Certification and Appointment of Class Representative and Class Counsel (Motion for Class Cert."), which addresses the issues attendant to certifying the Settlement Class. *See generally,* Motion for Class Cert. To avoid unnecessary redundancy, we do not repeat those arguments here.

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

Rule 23(g) of the Federal Rules of Civil Procedure requires that the Court examine the knowledge, experience, and resources of Class Counsel. This Court has already considered the claims brought, and work completed, in this action in the context of Defendant's motions to dismiss. *See* Order, ECF 37. Class Counsel have detailed the time and effort already expended in connection with this litigation. *See* Section III(B)(5) and (6), *supra; see generally,* Motion for Attorney's Fees and Expenses and Motion for Class Cert. Class Counsel thus satisfy the requirements of Rule 23(g).

E. The Proposed Notice Plan Satisfies Rule 23(c)(2) and Due Process Requirements

The Class Notice directed by the Court and provided to the Class satisfies the requirements of Rule 23(c)(2)(B), which requires "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B). The Class Notice also satisfies Rule 23(e)(1), which requires that notice of

a settlement be directed in a "reasonable manner." Fed. R. Civ. P. 23(e)(1). Notice of a settlement is reasonable if it:

> [F]airly and adequately advises the class of the terms of the proposed settlement and the process available to class members to obtain monetary relief provided by the settlement, the rights of class members to object to the settlement and/or to opt-out of the monetary relief provided by the settlement, and the rights of class members to appear before the Court at the Final Fairness Hearing.

Tucker v. Walgreen Co., No. 05-440-GPM, 07-172-GPM, 2007 WL 2915578, at *4 (S.D. Ill. Oct. 5, 2007). Both the substance of the Class Notice and the method of its dissemination to potential Class members satisfy these standards. The Class Notice also defined the Class and the Class claims, issues, or defenses, and appointed Class Counsel, as required by Rule 23(c)(2)(B). Vieira Dec. Ex. B. In accordance with the Preliminary Approval Order, Strategic Claims Services has disseminated 967 copies of the Notice to Class members. Vieira Dec. ¶ 5. The combination of individual mail and email to all Class members and a dedicated settlement website containing all the relevant settlement documents constituted the least costly and "best notice that is practicable under the circumstances." Fed. R. Civ. P. 23(c)(2)(B). It therefore satisfied the requirements of due process and Rule 23. *See, e.g.*, *CE Design v. Beaty Constr., Inc.*, No 07 C 3340, 2009 WL 192481, at *10 (N.D. Ill. Jan. 26, 2009) ("the Federal Rules, however, require the best notice that is 'practicable' not perfect notice").

IV. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court grant final approval of the Settlement because it is a fair and reasonable result when viewed in the light of the governing standard; and grant such other and further relief as the Court deems appropriate.

DATED this 9th day of January 2023.

Respectfully submitted,

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EXHIBIT A

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

CALVIN McCUTCHAN, Plaintiff, vs. CORIANT OPERATIONS, INC., INFINERA CORPORATION, CORIANT 401(k) PLAN, and DOES 1-20, Defendants.	Case No. 1:20-cv-00561 (CPK)

[PROPOSED] FINAL APPROVAL ORDER OF
CLASS ACTION SETTLEMENT

1. 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 Complaint with respect to the Coriant's 401(k) Plan (the "Plan") with an investment option known as the Gibraltar Guaranteed Fund ("GGF").[1]

2. The Court previously entered an Order Preliminarily Approving the Class Action Settlement ("Preliminary Approval Order") and an Order Preliminarily Certifying the Class ("Preliminary Certification 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

[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.

a Final Approval Hearing, and providing members of the Class with an opportunity to object to the proposed Settlement.

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

4. Due and adequate notice having been given to the Settlement Class as required in the Order, and the Court having considered the Settlement, all papers filed and proceedings held herein, and good cause appearing therefore, **IT IS HEREBY ORDERED, ADJUDGED, AND DECREED as follows**:

5. The Court has jurisdiction over the subject matter of this Action and all Parties to the Lawsuit, including all members of the Class.

6. The Court directed that Class Notice be given pursuant to the proposed Notice program in the Settlement Agreement – proposed by the Parties and approved by the Court. The Notice was sent via U.S. Mail to the last known addresses of Class Members, and via email (if available) to the last known electronic mail addresses of Class Members, and published on the Settlement Administrator's website at www.strategicclaims.net/coriant401k. In accordance with the Court's Preliminary Approval Order and Court-directed Notice: (1) on or about December 16, 2022, copies of the Class Notice were mailed and emailed to members of the Class; and, (2) on or about December 12, 2022 the Settlement papers and Notice were posted to the settlement website. With respect to such Notice, the Court finds that such Notice fairly and adequately:

a. Described the terms and effect of the Settlement;

b. Notified the Class that an award of Attorney's Fees and reimbursement of Expenses, and a Case Contribution Award to the Class Representative, will be

requested according to §§ 7.1& 7.2 of the Settlement Agreement, and set forth the amounts of those requests;

c. Notified the Class of the proposed Plan of Allocation of settlement proceeds;

d. Gave notice to the Class of the time and place of the Final Approval Hearing;

e. Advised Class Members that they do not have the right to opt-out of the Class;

f. Advised Class Members of the binding effect of a judgment on Class Members; and

g. Described how Class Members may object to any of the relief requested.

7. The Notice Program met all applicable requirements of the Federal Rules of Civil Procedure, the United States Code, the United States Constitution, and any other applicable law, and that it constituted the best practicable notice, was concise, clear, and in plain, easily understood language, and was reasonable calculated to apprise of the pendency of the Action, the claims, issues, and defenses of the Class, the definition of the Class, the right to object to the proposed Settlement, the right to appear at the Final Approval Hearing, and the binding effect of a judgment on members of the Class.

8. Notice pursuant to the Class Action Fairness Act of 2005, 28 U.S.C. § 1715 ("CAFA") was sent by Defendant on November 14, 2022. The Court finds that the parties complied with the requirements of CAFA.

9. The Court finds after the Final Approval Hearing, and based upon all the submissions in the Action by interested parties, that the Parties' proposed Settlement is fair, reasonable, and adequate, and is consistent with the Federal Rules of Civil Procedure, the United States Code, the United States Constitution. In so finding, the Court has considered and found that:

a. The Settlement provides for a significant financial benefit and provides substantial financial payment to the benefit of the Class members;

b. The terms of the Settlement were entered into by experienced counsel and only after extensive arm's-length negotiations that took place over multiple months and were facilitated by an experienced mediator, Robert A. Meyer of JAMS, and is therefore not the result of collusion;

c. The negotiations were supported by robust investigation before the commencement of the Action; the production and review of confidential documents during mediation; and extensive legal and factual research on the matters at issue;

d. Defendant denied and continues to deny Plaintiff's claims and allegations, and has raised various factual and legal arguments in support of its vigorous defense in the Action; and,

e. Approval of the Settlement will result in substantial savings of time, money and effort for the Court and Parties and will further the interests of justice.

10. Accordingly, the Settlement shall be and hereby is approved and the Settlement Agreement is adopted in full as an Order of this Court.

11. All members of the Class are bound by this Judgment and by the terms of the Settlement, including the scope of the Released Claims described in §§ 1.37, and 5.1-5.6 of the Settlement Agreement and Unknown Claims described in §1.45 of the Settlement Agreement, which are incorporated herein. The Released Claims shall not include any claims that cannot be waived by law.

12. The release shall not extend to the claims (1) related to the enforcement of the Settlement Agreement, including by not limited to, the implementation of the Plan of Allocation

and the allocation and distribution of the Settlement Fund to the members of the Class. The Parties are not liable for any claims of Class members based upon calculations performed by the Administrator.

13. Upon entry of the Order, Defendant shall be deemed to have released Class Representative and Class Counsel for any claims arising out of this Action.

14. The Plan of Allocation summarized in the Notice, and filed with the Court prior to the Final Approval Hearing, is approved as fair, reasonable, and Class Counsel are directed to arrange for the administration of the Settlement Fund in accordance with the terms and provisions of the Plan of Allocation.

15. The Court retains jurisdiction over the implementation, administration, and enforcement of this Judgment and the Settlement, and all matters ancillary thereto.

16. The Court hereby dismisses with prejudice the Action and all Released Claims identified in Settlement Agreement against each and all Released Parties and without costs to any of the Parties as against the others, expect to the extent any costs are included in the Court's award of fees and expenses in the Attorney's Fee and Expense Order.

17. The Court finds that no reason exists for delay in ordering final judgment, and the clerk is hereby directed to enter this Judgment forthwith.

DATED this __day of _____ , 2023.

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