IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

In re:	)	Chapter 11
SPECIALTY RETAIL SHOPS HOLDING CORP., *et al.*,[1]	)	Case No. 19-80064 (TLS)
Debtors.	)	(Jointly Administered)

DECLARATION OF CHRISTOPHER LONGLEY IN SUPPORT OF JOINT MOTION FOR ENTRY OF AN ORDER (I) APPROVING THE SETTLEMENT AGREEMENT, (II) CERTIFYING A CLASS OF FORMER EMPLOYEES FOR SETTLEMENT PURPOSES ONLY, (III) APPOINTING CLASS COUNSEL AND CLASS REPRESENTATIVES, (IV) SETTING THE AGGREGATE RECOVERY OF THE CLASS UNDER THE GLOBAL SETTLEMENT AGREEMENT, AND (V) GRANTING RELATED RELIEF

I, Christopher Longley, hereby declare under penalty of perjury and pursuant to 28 U.S.C. §1746 that the following is true and correct to the best of my knowledge, information, and belief:

1. I am the Chief Executive Officer of Atticus Administration, LLC ("Atticus") and have 7 years of experience in claims administration for class actions and high-volume claims administration litigation. Atticus is a class action notice campaign and claims administration company located at 1250 Northland Drive, Suite 2450, Mendota Heights, MN 55120. My responsibilities at Atticus primarily involve overseeing the day to day operations and case management of the company. In this capacity, I have personal knowledge[2] of: (a) the creation and service of the notice packages mailed in connection with the settlement between Debtors and certain former employees of Debtors who were eligible to receive severance payments ("Settlement"); (b) Atticus's efforts to assist and provide prospective class members with information regarding the Settlement; and (c) publication of notice of the Settlement.

[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are: Specialty Retail Shops Holding Corp. (0029); Pamida Stores Operating Co., LLC (6157); Pamida Transportation, LLC (4219); Penn-Daniels, LLC (0040); Place's Associates' Expansion, LLC (7526); Retained R/E SPE, LLC (6679); Shopko Finance, LLC (1152); Shopko Gift Card Co., LLC (2161); ShopKo Holding Company, LLC (0171); ShopKo Institutional Care Services Co., LLC (7112); ShopKo Optical Manufacturing, LLC (6346); ShopKo Properties, LLC (0865); ShopKo Stores Operating Co., LLC (6109); SVS Trucking, LLC (0592). The location of the Debtors' service address is: 700 Pilgrim Way, Green Bay, Wisconsin 54304.

[2] Certain of the disclosures herein relate to matters within the personal knowledge of other representatives of Atticus and are based on information provided by them.

2. I submit this declaration to support the relief requested in the *Joint Motion for Entry of an Order (I) Approving the Settlement Agreement, (II) Certifying a Class of Former Employees for Settlement Purposes Only, (III) Appointing Class Counsel and Class Representatives, (IV) Setting the Aggregate Recovery of the Class Under the Global Settlement Agreement, and (V) Granting Related Relief* ("Joint Motion").

3. I am authorized to execute and submit this declaration on behalf of Atticus in support of the Joint Motion. If I were called upon to testify, I could and would testify competently to the facts set forth herein.

4. In late August 2020, Atticus was provided a list by the Debtors of 3,969 class members. The list included the last known address for each individual class member. Atticus ran the list of addresses through National Change of Address Database to determine whether any addresses required updating.

5. On September 11, 2020, Atticus served the notice package attached hereto as **Exhibit A**, via regular U.S. first class mail, on the 3,969 individuals who are identified on **Exhibit B** attached hereto.

6. Of the 3,969 notice packages mailed by Atticus, 281 have been returned to Atticus as undeliverable, and 68 were returned with a forwarding address. The latter 68 notice packages were then mailed to the respective forwarding addresses.

7. Of the 281 notice packages returned to Atticus as undeliverable, all have been sent to trace. Through the trace process, 142 class notices have been re-mailed based on an updated address found. Atticus has been unable to locate good addresses for the remaining 139 individuals, and the names of those class members have been turned over to Debtors' counsel for further handling.

8. On September 21, 2020, Atticus caused a legal notice regarding the Settlement to be published in the national newspaper, *USA Today*. Attached hereto as **Exhibit C** is a copy of the legal notice that was circulated via publication.

9. Since September 11, 2020, Atticus has maintained a toll-free telephone line dedicated to the Settlement for purposes of assisting class members and interested parties with questions about the Settlement. To date, Atticus has fielded a total of 2 telephone calls related to the Settlement, and it is anticipated that the phone line will be in operation through October 23, 2020.

10. Since September 11, 2020, Atticus has also hosted a website found at: https://www.shopkosettlement.com/ to provide affected parties information about the Settlement.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the facts set forth in the foregoing declaration are true and correct to the best of my knowledge, information, and belief.

Dated: October 12, 2020.

Christopher Q. Longley | CEO
Atticus Administration, LLC

Subscribed and sworn to before me,
This 14th day of October 2020.

Notary Public

JAMES B. HARDY
Notary Public
Minnesota
My Commission Expires Jan. 31, 2023

My commission expires 1-31-2023

EXHIBIT A

SHOPKO EMPLOYEE SETTLEMENT
C/O ATTICUS ADMINISTRATION
PO BOX 64053
SAINT PAUL MN 55164

«Claimant_ID»-«Seq_ID»

«First_Name» «Last_Name»
«Address_1»
«City» «State» «Zip»

IMPORTANT LEGAL NOTICE

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

In re:	)	Chapter 11
SPECIALTY RETAIL SHOPS HOLDING CORP., *et al.*,	)	Case No. 19-80064-TLS
Debtors.	)	(Jointly Administered)

NOTICE OF SHOPKO CLASS-ACTION SETTLEMENT REGARDING EMPLOYEE SEVERANCE PAY

This is NOT a summons. You are NOT being sued.

YOU MAY BE ELIGIBLE TO RECEIVE SEVERANCE PAY IN A CLASS-ACTION SETTLEMENT INVOLVING SHOPKO AND ITS FORMER EMPLOYEES.

This Notice is to inform you about a proposed "Settlement" between Specialty Retail Shops Holding Corp. and its affiliated debtor entities (referred to in this notice as "Shopko" or the "Debtors"), on the one hand, and former employees who may be entitled to severance pay, on the other. A group of former employees ("Class Representatives") has asserted claims against Shopko, alleging that Shopko failed to make certain severance payments. The Class Representatives are pursuing such claims on behalf of all similarly situated former employees, including you. Shopko denies that it owes any severance pay. Nevertheless, Shopko has reached an agreement with the Class Representatives to settle the asserted claims for the entire class of similarly situated former employees. To obtain court approval of the settlement, the parties have filed a Joint Motion to Approve Class Settlement (the "Joint Motion") with the U.S. Bankruptcy Court for the District of Nebraska (the "Court"). If the Court should approve the Joint Motion, you may be eligible to receive a *pro rata* share of the settlement amount, less certain attorneys' fees, service payments and payroll taxes.

YOUR LEGAL RIGHTS MAY BE AFFECTED BY THE SETTLEMENT. To understand your rights, please read this Notice carefully along with enclosed Joint Motion.

1. Why is there a Settlement?

In May 2019, the Class Representatives, along with certain other former employees, filed an Objection to the Debtors' Joint Plan of Reorganization (the "Plan"), alleging that (a) they were not paid severance compensation after the Debtors filed for bankruptcy and (b) they are entitled to administrative-expense claims for the amount of the severance pay. The Debtors' disputed the former employees' allegations. Since then, the Class Representatives, along with their attorneys ("Class Counsel"), investigated the unpaid severance claims and worked with the Debtors to resolve the dispute.

On July 31, 2020, the Class Representatives and Debtors entered into a "Settlement Agreement," which sets forth the terms and conditions of the Settlement. The Settlement Agreement can be viewed on Debtors' Bankruptcy Notification website: www. https://cases.primeclerk.com/shopko/Home-DocketInfo or at www.shopkosettlement.com. The Debtors and Class Representatives are now seeking Court approval of the Settlement Agreement.

2. How do I know if I am part of the Settlement?

You are a member of the "Class" that is subject to the Settlement if you meet the "Class Definition" provided in Section 2 of the Settlement Agreement. The names of all known Class Members are listed on Exhibit A or Exhibit B to the Settlement Agreement. If you do not see your name listed on Exhibit A or Exhibit B to the Settlement Agreement or have any questions, you may inquire of Class Counsel, whose contact information is provided in No. 13, below.

3. If I am a member of the Class, what are my options?

Options:	Comments	Deadline
You May Object to the Settlement	If you object to the proposed Settlement, you may write to the Court by the deadline listed in the next column, stating your objection. See No. 11 below for information about objecting to the Settlement.	Any objection must be received by the Court no later than **October 5, 2020.**
You May Do Nothing	If you have no objection to the Settlement, you may do nothing, in which case you will be sent a check for your share of the Settlement Amount (defined herein). See Nos. 9 and 10 below for information about the consequences of not objecting to the Settlement and about choosing not to participate in the Settlement.	**N/A**

4. How much are Debtors paying to settle the dispute?

Shopko is paying the total settlement amount of $3,018,434.78 ("Settlement Amount") which represents 100% of the Class's severance claims.

5. How much will I receive from the Settlement?

You will receive a *pro rata* portion of the net of the Settlement Amount that remains after deducting attorneys' fees for Class Counsel and service awards for the Class Representatives (the "Net Settlement Amount"). Class Counsel fees are described in No. 6 below, and service awards for Class Representatives are described in No. 7 below. Your *pro rata* portion of the Net Settlement Amount will be based on the amount of severance (i.e., two weeks' or four weeks' pay) listed on the Severance Memorandum you were provided in the spring of 2019. As with any wage payment, federal and state payroll taxes will be deducted from your settlement payment.

6. Who is Class Counsel, and how much will Class Counsel be paid?

Jack Raisner and René Roupinian of Raisner Roupinian LLP are serving as Class Counsel. The Settlement Agreement provides that Class Counsel will be paid the total amount of $753,208.70, which represents twenty-five percent (25%) of the Settlement Amount, in addition to costs of $600. These amounts will be deducted from the Settlement Amount prior to distributing payments to the Class.

If you want to be represented by your own lawyer, you may hire one at your own expense.

7. What do Class Representatives receive from the Settlement?

Class Representatives Brooke Hutchison, Trudy Koch, Jenelle Yaunk, Susan Craft, and Daniel Fleeman will receive a service award of $1,000 each (total $5,000). These service awards recognize the willingness of the Class Representatives to challenge the Plan publicly on behalf of the Class and their efforts in investigating and bringing the severance claims to resolution. The service awards are subject to Court approval and will be deducted from the Settlement Amount prior to any distributions to the Class.

8. If the Settlement is approved, when will I receive my settlement check?

If the Court should approve the Settlement, severance checks will be mailed to the members of the Class within 100 calendar days after the Court enters a final order approving the Settlement. Settlement checks that are not cashed within 180 days after issuance or otherwise returned will be void, and the funds represented by such checks will be disbursed to: (a) Brown County United Way; and (b) Feeding America Eastern Wisconsin.

9. Am I giving something up if I participate in the Settlement?

Yes, you will be giving up your right to pursue any claims against Debtors arising from your employment with Debtors.

If your name was listed in the *Order Confirming* the *Third Amended Chapter 11 Plan of Specialty Retail Shops Holding Corp. and its Debtor Affiliates* (Doc. No. 1495), you are either a Class Representative or Represented Employee. These individuals are also named in Exhibits A and B of the Settlement Agreement. If you are a Class Representative or Represented Employee, then upon approval of the Settlement by the Court, any further claims you may have against the Debtors that arise from your employment will be released in this Settlement.

If you are a Class Member but not a Class Representative or Represented Employee (as described above), then any further claims you may have against the Debtors will be released in this Settlement, unless you choose not to participate in the Settlement, as described in Section 10 below.

10. What if I do not want to participate in the Settlement?

If you are not a Class Representative or Represented Employee, and you do not want to participate in the Settlement, then you should **not** cash or negotiate your check. Instead, you should return your check to Shopko Employee Settlement c/o Atticus Administration, PO Box 64053, Saint Paul, MN 55164 or otherwise destroy it. If you choose not to participate in the Settlement, you will not receive a settlement payment, but you will preserve whatever right you have to sue the Debtors on your own.

If, however, you cash or negotiate your check, you will be deemed to be participating in the Settlement, and you will effectively release any claims you may have against the Debtors arising from your employment.

11. How do I object to the Settlement?

If you do not approve of the Settlement or some part of it, you may tell the Court by submitting a written objection. To do so, you must mail a letter containing the following information: (1) the name and case number of this bankruptcy case (Specialty Retail Shops Holding Corp., et al., Case No. 19-80064 (TLS)); (2) your full name, mailing address, and email address or telephone number; (3) your reason for

objecting to the Settlement. Your objection must be received by the Court at the following address, no later than **October 5, 2020**: Office of the Clerk, United States Bankruptcy Court for the District of Nebraska, Roman L. Hruska Courthouse, 111 South 18th Plaza, Omaha, Nebraska 68102.

12. When and where will the Court decide whether to approve the Settlement?

The Court will hold a "Hearing" to decide whether to approve the Settlement. The Hearing is scheduled to take place on October 15, 2020, at 10:00 a.m. CST, at the United States Bankruptcy Court for the District of Nebraska, Roman L. Hruska Courthouse, 111 South 18th Plaza, Courtroom 8, Omaha, Nebraska 68102. You may participate by telephone or appear in person. The call-in instructions for the hearing are:

TOLL FREE CALL-IN NUMBER – 1-888-684-8852
ACCESS CODE 5799715
PARTICIPANT SECURITY CODE 0804

You do not need to attend the Hearing unless you file an objection, in which case you must attend in order for your objection to be heard by the Court. At the Hearing, the Court will consider whether the Settlement is fair, reasonable, and adequate, and consistent with the Bankruptcy Code and will hear any objections to the Settlement.

13. Where Can I Get More Information?

This Notice contains only a summary of the Settlement. The terms of the Settlement are set forth more fully in the Joint Motion and the Settlement Agreement. More information is available at www.shopkosettlement.com.

You may also contact Class Counsel at: René S. Roupinian of Raisner Roupinian LLP, 270 Madison Avenue, Suite 1801, New York, NY 10016; Telephone: (212) 221-1747; Email: rsr@raisnerroupinian.com.

The Debtors are represented by Lauren Goodman of McGrath North Mullin & Kratz LP LLO, 1601 Dodge Street, Suite 3700, Omaha Nebraska 68102 and Kevin Scott McClelland of Kirkland & Ellis LLP, 300 North LaSalle, Chicago, Illinois 60654.

OTHER THAN FOR PURPOSES OF FILING AN OBJECTION TO THE SETTLEMENT, PLEASE DO NOT CALL OR WRITE TO THE COURT OR THE OFFICE OF THE CLERK OF COURT REGARDING THIS NOTICE.

Dated: August 26, 2020

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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

In re:	)	Chapter 11
	)	
SPECIALTY RETAIL SHOPS HOLDING CORP., *et al.*, [1]	)	Case No. 19-80064 (TLS)
	)	
	)	(Jointly Administered)
Debtors	)	

JOINT MOTION FOR ENTRY OF AN ORDER (I) APPROVING THE SETTLEMENT AGREEMENT, (II) CERTIFYING A CLASS OF FORMER EMPLOYEES FOR SETTLEMENT PURPOSES ONLY, (III) APPOINTING CLASS COUNSEL AND CLASS REPRESENTATIVES, (IV) SETTING THE AGGREGATE RECOVERY OF THE CLASS UNDER THE GLOBAL SETTLEMENT AGREEMENT, AND (V) GRANTING RELATED RELIEF

Debtors Specialty Retail Shops Holding Corp.; Pamida Stores Operating Co., LLC; Pamida Transportation LLC; Penn-Daniels, LLC; Place's Associates' Expansion, LLC; Retained R/E SPE, LLC; Shopko Finance, LLC; ShopKo Gift Card Co., LLC; ShopKo Holding Company, LLC; ShopKo Institutional Care Services Co., LLC; ShopKo Optical Manufacturing, LLC; ShopKo Properties, LLC; ShopKo Stores Operating Co., LLC; and SVS Trucking, LLC (collectively, the "Debtors"), and Brooke Hutchison, Trudy Koch, Jenelle Yaunk, Susan Craft, and Daniel Fleeman, (collectively, the "Class Representatives"), on behalf of themselves, and on behalf of: (1) any "Represented Employees" expressly identified in the *Order Confirming* the *Third Amended Chapter 11 Plan of Specialty Retail Shops Holding Corp. and its Debtor Affiliates* (Doc. No. 1495) ("Confirmation Order") and those who meet the "Class Definition" in Section 2.2 of the Settlement Agreement; and (2) those individuals who are similarly situated known as "Putative Employee

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[1] The thirteen Debtors in these chapter 11 cases are: Specialty Retail Shops Holding Corp.; Pamida Stores Operating Co., LLC; Pamida Transportation LLC; Penn-Daniels, LLC; Place's Associates' Expansion, LLC; Retained R/E SPE, LLC; Shopko Finance, LLC; ShopKo Gift Card Co., LLC; ShopKo Holding Company, LLC; ShopKo Institutional Care Services Co., LLC; ShopKo Optical Manufacturing, LLC; ShopKo Properties, LLC; ShopKo Stores Operating Co., LLC; and SVS Trucking, LLC

Class" in the Confirmation Order and who meet the Class Definition in Section 2.2 of the Settlement Agreement (together with the Class Representatives, the "Class Members" or the "Class," the "Parties"), respectfully state as follows in support of this joint motion (this "Motion"):

Relief Requested

1. By this Motion, the Parties respectfully seek entry of an Order: (a) approving the Settlement Agreement dated July 31, 2020 attached hereto as **Exhibit 1** (the "Settlement Agreement"); (b) certifying the Class as a class within the meaning of Rule 23 of the Federal Rules of Civil Procedure (the "Civil Rules"), as incorporated by Rule 7023 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules") for settlement purposes only; (c) appointing the class representatives as Class Representatives and Raisner Roupinian LLP as Class Counsel ("Class Counsel"); (d) setting the aggregate recovery of the Class under the Settlement Agreement; (e) approving the manner and form of class notice described herein and attached hereto as **Exhibit 2**; and (f) granting related relief.

Jurisdiction and Venue

2. The United States Bankruptcy Court for the for the District of Nebraska (the "Court") has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. The Parties confirm their consent, pursuant to Bankruptcy Rule 7008, to the entry of a final order by the Court in connection with this Motion to the extent that it is later determined that the Court, absent consent of the Parties, cannot enter final orders or judgments in connection herewith consistent with Article III of the United States Constitution.

3. Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

4. The bases for the relief requested herein are sections 105(a) and 363(b) of the Bankruptcy Code, Civil Rule 23, made applicable hereto by Bankruptcy Rule 7023, Bankruptcy

Rules 2002, 9008, and 9019 and Rule 9013-1.C of the Nebraska Rules of Bankruptcy Procedure (the "Local Rules").

Background

A. The Bankruptcy Cases

5. On January 16, 2019, Debtors filed voluntary petitions for relief commencing cases (the "Chapter 11 Cases") under chapter 11 of title 11 of the United States Code, 11 U.S.C. §§ 101–1532 (the "Bankruptcy Code"), in the United States Bankruptcy Court for the District of Nebraska (the "Court").

6. On March 1, 2019, the Debtors sought confirmation of the *Second Amended Joint Chapter 11 Plan of Reorganization of Specialty Retail Shops Holding Corp. and Its Debtor Affiliates* ("Second Amended Plan") (Docket No. 570).

7. On May 24, 2019, the Class Representatives filed a Limited Objection to Debtors' Confirmation of Second Amended Plan (the "Objection") on behalf of the Class Representatives and all similarly situated Shopko store employees who were not paid severance after Debtors filed for bankruptcy and commenced winding down the stores. The Objection alleges that the Class Representatives and all similarly situated store employees had administrative expense claims for unpaid severance against the Debtors as of May 24, 2019, in an ascertainable amount contained in Debtors' books and records (Docket No. 1440).

8. On May 31, 2019, after receiving objections from the Class Representatives and other key constituents, the Debtors amended their Second Amended Plan and sought confirmation of the *Third Amended Joint Chapter 11 Plan of Specialty Retail Shops Holding Corp. and its Debtor Affiliates* ("Third Amended Plan") (Docket No. 1495).

9. On June 11, 2019, the Court entered the *Order Confirming the Third Amended Chapter 11 Plans of Specialty Retail Shops Holding Corp. and its Debtor Affiliates* ("Confirmation Order") (Docket No. 1557). The Confirmation Order resolved the Objection by providing that:

> Brooke Hutchison, Trudy Koch, Jenelle Yaunk, Susan Craft, and Daniel Fleeman; and the following individuals: Krista Gardner, Chris Bailey, Patricia Brock, Shaton Back, Karen Lowery, Temple Moser, Cindy Funke, Jason Bailey, Kristi Van Beckum, Rita Ruth Carson, Crystal Cooper, Christopher Lebutzki, Abigail Reger, Justin Crockett, Kristin A. Higgins, Jennie Ostler, Lara McCloe, Brandalee Glowac, Harold Davies, Wendy Stammers, Michael Schreiner, Emily Reger, Shawn Plienis, Melanie J. Pickell, Christine Keys, Tyler Splinter, Sara Huwaldt, Priscilla Mendiola, Mary Jones, Brooklyn Henderson, Julie Kelly, Amber Brill, Carol Neneman, Christine Cook, Danielle Stachewicz, Diane Cherubini, Gina Brownell-Adametz, Heather Dee Book, Janet Michelle Bird, Karen Rogers, Kathleen Walsh Karle, Laurie Renee Lawrence, Leah Carty-Blanton, Melissa Jo Stamp, Nola M Allen, Patricia Berardi, RaeDean Stamp, Robert Warren Farr, Sandra Anderson, Savannah Lea Williams, Teresa Lynn Dearing, Thomas Hayenga, Twila Taylor, Penny Lynn Smuin, Karen Lynn Dougherty, Lisa Marie Barnes, and Gale McKinney (the "Represented Employees"); to the extent this Court authorizes the formation of a class of employees that includes the Represented Employees and those similarly situated (the "Putative Employee Class"), the Putative Employee Class shall be deemed to be a Specified Claim Objector….

B. The Settlement Agreement

10. The Class Representatives have alleged that the Class has potential claims against the Debtors arising from the Debtors' dissemination of a severance memorandum to eligible employees in connection with permanent store closings and the subsequent failure by Debtors to pay severance to those employees who worked through the date of their termination (the "Severance Claims").

11. Debtors deny that they are liable for the Severance Claims.

12. The Class Representatives allege that if they were to litigate their Severance Claims, on a class basis, the Severance Claims would implicate not only the Bankruptcy Code, but the contract and statutory wage payment laws of at least ten states. The amount at issue, if the

Severance Claims were to be litigated, allegedly totals over $3 million plus possible attorneys' fees and interest.

13. After the Class Representatives asserted their Objection to the Debtor's Second Amended Plan, the Parties, along with their advisors, have engaged in numerous discussions in hopes of reaching a consensual resolution of the Severance Claims. These discussions bore significant and constructive results.

14. Debtors have agreed to allow the Severance Claims of the Class.

15. In late May 2020, after months of investigation, exchanges of information and contentious arm's-length negotiations, the Parties reached an agreement, the terms of which are reflected in **Exhibit 1**.

16. If approved, the Settlement Agreement will resolve all Severance Claims, thereby avoiding the risk of costly, time-consuming, and uncertain litigation on claims of approximately 4,000 former employees. The Settlement Agreement also will eliminate the risks of class-action litigation.

17. As part of the proposed resolution, Debtors agree that the Class shall be deemed to have an allowed administrative claim against Debtors in the total amount of $3,018,434.78 (the "Allowed Administrative Claim").

18. The Parties believe that the Settlement Agreement is fair and well within the range of reasonableness. Accordingly, the Parties respectfully request that the Court enter the Order approving the Settlement Agreement and granting the other relief requested in this Motion.

The Settlement Agreement

19. The material terms of the Settlement Agreement are summarized below:[2]

Provision	Summary Description
The Allowed Administrative Claim **¶ 2.3**	Effective upon an Order approving this Motion becoming final and non-appealable, in full and final settlement of any and all Severance Claims, the Class shall be deemed to have an allowed administrative expense claim against Debtors in the total amount of $3,018,434.78 (the "Allowed Administrative Claim").
Satisfaction of the Allowed Administrative Claim **¶ 2.4(a)**	Notwithstanding anything to the contrary in the Global Settlement Agreement, in full and final satisfaction of the Allowed Administrative Claim, the Class Members shall be entitled to an aggregate distribution on account of the Allowed Administrative Claim in the amount of $3,018,434.78 (the "Distributable Amount").
Class Notice **¶ 2.5**	After filing this Motion, Debtors shall timely serve the Motion: (a) on all Class Members that are listed on Exhibit A to the Settlement Agreement; and (b) on all individuals who have timely filed administrative claims relating to the Severance Claims; and (c) publish a notice of the Motion in *USA Today* (national edition) and electronically at https://www.shopkosettlement.com. To the extent the Court orders additional notice of the Settlement, Debtors shall be responsible for the execution of such notice and any related costs up to $15,000.00.
Service Award **¶ 2.6**	Debtors will pay each of the five Class Representatives the additional amount of $1,000 ($5,000 total) as a one-time "Service Award," to be paid from the Distributable Amount at the time of its distribution to the Class.
Class Counsel's Fees **¶ 2.7**	Class Counsel is entitled to attorneys' fees ("Class Counsel's Fees") in the amount of $753,208.70, representing twenty-five percent (25%) of the Distributable Amount net of Counsel's expenses of $600 ("Class Counsel's Expenses") (not including the Service Awards). Class Counsel's Fees will be distributed to Class Counsel (according to instructions to be supplied by Class Counsel) within thirty days after the Settlement Effective Date and shall be payment in full for Class Counsel's work and expenses in connection with this matter. Reduction of the Distributable Amount by the Service Award and Class Counsel's Fees shall result in the "Net Distributable Amount."

[2] This summary is being provided for convenience only. In the event of any conflict between anything contained in the Motion—including this summary—and the Settlement Agreement, the Settlement Agreement, attached hereto as **Exhibit 1**, shall control.

Provision	Summary Description
Allocation of the Net Distributable Amount and Disbursements **¶¶ 2.3(b), 2.3(c), 2.6(a), 2.6(c)**	The Net Distributable Amount shall be allocated to each Class Member for whom the Claim Administrator is able to locate (each, an "Individual Claim") *pro rata* based on their two-week or four-week severance amounts reflected in the records of Debtors. The employee's share of employee payroll taxes shall be deducted and withheld from each Individual Claim. Debtors are responsible for paying from funds other than the Distributable Amount: (i) the employer portion of taxes for the distributions under the Settlement Agreement, and (ii) the costs to make the distributions to Class Members.
Disallowance of Proofs of Claim **¶ 2.7**	Any and all proofs of claim filed on account of Severance Claims shall be disallowed and expunged from the Debtors' claims register on the Effective Date. Nothing in this Settlement Agreement shall waive or limit defenses available to the Debtors and their successors and assigns against a proof of claim that has been or may be filed against the Debtors in the Chapter 11 Cases. Any additional claims or causes of action filed or asserted by any of the Class Members with respect to liabilities related to the Severance Claims shall be null, void and of no effect.

20. The Parties believe, in their judgment and after substantial analysis, that entering into the Settlement Agreement is reasonable under these circumstances and respectfully request that the Court approve the Settlement Agreement and all other relief requested in this Motion. The Settlement Agreement will allow all interested parties to avoid the uncertainty and costs of extensive litigation to determine the recovery on the Severance Claims and will reduce the burden that such litigation would impose on this Court. In addition, the Settlement Agreement will release Debtors from all further obligations related to the Severance Claims and any other employment-related claim[3], which will inure to the benefit of all stakeholders in these chapter 11 cases.

[3] For those Class Members who are not Class Representatives or Represented Employees, the release of claims under the Settlement Agreement will only take effect as to each Class Member upon the Class Member's negotiation of the check the Debtors send him or her pursuant to the Settlement Agreement. If any such Class Member should fail to negotiate the check received from the Debtors, the release will not take effect as to that Class Member.

Accordingly, the Parties believe that entry into the Settlement Agreement is in the best interests of the Debtors' estates, their creditors, and other parties in interest.

Basis for Relief

I. Entry into the Settlement Agreement Is in the Best Interests of Debtors' Estate.

21. Pursuant to Bankruptcy Rule 9019(a), a bankruptcy court may, on motion by [debtor in possession] after appropriate notice and a hearing, approve a compromise or settlement. The standard for compromise and approval of a settlement is "whether the settlement is 'fair and equitable' and 'in the best interests of the estate.'" *In re Martin*, 212 B.R. 316, 319 (B.A.P. 8th Cir. 1997). *See, e.g., In re Carlson*, No. 04-41534 (TJM), 2008 WL 345606, at *1 (Bankr. D. Neb. Jan. 7, 2008) (same).

22. Ultimately, "the decision to approve a settlement under [Bankruptcy] Rule 9019 is within the discretion of the bankruptcy judge." *In re Racing Servs., Inc*., 332 B.R. 581, 586 (B.A.P. 8th Cir. 2005). When determining whether a settlement is fair, equitable, and in the best interest of an estate, courts in Nebraska consider, among other factors, "the expense, inconvenience, and delay associated with [the dispute] and the paramount interest of the creditors and a proper deference to their reasonable views." *In re Brodkey Bros., Inc*., No. 13-80203 (TLS), 2013 WL 5636484, at *7 (Bankr. D. Neb. Oct. 15, 2013) (citing *Drexel Burnham Lambert, Inc., v. Flight Transp. Corp*. (*In re Flight Transp. Corp. Sec. Litig.*), 730 F.2d 1128, 1135 (8th Cir. 1984) (quoting *Drexel v. Loomis*, 35 F.2d 800, 806 (8th Cir.1929))); *ReGen Capital III, Inc. v. Official Comm. of Unsec. Creditors (In re Trism, Inc*.), 282 B.R. 662, 667 (B.A.P. 8th Cir.2002)). For example, courts in Nebraska have found that a settlement is in the best interests of the estate when it reduces attorneys' fees that would otherwise be incurred. *See, e.g., In re Carlson,* No. 04-41534 (TJM), 2008 WL 345606, at *2 (Bankr. D. Neb. Jan. 7, 2008).

23. In determining whether to preliminarily approve a class settlement, the Court is to consider the fairness, reasonableness, and adequacy of the proposed settlement. *Flott v. Hair Salons, Inc.,* 2010 WL 5093923, No. 8:09CV3211 (D. Neb. Dec. 7, 2010) at *2 (citing *DeBoer v. Mellon Mortgage Co*., 64 F.3d 1171, 1178 (8th Cir.1995)); *see also Van Horn v. Trickey,* 840 F.2d 604, 607 (8th Cir.1988). Importantly, it is well established that a proponent of a settlement need not convince the court that a settlement is the best possible compromise, but only that the settlement falls within the "range of reasonable compromises." *Carlson*, 2008 WL 345606, at *2 (citing *PW Enter., Inc. v. Kaler (In re Racing Servs., Inc*.), 332 B.R. 581, 586 (B.A.P. 8th Cir. 2005)). Here the Parties believe that the Settlement Agreement represents a fair and reasonable compromise of the disputed issues and all claims and causes of action that could be brought by the Class.

24. Among the relevant factors considered by bankruptcy courts in the District of Nebraska are: "the expense, inconvenience, and delay associated with [the dispute] and the paramount interest of the creditors and a proper deference to their reasonable views." *In re Brodkey Bros., Inc.*, No. 13-80203 (TLS), 2013 WL 5636484, at *7 (Bankr. D. Neb. Oct. 15, 2013) (citing *Drexel Burnham Lambert, Inc., v. Flight Transp. Corp. (In re Flight Transp. Corp. Sec. Litig.),* 730 F.2d 1128, 1135 (8th Cir. 1984) (quoting *Drexel v. Loomis,* 35 F.2d 800, 806 (8th Cir.1929))); *ReGen Capital III, Inc. v. Official Comm. of Unsec. Creditors (Inre Trism, Inc.),* 282 B.R. 662, 667 (B.A.P. 8th Cir.2002)). For example, courts in Nebraska have found that a settlement is in the best interests of the estate when it reduces attorneys' fees that would otherwise be incurred. *See, e.g.*, *Carlson*, 2008 WL 345606, at *2. Also it is well established that a proponent of a settlement need not convince the court that a settlement is the best possible compromise, but only that the settlement falls within the "range of reasonable compromises." *Carlson*, 2008 WL 345606, at *2

(citing *PW Enter., Inc. v. Kaler (In re Racing Servs., Inc.),* 332 B.R. 581, 586 (B.A.P. 8th Cir. 2005)).

25. In determining whether to approve a proposed Settlement Agreement, the Court should not substitute its judgment for that of Debtors. *See In re Carla Leather, Inc.*, 44 B.R. 457, 465 (Bankr. S.D.N.Y. 1984). Instead, rather than conduct "a mini-trial" of the lawsuit at issue, "[t]he Court's fundamental determination is . . . whether the settlement falls 'below the lowest point in the range of reasonableness.'" *In re Three Rivers Woods, Inc.*, No. 98-38685 (DOT), 2001 WL 720620, at *6 (Bankr. E.D. Va. Mar. 20, 2001).

26. Once the Debtors articulate a valid business justification, "[t]he business judgment rule 'is a presumption that in making the business decision the directors of a corporation acted on an informed basis, in good faith, and in the honest belief that the action was in the best interests of the company.'" *In re S.N.A. Nut Co*., 186 B.R. 98, 102 (Bankr. N.D. Ill 1995) (citations omitted); see also *In re Apex Oil Co.,* 92 B.R. 847, 869 (Bankr. E.D. Mo. 1988) (holding that section 363(b) of the Bankruptcy Code is satisfied when using "sound business justifications" and, "absent a showing of bad faith, the debtors entered into the disposition of substantially all of their assets"); *In re Filene's Basement, LLC*, 2014 WL 1713416, at *12 (Bankr. D. Del. Apr. 29, 2014) ("If a valid business justification exists, then a strong presumption follows that the agreement at issue was negotiated in good faith and is in the best interests of the estate . . . ") (citations omitted); *In re Integrated Resources, Inc.*, 147 B.R. 650, 656 (S.D.N.Y. 1992) (explaining that the business judgment rule's presumption that corporate directors "acted on informed basis, in good faith and in the honest belief that action taken was in the best interests of the company"); *In re Johns-Manville Corp.*, 60 B.R. 612, 615-616 (Bankr. S.D.N.Y. 1986) ("[A] presumption of reasonableness attaches to a Debtor's management decisions.").

27. The Parties believe that the Settlement Agreement is fair, equitable, in the best interests of Debtors' estate, appropriate in Debtors' business judgment, and easily falls within the reasonable range of outcomes. As set forth above, the Settlement Agreement is the culmination of several months of negotiations among the Parties and represents a resolution of all Severance Claims. A settlement of the Severance Claims will also allow the Debtors to effectuate the Third Amended Plan by continuing with the liquidation of claims. By entering into the Settlement Agreement, the Debtors can mitigate their litigation risk and avoid the cost of protracted litigation which could involve thousands of its former employees. The Class Representatives believe that the Settlement should be approved because the terms of the Settlement Agreement are structured to ensure that distributions to Class Members can be made as swiftly and efficiently as possible under the circumstances. The distributions to Class Members are particularly critical given the massive unemployment throughout the country. As such, the Parties respectfully submit that the Settlement Agreement satisfies the standards for approval under applicable law and that the Court should therefore approve the Settlement Agreement in its entirety, including fixing the aggregate recovery for the Class, pursuant to sections 105 and 363 of the Bankruptcy Code and Bankruptcy Rule 9019.

II. The Class Should Be Certified for Settlement Purposes.

28. To approve a class settlement pursuant to Civil Rule 23, the Court must determine whether the proposed settlement class satisfies the certification requirements of Civil Rule 23. *See Amchem v. Windsor*, 521 U.S. 591, 620 (1997); *Coleman v. Watt*, 40 F.3d 255, 258-59 (8th Cir. 1994) (citing *Smith v. Merch. & Farmers Bank of W. Helena*, 574 F.2d 982, 983 (8th Cir. 1978)).

29. "[A]ll Federal Circuits recognize the utility of Rule 23(b)(3) settlement classes." *Amchem*, 521 U.S. at 618. The "presumptive validity" of class action settlements holds true both

in the Eighth Circuit and beyond. *See, e.g., Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist.,* 921 F. 2d 1371, 1391 (8th Cir. 1990); *Holden v. Burlington N., Inc.*, 665 F. Supp. 1398, 1407 (D. Minn. 1987) ("In determining whether the proposed settlement is fair, reasonable, and adequate, by far the most important factor for the Court to consider is the strength of plaintiffs' case balanced against the amount offered in settlement"); *In re Linerboard Antitrust Litig.,* 292 F. Supp. 2d 631, 640 (E.D. Pa. 2003) ("A presumption of correctness is said to attach to a class settlement reached in arms'-length negotiations between experienced, capable counsel").

30. Subdivisions (a) and (b) of Civil Rule 23 "focus court attention on whether a purported class has sufficient unity so that absent members can fairly be bound by decisions of class representatives." *Amchem*, 521 U.S. at 621; *see also* Fed. R. Civ. P. 23(a)–(b).

A. <u>The Civil Rule 23(a) Criteria Are Satisfied</u>.

31. Numerosity requires a finding that the putative class is "so numerous that joinder of all members is impracticable." *Caroline C. v. Johnson*, 174 F.R.D. 452, 456 (D. Neb. 1996) ("[A]s few as 40 class members should raise a presumption that joinder is impracticable."), *citing* Newberg on Class Actions § 3.05).

32. The proposed Class of approximately 4,000 Class Members is sufficiently numerous to make joinder of all Class Members impractical, if not impossible. Accordingly, the Court should find that the numerosity requirement has been met.

33. The commonality requirement requires existence of at least one question of law or fact common to the class. Fed. R. Civ. P. 23(a)(2). *Cortez v. Nebraska Beef, Inc*., 266 F.R.D. 275, 289 (D.Neb. 2010), c*iting In re Hartford Sales Practices Litig.,* 192 F.R.D. 592, 603 (D.Minn.1999) ("the commonality requirement imposes a very light burden on the Plaintiff seeking to certify a class and is easily satisfied."); *Evans v. Am. Credit Sys*., 222 F.R.D. 388, 393

(D. Neb. 2004). In this case, fundamental issues of law and fact regarding the Debtors' actions toward the Class Members regarding payment of severance are common to all Class Members.

34. Typicality under Rule 23(a) requires a named plaintiff to have claims or defenses which "are typical of the claims or defenses of the class." *See* Fed.R.Civ.P. 23(a)(3). *Cortez v. Nebraska Beef, Inc*., 266 F.R.D. 275, 289 (D.Neb. 2010) ("The Eighth Circuit, "long ago defined typicality as requiring a demonstration that there are other members of the class who have the same or similar grievances as the plaintiff."), *citing Chaffin v. Rheem Mfg. Co.,* 904 F.2d 1269, 1275 (8th Cir.1990); *Wildman v. American Century Services, LLC,* No. 4:16–CV–00737–DGK, 2017 WL 6045487 (W.D. Miss., Dec. 6, 2017) ("The test for typicality is not "onerous" and focuses on whether the "other members of the class ... have the same or similar grievances as the plaintiff."), c*iting Paxton v. Union Nat'l Bank*, 688 F.2d 552, 559 (8th Cir. 1982).

35. Here the Class Representatives allege that they suffered harm because of the same conduct that allegedly injured the absentee Class Members. Most of the Class Members were store employees, as were the Class Representatives. Accordingly, the Court should find that the typicality requirement is met.

36. With respect to adequacy, class representatives must "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). *Cortez*, 266 F.R.D. at 291. The Parties are not aware of any such conflicting interests that would impair the Class Representatives' ability to adequately represent the interests of the Class.

37. Accordingly, the Court should find that the Class Representatives are well qualified to represent the Class Members. Additionally, Class Counsel has been appointed as class counsel in numerous class employment disputes and is amply qualified to represent the Class. Jack A. Raisner and René S. Roupinian are founding partners in the law firm of Raisner Roupinian LLP,

along with Gail Lin, who is Of Counsel to the firm. For over eighteen years, these three attorneys have litigated on behalf of workers hurt by layoffs, shutdowns, furloughs, and bankruptcies. They have represented tens of thousands of former employees in more than 150 WARN Act cases, most of which were originally litigated in the bankruptcy courts, and of those, two were successfully decided by the U.S. Circuit Courts of Appeal, and one by the U.S. Supreme Court. *Guippone v. BH S & B Holdings LLC*, 737 F.3d 221 (2d Cir. 2013); *In re TWL Corp*., 712 F.3d 886 (5th Cir. 2013); *Czyzewski v. Jevic Holding Corp*., 137 S.Ct. 973, 197 L.Ed.2d 398 (2017). Their cases have helped shape the law regarding mass layoffs and terminations.

B. The Civil Rule 23(b) Criteria Are Satisfied.

i. The Class Can Be Certified Under Civil Rule 23(b)(1)(B).

38. Civil Rule 23(b)(1)(B) permits a mandatory, no-opt-out class action to be maintained if:

> [P]rosecuting separate actions by or against individual class members would create a risk of [] adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests.

Fed. R. Civ. P. 23(b)(1)(B).

39. The classic example of a Rule 23(b)(1)(B) case involves limited funds. The instant case presents that situation: multiple claimants seeking satisfaction from a limited fund. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 838–39, 842 (1999); *see also, In re Telectronics Pacing Sys., Inc.*, 221 F.3d 870, 877 n.5 (6th Cir. 2000) ("A limited fund exists when a fixed asset or piece of property exists in which all class members have a preexisting interest. . . . Classic illustrations include claimants to trust assets, a bank account, insurance proceeds, company assets in a liquidation sale, and others." (alteration in original) (citing another source)). *See* also, *In re*

Asbestos Litig., 134 F.3d 668, 673 (5th Cir. 1998), *rev'd sub nom. Ortiz*, 527 U.S. 815, and *cert. granted, cause remanded sub nom. Flanagan v. Ahearn*, 527 U.S. 1031 (1999) ("The underlying trust fund had been established during the asbestos defendant's bankruptcy reorganization. It was entirely proper, then, for the claims against that fund to be litigated *en masse* as a 'limited fund' class."); *Goodman v. Crittendan Hospital Association, Inc.*, No. 3:14-cv-229-DPM, 2015 WL 13636081 (E.D.AK., Dec. 10, 2015)(noting that "[defendant's] bankruptcy also suggests that there will be a limited fund for relief" and certifying a class under Rule 23(b)(1)(A) and (B)); *In re Drexel Burnham Lambert Grp., Inc.*, 130 B.R. 910, 921 (S.D.N.Y. 1991), *aff'd*, 960 F.2d 285 (2d Cir. 1992) (approving class certification under Rule 23(b)(1)(B) upon finding that "the Debtors' assets are sufficiently limited that they would not be able to withstand a greater judgment"). *See, e.g.*, *DiFelice v. U.S. Airways, Inc*., 235 F.R.D. 70, 80 n.11 (E.D. Va. 2006) ("When claims are made by numerous persons against a fund insufficient to satisfy all claims, an adjudication as to one or more members of the class will necessarily or probably have an adverse practical effect on the interests of other members who should therefore be represented in the lawsuit."); *Oshana v. Coca-Cola Bottling Co.*, 225 F.R.D. 575, 584 (N.D. Ill. 2005), *aff'd sub nom. Oshana v. Coca-Cola Co.*, 472 F.3d 506 (7th Cir. 2006) ("While Oshana correctly points out that certification of a class under 23(b)(1)(B) is not restricted solely to a limited fund rationale, limited funds are 'certainly the paradigm case.'" (citing *Doe v. Karadzic*, 192 F.R.D. 133, 139 n.9 (S.D.N.Y. 2000))). The United States Supreme Court has articulated three "common characteristics" which it determined "as presumptively necessary, and not merely sufficient, to satisfy the limited fund rationale for a mandatory class action": (1) the fund is inadequate to pay all the claims; (2) the whole of the inadequate fund is to be devoted to the overwhelming claims; and (3) the claimants identified by a common theory of recovery are to be treated equitably among

themselves. *See also*, *Wildman v. American Century Services LLC*, No. 4:16–CV–00737–DGK, 2017 WL 6045487 (W.D.MO. Dec. 6, 2017) (noting that while the classic example of a 23(b)(1)(B) class involves a limited fund, "many courts have certified a class under Rule 23(b)(1)(B) alleging breach of ERISA fiduciary duties."), *citing*, *Krueger v. Ameriprise Financial, Inc.*, 304 F.R.D. 559 (D. Minn. 2014).

40. In a case similar to this one, *Toy's "R" Us, Inc*., the Bankruptcy Court certified the severance claim of a class of 30,000 employees under Rule 23(b)(1). Case 17-34665-KLP Doc. 7110, at G, ¶ 4 (Bankr. E.D. Va.). Here, there is no doubt that Rule 23(b)(1)(B) and the limited funds doctrine are applicable to the Class and the proposal set forth in the Settlement Agreement. In fact, the Parties can easily establish all three of the "common characteristics" articulated by the United States Supreme Court:

- ***First***, the fund is inadequate to pay all the claims asserted. This characteristic is obviously present here in light of the profoundly limited resources of Debtors—its estate has nothing available to distribute other than what is left in the administrative claims pool for holders of administrative claims.

- ***Second***, the whole of the inadequate settlement fund will be devoted to the payment of the overwhelming claims asserted.

- ***Third***, the claimants are identifiable by a common theory of recovery and will be treated equitably among themselves. This final characteristic is also present here, given that all of the Class Members are former employees of Debtors seeking a recovery of severance owed to them, and each Class Member will receive an equitable share of the settlement fund based on their legal entitlements.

41. Most importantly, due to passage of the bar date, none of the Class Members, other than the Class Representatives and a handful of other former employees that properly filed administrative claims for severance, have a private interest in money, notice, or anything from this estate. Only through the approval of the Settlement Agreement may substantially all the Class Members receive anything of value.

42. Considering the foregoing, the Court should find that the Class meets the standard set forth in Civil Rule 23(b)(1)(B) for a mandatory, no-opt-out class action.

ii. Alternatively, the Class Is Eligible for Certification Under Civil Rule 23(b)(1)(A) or Civil Rule 23(b)(2).

43. Civil Rule 23(b)(1)(A) permits a mandatory class action to be maintained if "prosecuting separate actions by or against individual class members would create a risk of [] inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class." Fed. R. Civ. P. 23(b)(1)(A). Civil Rule 23(b)(2) permits a mandatory class action when "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2).

44. Although the Class meets the criteria for certification under Civil Rule 23(b)(1)(B) for the reasons set forth in the preceding subsection, it is likely that the Class could also be eligible for certification under Civil Rule 23(b)(1)(A) or Civil Rule 23(b)(2) in light of the equitable nature of the Class's claims. "[C]ourts generally apply Rule 23(b)(1)(A) restrictively, to classes where there is a statutory obligation to treat all class members alike. . . ." *Richards v. FleetBoston Fin. Corp.*, 238 F.R.D. 345, 353 (D. Conn. 2006) (citing *Ortiz*, 527 U.S. at 846–47). "Cases involving breach of fiduciary duty affecting a large class of beneficiaries have been called '[c]lassic examples' of matters falling within Rule 23(b)(1)." *Kindle v. Dejana*, 315 F.R.D. 7, 12 (E.D.N.Y. 2016) (quoting *Ortiz*, 527 U.S. at 833–34). *See also*, *In re Acquila ERISA Litig.*, 237 F.R.D. 202, 213 (W.D. MO 2006) (certification under 23(b)(1)(A) appropriate for putative class that "has one single claim against the fiduciaries for failing to fully and accurately disclose information to Plan participants" because "prosecution of separate actions in this case would create

the risk of inconsistent or varying adjudications with respect to individual members of the proposed Class."); *Rozo v. Principal Life Insurance Company*, No. 4:14-CV-000463-JAJ-CFB, 2017 WL 2292834 (S.D.Iowa, May 12, 2017) (same).

45. Courts have previously certified mandatory, no-opt-out classes when there is "a (b)(1)(A) ERISA suit involving the application of an ERISA-covered plan to a number of employees." *Richards*, 238 F.R.D. at 353 (first citing *Petrolito v. Arrow Fin. Servs., LLC*, 221 F.R.D. 303, 313 (D. Conn. 2004); *then citing Piazza v. EBSCO Indus., Inc.*, 273 F.3d 1341 (11th Cir. 2001)). *See also, Taylor v. ANC Bancshares, Inc*., No. 08-5170, 2010 WL 4627841 at *11 (W.D.AK., Oct. 18, 2010) (noting non opt-out nature of a Rule 23(b)(1)(A) or 23(b)(1)(B) class), *citing In re Federal Skywalk Cases,* 680 F.2d 1175, 1178 (8th Cir.1982), *cert. denied,* 459 U.S. 988 (1982). *See also, Jones v. NovaStar Financial, Inc.*, 257 F.R.D. 181, 194 (W.D. MO 2009)(certifying Rule 23(b)(1) class in ERISA litigation); *Zilhaver v. UnitedHealth Group, Inc.*, 646 F.Supp.2d 1075 (D. MN. 2009) (same); *Morales v. Greater Omaha Packing Co., Inc.*, 266 F.R.D. 294 (D. Nev. 2010) (certification of Rule 23(b)(1) class in FLSA action appropriate). *See also, In re Polaroid ERISA Litig.*, 240 F.R.D. 65, 78 (S.D.N.Y. 2006) ("ERISA litigation of this nature presents a paradigmatic example of a (b)(1) class."); *Kindle*, 315 F.R.D. at 12 ("The risk of inconsistent adjudications raised in Rule 23(b)(1)(A) 'speaks directly to ERISA suits, because defendants have a statutory obligation, as well as a fiduciary responsibility, to treat the members of the class alike.' . . . Absent class certification, there is a legitimate risk that individual plaintiffs could obtain inconsistent dispositions resulting in incompatible standards of conduct for defendants, 'precisely the problems Rule 23(b)(1) was intended to avoid.'" (first quoting *In re Citigroup Pension Plan ERISA Litig.*, 241 F.R.D. 172, 179 (S.D.N.Y. 2006); then quoting *In re Polaroid*, 240 F.R.D. at 78)).

46. Here, the claims at issue all arise out of Debtors' alleged failure to pay severance to eligible store employees and are equitable in nature. Under these circumstances, the success or failure of one employee's suit will necessarily impact the success or failure of the other employees' potential causes of action because of the grant or denial of the equitable relief sought by the Class Members. *Jones v. NovaStar Financial, Inc.*, 257 F.R.D. at 194 (""ERISA litigation of this nature presents a paradigmatic example of a (b)(1) class"), *citing In re Global Crossing Sec. & ERISA Litig.,* 225 F.R.D. 436, 453 (S.D.N.Y.2004) (citation omitted) ("[Given] the nature of an ERISA claim which authorizes plan-wide relief, there is a risk that failure to certify the class would leave future plaintiffs without relief").

47. Although monetary relief may follow the grant of equitable relief to the Class, courts have held that certification under Rule 23(b)(2) may nonetheless be appropriate "where monetary relief is 'incidental' to injunctive or declaratory relief." *Berry v. Schulman*, 807 F.3d 600, 609 (4th Cir. 2015) (citing *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 415 (5th Cir. 1998)); *DeBoer v. Mellon Mortg. Co.*, 64 F.3d 1171 (8th Cir. 1995) (Rule 23(b)(2) settlement class certified); *Evans v. American Credit Systems, Inc.*, 222 F.R.D. 388 (D.Neb. 2004) (certifying class under Rule 23(b)(2)); *Murray v. Auslander*, 244 F.3d 807, 812 (11th Cir. 2001); *see also Johnson v. Meriter Health Servs. Emp. Ret. Plan*, 702 F.3d 364, 372 (7th Cir. 2012). Thus, it is likely that the Class could also be eligible for certification under Civil Rule 23(b)(1)(A) or Civil Rule 23(b)(2).

48. A number of courts have previously certified classes under Civil Rule 23(b)(1)(A) in bankruptcy proceedings. *See, e.g.*, *In re Gymboree Group, Inc.,* Case 19-30258-KLP (Bankr. E.D. Val)(Doc 1071); *In re A.H. Robins Co.*, 880 F.2d 709, 749 (4th Cir. 1989); *In re Integra Realty Res., Inc.*, 179 B.R. 264, 272 (Bankr. D. Colo. 1995), *subsequently aff'd*, 354 F.3d 1246

(10th Cir. 2004); *In re Dehon, Inc.*, 298 B.R. 206, 216 (Bankr. D. Mass. 2003); *First Fed. of Mich. v. Barrow*, 878 F.2d 912, 919 (6th Cir. 1989); *In re Broadhollow Funding Corp.*, 66 B.R. 1005, 1013 (Bankr. E.D.N.Y. 1986); *Guy v. Abdulla*, 57 F.R.D. 14, 17–18 (N.D. Ohio 1972). Bankruptcy courts have also certified classes under Civil Rule 23(b)(2). *See, e.g.*, *In re Rodriguez*, 695 F.3d 360, 369 (5th Cir. 2012); *In re Brannan*, 485 B.R. 443, 459 (Bankr. S.D. Ala. 2013).

49. In light of the foregoing, if the Court does not certify the Class under Civil Rule 23(b)(1)(B), the Court should alternatively certify the Class pursuant to Civil Rule 23(b)(1)(A) or Civil Rule 23(b)(2).

III. Entry into the Settlement Agreement Is in the Best Interests of the Class.

50. Civil Rule 23 provides that "[t]he claims, issues, or defenses of a certified class may be settled, voluntarily dismissed or compromised only with the court's approval." Fed. R. Civ. P. 23(e). Final approval of a settlement pursuant to Civil Rule 23(e) turns on whether the settlement is "fair, reasonable and adequate[.]" Fed. R. Civ. P. 23(e)(2). The Eighth Circuit has established four factors for determining whether a proposed settlement is "fair, reasonable, and adequate: (1) the merits of the plaintiff's case, weighed against the terms of the settlement; (2) the defendant's financial condition; (3) the complexity and expense of further litigation; and (4) the amount of opposition to the settlement." *In re Wireless Tel. Fed. Cost Recovery Fees Litig.*, 396 F 3d 922, 932 (8th Cir. 2005); *see also Van Horn v. Trickey*, 840 F.2d 604 (8th Cir. 1988). In this case, all the factors weigh in favor of granting approval.

51. Recent amendments to Civil Rule 23(e) have established uniform criteria for courts to consider in evaluating whether to approve a settlement proposal, namely whether:

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) (*i.e.*, the Settlement Agreement); and

d. the proposal treats class members equitably relative to each other.

52. In view of the foregoing criteria, the proposed compromise embodied in the Settlement Agreement should be approved by the Court. As discussed above, the Class representatives and Class Counsel adequately represent the Class, and the proposed compromise between the Parties was negotiated at arm's length over the course of several months with the assistance of sophisticated counsel. Moreover, the relief provided to the Class through the Settlement Agreement is more than adequate in light of the limited funds available for distribution, the significant number of Class Members, and the burdensome consequences that would result from protracted litigation between Debtors and the Class Members. The Distributable Amount represents 100% of the class' Severance Claim, before the proposed Class Representative Award and Class Counsel fees and expenses. The proposed method of distributing funds set forth in the Settlement Agreement also settles the employers' share of the Class Members' payroll taxes and provides for an administration process through which Class Members' Severance Claims will be liquidated and paid without further diminution, delay, or risk.

53. In addition, the amount and timing of the proposed award of attorney's fees in the Settlement Agreement (*i.e.*, 25% of the distributable value of the settlement paid at the time of distribution) is less than the customary 33⅓ % for a class settlement of this size and complexity. Civil Rule 23(h) allows for the award of "reasonable attorneys' fees and nontaxable costs that are authorized by law or the parties' agreement." Fed. R. Civ. P. 23(h). In determining a reasonable

fee in a class action, courts generally use two different methods, the "lodestar" method and the "percentage of the fund" method. In the Eighth Circuit, Courts utilize two main approaches to analyzing a request for attorney's fees: (1) the "lodestar" methodology (multiplying the hours expended by an attorney reasonable hourly rate of compensation to produce a fee amount that can be adjusted to reflect the individualized characteristics of a given action); and (2) the "percentage of the benefit" approach (permitting an award of fees that is equal to some fraction of the common fund that the attorneys were successful in gathering during the course of the litigation). *Powers v. Credit Services Management, Inc.,* 8:11CV436, 2016 WL 6994080 (D. Neb., Nov. 29, 2016) *citing Johnston v. Comerica Mortg. Corp.*, 83 F.3d 241, 244-245 (8th Cir. 1996). *See also*, *In re United States Bancorp Litig.,* 291 F.3d 1035, 1038 (8th Cir.2002) (concluding that district court did not abuse its discretion by applying percentage-of-the-benefit method to award "36% of the guaranteed $3.5 million fund amount," where class counsel "obtained significant monetary relief on behalf of the class").

54. It is within the Court's discretion to decide which method to apply. *Id.* However, with respect to attorney's fees, the Eighth Circuit has held that in common fund cases such as this one, where attorney's fees and class members' benefits are distributed from one fund, a percentage-of-the-benefit method may be preferable to the lodestar method for determining reasonable fees. *In re U.S. Bancorp Litig.*, 291 F.3d 1035, 1038 (8th Cir. 2002) (approving the district court's application of the percentage-of-the-benefit method to award "36% of the guaranteed $3.5 million fund amount," where class counsel "obtained significant monetary relief on behalf of the class"). *West v. PSS World Medical, Inc.*, No. 4:13 CV 574 CDP, 2014 WL 1648741 (E.D. Mo., April 24, 2014) ("In this case, the court believes that 33 percent is a reasonable percentage for attorney's fees. It is appropriate to apply a reasonable percentage to the gross settlement fund").

55. In *In re LifeTime Fitness, Inc., Tel. Consumer Protection Act (TCPA) Litig.*, 847 F3d 619, 622-23 (8th Cir 2017), the plaintiffs filed suit in 2014 and mediated a $10 million settlement in February 2015. The 8th Circuit upheld the District Court's awarding of attorney's fees of 28%, ($2.8MM), noting that after a thorough review and argument on the matter, it would not disrupt the trial court's determination finding that the attorneys' efforts led to an expeditious settlement of the class claims and an agreement that was "fair, reasonable, and adequate"; that achieved "substantial savings of time, money, and effort" for the court and the parties; and that "further[ed] the interests of justice." It further found the award was "typical of that awarded in other class actions" and that class counsel "obtained a substantial benefit for the class [and] assumed significant risk in taking on [the lawsuit] on a contingency basis," that the lawsuit "presented difficult legal questions," that class counsel "devoted significant time and effort" to the lawsuit, and that "there was only one objection."

56. Class Counsel requests twenty five percent (25%) of the distributable value of the settlement. Debtors do not oppose this request for attorney's fees. The parties, through Class Counsel, negotiated a gross recovery of 100% of the maximum class Severance Claim for the Class, which was negotiated expeditiously and efficiently. As a result of the successful negotiation, the Parties were able to avoid protracted litigation. Class Representatives contend that Class Counsel's work benefitted all creditors and conserved both the resources of the estate and the Court. Class Representatives further contend that Class Counsel's success in obtaining this result took vigilance, timing, persistence and hard work. Class Counsel's work on the matter included interviewing and collecting data from hundreds of employees in order to review Debtors' practices during the spring of 2019 as the stores wound down. Class Counsel had many communications, all of which were sent to different tiers of employees. Class Counsel believes

that the reconstruction of what took place was painstaking and ultimately necessary to secure the fair and right outcome. Class Counsel believes that the result achieved was a testament to their collective expertise, skill, credibility, and hard work. Given the unique circumstances of the settlement, Class Counsel's requested fee is reasonable and appropriate.

57. Moreover, the proposed fee award to Class Counsel is also reasonable considering recent trends in common fund fee award actions. Empirical data on fee awards demonstrates that class action percentage awards for attorneys' fees generally fall between twenty and thirty percent, with fifty percent representing the upper limit on reasonable fee awards. *See* Newberg on Class Actions § 15:83 (5th ed.). See, *Caligiuri v. Symantec Corp.*, 855 F.3d 860, 865-66 (8th Cir. 2017) (affirming fee award that represented one-third of the total settlement fund in class action seeking to recover cost of download insurance services); *Khoday v. Symantec Corp.*, No. 11–cv–180 (JRT/TNL), 2016 WL 1637039 (D. Minn., Apr. 5, 2016)(approving attorneys' fees of 33⅓% of the settlement fund).

58. In the substantially similar case, *Toys "R" Us Inc*., Case 17-34665-KLP (Bank.E.D.Va.) (Doc. 7056, at 7, *approved*, Doc. 7110), the undersigned was awarded attorney's fees of one-third (33⅓%) of the settlement amount in a severance action like this case. In another WARN case in this Circuit, the undersigned was awarded attorneys' fees of 33⅓% of a class settlement of $1.5 million. *Bridges v. Continental AFA Dispensing Co.,* Case No. 08-45921 (Bankr. E.D. Mo.) (at the time, the undersigned was affiliated with the law firm of Outten & Golden LLP). Indeed, in all of Class Counsel's more than 80 WARN class action settlements, it has not been awarded less than its requested 33⅓% of the common fund for attorneys' fees.

59. Severance claims are complex, and precarious in the law generally, and under the Bankruptcy Code in particular, especially when administrative insolvency looms, as it did in these

cases. Class actions on behalf of employees for severance are therefore extremely rare. Deterring such filings is the strong possibility that the attorney will receive nothing after months or years of effort. In light of this forbidding reality, and the exceptional outcome, the proposed fee award to Class Counsel is reasonable, appropriate, and should be approved.

60. The proposed service awards of $1,000 for each of the five Class Representatives is also reasonable and customary for a class settlement of this size and nature. In *Toys' R Us*, the class representative was awarded $2,000, although she was unable to obtain more than a token fraction of the severance settled for, due to the estate's inability to pay administrative claims in full. *Id. In re Xcel Energy, Inc., Securities, Derivative & "ERISA" Litig.*, 364 F.Supp.2d 980, 1000 (D. Minn. 2005) (awarding $100,000 collectively to a group of eight lead plaintiffs). Courts commonly approve service awards to compensate named plaintiffs and class members for the services they provide and the risks they incur during a class action. *See, e.g., In re U.S. Bancorp Litig.*, 291 F.3d 1035, 1038 (8th Cir. 2002); *Powers v. Credit Services Management, Inc.,* 8:11CV436, 2016 WL 6994080 at *4 (D. Neb., Nov. 29, 2016)(incentive award of $7,000 to each of three named plaintiffs); *Wineland v. Casey's General Stores, Inc.*, 267 F.R.D. 669, 677-678 (S.D. Iowa 2009) ("Courts routinely recognize and approve incentive awards for class representatives and deponents"). Here, the proposed amount of the service awards is well within the range approved by other Courts. *See, e.g., Wineland*, 267 F.R.D. at 677-678 (approving $10,000 payment to each of the named plaintiffs for the time and effort they devoted in pursuing litigation); *Khoday v. Symantec Corp.*, No. 11–cv–180 (JRT/TNL), 2016 WL 1637039 (D. Minn., Apr. 5, 2016) ($10,000 incentive award to each of two named plaintiffs approved); *Zilhaver v. UnitedHealth Group, Inc.,* 646 F.Supp.2d 1075, 1085 (D. Minn. 2009) (awarding two lead plaintiffs $15,000 incentive awards); *Roberts v. Texaco*, 979 F.Supp. 185, 203-04 (S.D.N.Y. 1997)

(approving incentive payments of up to $85,000 for named plaintiffs in employment case settling prior to class certification); *Enterprise Energy Corp. v. Columbia Gas Transmission Corp.,* 137 F.R.D. 240, 251 (S.D. Ohio 1991) (approving $50,000 service payments).

61. Here, the Class Representatives were willing to come forward and object to confirmation of the Second Amended Plan because it did not address or appear to have the means to pay the asserted Severance Claims. By filing the Objection, they subjected themselves to public scrutiny and possible stigma, and undertook the obligation to assist in this litigation of the Objection and underlying Severance Claims on behalf of their fellow employees. The Class Representatives provided a wide range of documents, and other information that aided Class Counsel. As a result of their efforts, thousands of former employees will receive some money for their work performed for the benefit of Debtors. Accordingly, payment to those Class Representatives is reasonable considering the efforts these individuals undertook on behalf of their fellow former employees.

62. For the foregoing reasons, the Parties respectfully submit that approval of the Settlement Agreement is in the best interest of the Class, and the Court should therefore approve the Settlement Agreement pursuant to sections 105 and 363 of the Bankruptcy Code, Bankruptcy Rule 9019, and Civil Rule 23(e).

IV. Notice of the Settlement Agreement Is Proper.

63. Civil Rule 23(c)(2)(A) provides that "the court may direct appropriate notice to the class" for "any class certified under Rule 23(b)(1)[.]" Fed. R. Civ. P. 23(c)(2)(A). Civil Rule 23(e)(1), as amended effective December 1, 2018, provides that "[t]he parties must provide the court with information sufficient to enable it to determine whether to give notice of the proposal to the class." Fed. R. Civ. P. 23(e)(1). In turn, "[t]he court must direct notice in a reasonable manner to all class members who would be bound by the proposal if giving notice is

justified by the parties' showing 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." *Id.* Bankruptcy Rule 2002(l) allows a court to "order notice by publication if it finds that notice by mail is impracticable or that it is desirable to supplement the notice." Fed. R. Bank. P. 2002(l). Pursuant to Bankruptcy Rule 2002(a)(3), bankruptcy courts have wide discretion in deciding what notice is required, if any, in advance of a hearing to approve a compromise or settle a controversy.

64. For the reasons set forth in this Motion, the Parties believe that the Court will be able to certify the Class and approve the Settlement Agreement.

65. In order to expedite the resolution of this matter and eliminate a procedural step that they believe is unnecessary in this case, the Parties are providing notice of the Settlement Agreement and this Motion to all known Class Members, as well as any parties that have properly filed administrative claims for severance or that have requested notice pursuant to Bankruptcy Rule 2002 following the filing of this Motion, in a reasonable manner in accordance with Civil Rule 23(e)(1) and in a form substantially similar to that set forth in **Exhibit 2**.

66. In addition, in the interest of ensuring that all potential claimants receive adequate notice of the proposed compromise set forth in this Motion and the Settlement Agreement, Debtors will provide notice of this Motion by publication in *USA Today* (national edition) and electronically at https:www.shopkosettlement.com in accordance with Bankruptcy Rule 2002(l).

67. The Parties submit that notice of this Motion by publication, in conjunction with service on Class Members and the parties that have properly filed administrative claims for severance or that have requested notice pursuant to Bankruptcy Rule 2002, is a reasonable manner of service under the circumstances.

68. The Parties therefore request that the Court enter an order approving the manner of notice of the proposed compromise set forth in this Motion and the Settlement Agreement in accordance with Civil Rule 23(e)(1).

Civil Rule 23(e)(3) Statement

69. Pursuant to Civil Rule 23(e)(3), the Parties identify the Settlement Agreement as being the only agreement to be made in connection with the proposed compromise.

No Prior Request

70. No prior request for the relief sought in this Motion has been made to this or any other court.

[*Remainder of page intentionally left blank.*]

WHEREFORE, the Parties respectfully request that the Court enter the Order granting the relief requested herein and such other relief as the Court deems appropriate under the circumstances.

DATED: August 21, 2020

Respectfully submitted,

/s/ *Lauren R. Goodman*

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