UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

DEMARLAND DEAN, KIMBERLY VAN DECREEK, BRADLEY KIRK, REYNOLD LEUTZ, TONDARIUS ROTHCHILD, JASON JONES and JOHN W. BOWER, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

CUMULUS MEDIA, INC., and JOHN DOES 1-10.,

Defendants.

CIVIL ACTION FILE

Case No.: 1:22-cv-04956-TWT

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT, PRELIMINARY CERTIFICATION OF SETTLEMENT CLASS, APPROVAL OF CLASS NOTICE, APPROVAL OF PLAN OF ALLOCATION, AND SCHEDULING OF FAIRNESS HEARING

TABLE OF CONTENTS

I. INTRODUCTION 1

II. FACTUAL AND PROCEDURAL BACKGROUND 3

A. Procedural History 3

1. The Prior Action 3

2. Pre-filing Investigation & Exhaustion of Administrative Remedies 4

3. Settlement Negotiations 4

III. THE PROPOSED SETTLEMENT 6

IV. THE PROPOSED SETTLEMENT SATISFIES THIS CIRCUIT'S STANDARD FOR PRELIMINARY APPROVAL 8

A. The Settlement Meets the Standards for Preliminary Approval Under Federal Rule of Civil Procedure 23 8

B. The Settlement Satisfies the Eleventh Circuit's Test for Approval 8

1. Likelihood of Plaintiffs' Success at Trial 9

2. Possible Range of Recovery at Trial and Point in the Range of Recovery at Which Settlement is Fair, Adequate, and Reasonable 10

3. The Complexity, Expense, and Likely Duration of Continued Litigation 12

4. Opposition to the Settlement 13

5. Stage of the Proceeding at which Settlement was Achieved. 14

V. CLASS CERTIFICATION IS APPROPRIATE 15

A. The Proposed Class Satisfies the Requirements of Rule 23(a)........ 16

1. The Class is Sufficiently Numerous 16

2. Common Questions of Law and Fact Abound 16

3. Plaintiffs' Claims are Typical of the Class 17

4. Plaintiffs and Class Counsel Will Adequately Protect the Interest of the Class... 18

a. Plaintiffs Have No Conflicts with Other Members of the Class and Will Vigorously Prosecute This Action On Behalf of the Class 18

b. Plaintiffs' Counsel Have No Conflicts With the Class, Are Qualified and Experienced, and Will Vigorously Prosecute This Action for the Class 20

B. The Class May Be Properly Certified Under Rule 23(b)(1)(A) and/or (B) 22

1. Certification Under Rule 23(b)(1)(B) is Most Appropriate... 22

2. Certification is Also Appropriate Under Section 23(b)(1)(A)23

VI. THE PROPOSED NOTICE PLAN SHOULD BE APPROVED 23

A. Description of the Notice Plan 23

B. The Proposed Notice Plan Meets the Requirements of Due Process.. 24

VII. CONCLUSION.. 25

TABLE OF AUTHORITIES

Page(s)

CASES

Albert v. Oshkosh Corp.,
47 F.4th 570 (7th Cir. Aug. 29, 2022) 9

Alfonso v. Cumulus Media, Inc.,
USCA Case No. 21- 14031 (Dec. 13, 2022)..2, 6

Behrens v. Wometco Ener., Inc.,
118 F.R.D. 534 (S.D. Fla. 1988)...11

Belton v. Georgia,
2011 WL 925565 (N.D. Ga. Mar. 14, 2011) 17

Bennett v. Behring Corp.,
737 F.2d 982 (11th Cir. 1984) 8

Brieger v. Tellabs, Inc.,
659 F. Supp. 2d 967 (N.D. Ill. 2009) 10

Brotherston v. Putnam Invs, LLC,
No. 15-13825-WGY (D. Mass. April 29, 2020)...12

Chiappa, et al. v. Cumulus Media, Inc.,
Case No. 1:20-cv-00847-TWT (Feb. 24, 2020)..1, 3

Cin-Q Autos, Inc.,
2022 WL 911388 (M.D. Fla. Mar. 29, 2022) 14

Cotton v. Hinton,
559 F.2d 1326 (5th Cir. 1977) 12

Drug Co. v. Geneva Pharms., Inc.,
350 F.3d 1181 (11th Cir. 2003) 18

Family Med. Pharmacy, LLC v. Trxade Grp., Inc.,
No. 15-cv-0590, 2016 WL 6573981 (S.D. Ala. Nov. 4, 2016) 8,

Family Med. Pharmacy, LLC, *v. Trxade Grp., Inc.,*
2017 WL 104207915 15

Fla. Educ. Ass'n v. Dep't of Educ.,
No.: 4-17-cv-414-RH/CAS, 2019 WL 8272779 (N.D. Fla. Nov. 4, 2019)............13

Fuller, et al. v. SunTrust Banks, Inc., et al.,
2018 U.S. Dist. LEXIS 113108, (N.D. Ga. June 27, 2018)....................................20

Hanley v. Tampa Bay Sports and Entm't LLC,
No. 8:19-CV-00550-CEH-CPT, 2020 WL 357002 (M.D. Fla. Jan. 7, 2020).........25

In re HealthSouth Corp. ERISA Litig.,
No. 03- cv-1700, 2006 WL 2109484 (N.D. Ala. June 28, 2006) 25

Henderson v. Emory Univ.,
No. 1:16-cv-02920-CAP, 2020 WL 9848976 (N.D. Ga. Jun. 11, 2020).................25

Huang, et al. v. Trinet HR III, Inc., et al.,
2022 WL 13631836 (M.D. Fl. Oct. 21, 2022)...16, 19, 21

Jairam v. Colourpop Cosmetics, LLC,
No. 19-CV-62438-RAR, 2020 WL 5848620 (S.D. Fla. Oct. 1, 2020)................8, 15

Karg et al. v. Transamerica Corp.,
2020 WL 3400199 (N.D. Iowa Mar. 25, 2020) 18

Koch v. Dwyer,
No. 98-CV-5519, 2001 WL 289972 (S.D.N.Y. Mar. 23, 2001)................................23

Lanfear v. Home Depot,
536 F.3d 1217 (11th Cir. 2008) 2

Lipuma v. American Express Co.,
406 F. Supp. 2d 1298 (S.D. Fla. 2005) 13

Matousek v. MidAmerican Energy Co.,
51 F.4th 274 (8th Cir. Oct.12, 2022) 9

Medoff v. CVS Caremark Corp.,
No. 09-CV-554-JNL, 2016 WL 632238 (D.R.I. Feb. 17, 2016) 11

Mehling v. New York Life Ins. Co. et al.,
246 F.R.D. 467 (E.D. Pa. 2007)...11, 22

In re Mirant Corp. ERISA Litig.,
No. 03-cv-1027 (N.D. Ga. Nov. 16, 2006) 24

Nelson v. Mead Johnson & Johnson Co.,
484 F. App'x 429 (11th Cir. 2012) 9

Nolan v. Integrated Real Estate Processing, LP,
No. 3:08-cv-642-J-34HTS, 2009 WL 10670779 (M.D. Fla. Sept. 9, 2009) 8

In re Nortel Networks Corp. ERISA Litig.,
2009 WL 3294827 (M.D. Tenn. Sept. 2, 2009)..17, 23

Perez v. Asurion Corp.,
501 F. Supp. 2d 1360, 1380-81 (S.D. Fla. 2007)...11

Pizarro v. Home Depot, Inc.,
2020 WL 6939810 (N.D. Ga. Sept. 21, 2020)...17, 20, 22

Pledger v. Reliance Trust Co.,
No. 1:15-CV-4444-MHC, 2021 WL 2253497, (N.D. Ga. Mar. 8, 2021)................12

Rivera v. Equifax Info. Services., LLC,
2022 WL 986443 (N.D. Ga. Mar. 30, 2022) 16

Sacerdote v. New York Univ.,
2018 WL 840364 (S.D.N.Y. Feb. 13, 2018)...19

Sellers v. Rushmore Loan Mgmt. Services, LLC,
941 F.3d 1031 (11th Cir. 2019) 16

Smith v. Commonspirit Health et al.,
2022 WL 2207557 (6th Cir. 2022) 9

Smith v. Krispy Kreme Doughnut Corp.,
No. 05-cv-00187, 2007 WL 119157 (M.D.N.C. Jan. 10, 2007)..............................12

Strube v. Am. Equity Inv. Life Ins. Co.,
226 F.R.D. 688 (M.D. Fla. 2005)..12

In re Suntrust Banks, *Inc. ERISA Litig.*,
2016 WL 4377131 (N.D. Ga. Aug. 17, 2016) 22

Tweedie v. Waste Pro of Fla., Inc.,
No. 8:19-cv-1827-TPB-AEP, 2021 WL 3500844 (M.D. Fla. May 4, 2021) 10

Vega v. T-Mobile USA, Inc.,
564 F.3d 1256 (11th Cir. 2009) 17

Wal-Mart Stores, Inc. v. Dukes,
564 U.S. 338 (2011)...17

Williams v. Mohawk Indus., Inc.,
568 F.3d 1350 (11th Cir. 2009) 18

Williams v. Nat. Sec. Ins. Co.,
237 F.R.D. 685 (M.D. Ala. 2006)..14

Williams v. Reckitt Benckiser LLC,
No. 20-23564-CIV-COOKE/GOODMAN,
2021 WL 8129371, (S.D. Fla. Dec. 15, 2021)...10

STATUTES

28 U.S.C. §§ 1332(D), 1453..25

28 U.S.C. §§ 1332(D), 1711-1715 25

FED. R. CIV. P. 23 ....18, 24

FED. R. CIV. P. 23(a) 16

FED. R. CIV. P. 23(a)(1) 16

FED. R. CIV. P. 23(a)(2) 17

FED. R. CIV. P. 23(a)(4) 18, 20

FED. R. CIV. P. 23(b) 23

FED. R. CIV. P. 23(b)(1) 22

FED. R. CIV. P. 23(b)(1)(A) 22, 23

FED. R. CIV. P. 23(b)(1)(B) 22, 23

FED. R. CIV. P. 23(e) 24

FED. R. CIV. P. 23(g) 20

FED. R. CIV. P. 23(g)(1)(A) 20, 21

Other Sources

Class Action Fairness Act of 2005 (“CAFA”) 25

Employee Retirement Income Security Act of 1974 .... Passim

Newberg on Class Actions§ 11.25 (4th ed.) 8

I. INTRODUCTION

Plaintiffs Demarland Dean, Kimberly Van DeCreek, Bradley Kirk, Reynolds Leutz, Tondarious Rothchild, Jason Jones and John W. Bower ("Plaintiffs"), participants in the Cumulus Media 401(k) Plan (the "Plan"), commenced this ERISA[1] class action lawsuit on December 15, 2022. *See* ECF No.1. It is an action brought pursuant to §§ 409 and 502 of ERISA on behalf of the Plan, to recover alleged losses to the Plan that Plaintiffs allege resulted from Cumulus and any other Plan fiduciaries' ("Defendants")[2] mismanagement of the Plan. Defendants strongly dispute Plaintiffs' allegations, maintain that the Plan has been prudently managed throughout the relevant period, and deny liability for the alleged ERISA violations.

The Parties have now settled this matter. This Action is related to an action previously filed in this Court on February 24, 2020 by Cara Chiappa and Dan Alfonso ("Former Named Plaintiffs") who alleged identical claims on behalf of the Plan, spanning the same relevant period alleged in the present Action. *See Chiappa,*

[1] The Employee Retirement Income Security Act of 1974, as amended, including all regulations promulgated thereunder, and court decisions interpreting ERISA, as amended, or regulations promulgated thereunder.

[2] Capitalized terms herein shall have the meaning ascribed to them in the Settlement Agreement, which is attached to the contemporaneously filed Gyandoh Declaration ("Gyandoh Decl.") as Exhibit 1. The Settlement Agreement itself has exhibits. These exhibits are: A (Settlement Notice); B (Final Approval Order); C (Plan of Allocation); and D (Preliminary Approval Order).

et al. v. Cumulus Media, Inc., Case No. 1:20-cv-00847-TWT (Feb. 24, 2020) (the "Prior Action"). Defendants filed, and the Court granted in part, a motion to dismiss on May 28, 2020, and later granted Defendants' motion for summary judgment on October 15, 2021. (ECFs No. 19 and 43). Former Named Plaintiffs appealed the decisions. In the interim, the seven Named Plaintiffs in this Action initiated the Action with an administrative claim. *See generally Lanfear v. Home Depot*, 536 F.3d 1217 (11th Cir. 2008) (discussing exhaustion of administrative remedies) before filing suit.

Prior to filing this Action, the Parties seized an opportunity to engage in substantial settlement discussions in an attempt to resolve the claims in this Action and in the Prior Action. Beginning in December 27, 2021 under the auspices of Caleb Davies of the Kinnard Mediation Center, continuing with arms-length counsel to counsel negotiations, and concluding with a mediation on November 16, 2022 before Robert A. Meyer, Esquire of JAMS, a neutral, third-party private mediator with experience mediating ERISA actions, the Parties agreed to a settlement in principle of $1,000,000.00 (the "Settlement Amount") to resolve Plaintiffs' claims. As a result, the Prior Action's Appeal was dismissed with prejudice, pursuant to an agreement by the Parties. *See* Stipulation of Dismissal with Prejudice, *Alfonso v. Cumulus Media, Inc*., USCA Case No. 21- 14031 (Dec. 13, 2022).

As noted above, the Parties agreed to the settlement only after arms-length negotiations, which involved highly experienced lead attorneys who have litigated many similar cases, and neutral mediators. Plaintiffs believe the Settlement is fair, reasonable, and adequate under governing law, and meets all prerequisites for preliminary approval.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Procedural History[3]

1. The Prior Action

On February 24, 2020, Former Named Plaintiffs Cara Chiappa and Dan Alfonso filed an ERISA class action complaint against Defendants regarding the Plan. *See Chiappa, et al. v. Cumulus Media, Inc*., Case No. 1:20-cv-00847-TWT (Feb. 24, 2020). Gyandoh Decl., ¶ 3. The claims were identical to those alleged in the Action. *Id.* On December 17, 2020, the Court granted Defendants' motion to dismiss claims that arose before February 24, 2019, and, because Cara Chiappa's participation in the Plan ended before that date she was dismissed as a plaintiff. *Id.* at ¶ 10. *See also* ECF No. 33. On October 15, 2021, the Court granted Defendants' motion for summary judgment as to the remaining claims asserted by Dan Alfonso because Mr. Alfonso

[3] The full procedural history of this matter is recounted in the Gyandoh Decl. at ¶¶ 3-27.

signed a waiver of claims upon the end of his employment at Cumulus. Gyandoh Decl. at ¶ 12, ECF No. 43. Former Plaintiffs appealed the Courts decisions on November 12, 2021 to the United States Court of Appeals for the Eleventh Circuit. Gyandoh Decl. at ¶ 13. The matter was then referred to mediation on December 27, 2021. *Id.*

2. Pre-filing Investigation & Exhaustion of Administrative Remedies

While Defendants' summary judgment motion was pending before the Court, Named Plaintiffs initiated an Administrative Claim for this Action on August 16, 2021. Gyandoh Decl., ¶ 14. The Administrative Claim submitted by Plaintiffs did not differ in any material way from the claims asserted by the Former Plaintiffs in the Prior Action. *Id.* at ¶ 15. Given the similarity of claims, the Parties agreed to stay the Plan's administrative procedures and to toll the applicable time period(s) for issuing a determination on Plaintiffs' Administrative Claim and to pursue a global resolution of the Parties' disputes. *Id.* at ¶ 16. Accordingly, on August 19, 2021, the Parties executed a tolling agreement related to the Administrative Claim. *Id.*

3. Settlement Negotiations

Settlement negotiations began in earnest on August 21, 2021 with Plaintiffs making a formal settlement demand to Defendants. Gyandoh Decl., ¶ 18. The Parties engaged in diligent, good faith negotiations towards a settlement for over a year. During this time the Parties engaged in exchange of information and data. Gyandoh

Decl., ¶¶ 17-27. Discussions involved telephone calls, exchange of emails, and exchange of information, and eventually led to Plaintiffs revising their damages assessment and sending a revised settlement demand to Defendants on February 26, 2022. *Id.* at ¶ 18. The Parties' discussions took place under the auspices of the Circuit mediator whereby the Parties had periodic check-in phone calls with the Circuit mediator.

Once the Parties understood their respective positions they mutually elected to mediate this matter before Robert Meyer, Esq. of JAMS, who is well-versed and experienced in mediating ERISA matters. Gyandoh Decl., ¶¶ 21-22; *see also* curriculum vitae of Meyer at https://www.jamsadr.com/meyer/. The Parties participated in a November 16, 2022, full-day mediation, ultimately reaching an agreement in principle to settle the Action on mutually agreeable terms. Gyandoh Decl., ¶¶ 21-22. Over the course of the last few weeks, counsel have continued to negotiate the precise terms of the Settlement, and other ancillary documents, including the Plan of Allocation, which are incorporated into the Settlement Agreement presented to the Court today.

The Settlement Agreement also resolves the Appeal. As such the Parties stipulated to the dismissal of the Appeal with prejudice, which was entered on December 16, 2022. *See* Order Granting Stipulation of Dismissal with Prejudice,

Alfonso v. Cumulus Media, Inc., USCA Case No. 21-14031 (Dec. 16, 2022).

III. THE PROPOSED SETTLEMENT

The Settlement provides Cumulus (or its insurers) will pay $1,000,000.00 – the Class Settlement Amount – to be allocated to participants on a pro-rata basis pursuant to the proposed Plan of Allocation (*see* Exhibit C to Settlement Agreement) in exchange for releases and dismissal of this action (described in Article 3 of the Settlement Agreement). Gyandoh Decl., at 29. The Settlement Fund will be used to pay the participants' recoveries, administrative expenses to facilitate the Settlement, Plaintiffs' counsel's attorneys' fees and costs, and Class Representatives' Compensation if awarded by the Court (described in Article 8 of the Settlement Agreement). Gyandoh Decl., ¶ 30. The Class Members include all individuals in the Settlement Class, or:

> "All persons who were participants in or beneficiaries of the Cumulus Media, Inc. 401(k) Plan, at any time between February 24, 2014, through the date of the Preliminary Approval Order."

Settlement Agreement, ¶ 1.40; Gyandoh Decl., ¶ 31 (citing Settlement Agreement, Section 1.40). Class Period means the period from February 24, 2014, through the date of the Preliminary Approval Order. Settlement Agreement, ¶ 1.10. Gyandoh Decl., ¶ 31 (citing *Id.*, Section 1.10).

Class Counsel intends to seek to recover their attorneys' fees not to exceed 33

1/3 percent of the Settlement Amount (a maximum amount of $333,300.00). Settlement Agreement, ¶ 10.1. Gyandoh Decl., ¶ 32 (citing Settlement Agreement, Section 10.1). Class Counsel also intends to seek to recover litigation costs and expenses advanced and carried by Class Counsel for the duration of this litigation, not to exceed $50,000.00. (*See* Exhibit A to Settlement Agreement). Additionally, Class Counsel intends to seek Case Contribution Awards in an amount not to exceed $5,000 for each Named Plaintiff, Demarland Dean, Kimberly Van DeCreek, Bradley Kirk, Reynold Leutz, Tondarius Rothchild, Jason Jones and John W. Bower, and the Former Named Plaintiffs, Daniel Alfonso and Cara Chiappa. Gyandoh Decl., ¶ 30 (citing Settlement Agreement, Section 10.1. Defendants also intend to retain an Independent Fiduciary to approve and authorize the settlement on behalf of the Plan. Gyandoh Decl., ¶ 33 (citing Settlement Agreement, ¶ 1.22). The fees and expenses of the Independent Fiduciary are not to exceed twenty-five thousand dollars ($25,000.00) and will be paid by Defendants and/or their insurers. Gyandoh Decl., ¶ 33 (citing *Id.*, ¶ 1.22).

IV. THE PROPOSED SETTLEMENT SATISFIES THIS CIRCUIT'S STANDARD FOR PRELIMINARY APPROVAL

A. The Settlement Meets the Standards for Preliminary Approval Under Federal Rule of Civil Procedure 23

"Federal courts have long recognized a strong policy and presumption in favor

of class action settlements." *Jairam v. Colourpop Cosmetics, LLC*, No. 19-CV-62438-RAR, 2020 WL 5848620, at *3 (S.D. Fla. Oct. 1, 2020). At preliminary approval, the Court must evaluate the settlement pursuant to Federal Rule of Civil Procedure 23 and determine whether it is "sufficiently fair, reasonable and adequate on its face to warrant presentation to the class members." *Nolan v. Integrated Real Estate Processing, LP*, No. 3:08-cv-642-J-34HTS, 2009 WL 10670779, at *6 (M.D. Fla. Sept. 9, 2009) (citing 4 *Newberg on Class Actions*§ 11.25 (4th ed.)); *see also Bennett v. Behring Corp.*, 737 F.2d 982, 986 (11th Cir. 1984) (for preliminary approval, the district court must find that the settlement is "fair, adequate and reasonable and is not the product of collusion between the parties") (internal citation omitted). The Court should grant preliminary approval "where the proposed settlement is the result of the parties' good faith negotiations, there are no obvious deficiencies and the settlement falls within the range of reason." *Family Med. Pharmacy, LLC v. Trxade Grp., Inc.*, No. 15-cv-0590, 2016 WL 6573981, at *7 (S.D. Ala. Nov. 4, 2016).

B. The Settlement Satisfies the Eleventh Circuit's Test for Approval

The Eleventh Circuit follows a six-factor test to determine whether the proposed settlement is fair, reasonable, and adequate and free from fraud or collusion:

> (1) the likelihood of success at trial; (2) the range of possible recovery;(3) the point on or below the range of possible recovery at which the settlement is fair, adequate and reasonable; (4) the complexity, expense and duration of litigation; (5) the substance and amount of opposition to the settlement;

and (6) the stage of the proceedings at which the settlement was achieved.

Nelson v. Mead Johnson & Johnson Co., 484 F. App'x 429, 434 (11th Cir. 2012); *Bennett*, 737 F.2d at 986 (collecting cases). Analysis of the Settlement under these factors confirms the Settlement should be preliminarily approved.

1. Likelihood of Plaintiffs' Success at Trial

The potential upcoming trial brings real uncertainties for both sides. Although a trial on the merits in any case always entails some risk, in the context of ERISA breach of fiduciary duty class actions, the risk is even more considerable. Indeed, one legal commentator recently observed the developing law in stating that a recent decision in an analogous breach of fiduciary duty case, *Smith v. Commonspirit Health et al.*, 2022 WL 2207557 (6th Cir. 2022) "presents a boundary in one circuit, [while] other judges have indicated more generous consideration of these kinds of claims at the pleading stage, including the Ninth and Seventh circuits."[4] Other Circuit courts have issued decisions affirming dismissal of plaintiff's actions similar to the one here. *See, e.g., Albert v. Oshkosh Corp.,* 47 F.4th 570 (7th Cir. Aug. 29, 2022) (affirming dismissal of ERISA "excessive fee" suit); *Matousek v. MidAmerican Energy Co.*, 51

[4] *See* htttps://www.law360.com/benefits/articles/1507690?cn_pk=d43891bd-aab3-46c2-81ef-43c800e76ab4&utm_source=newsletter&utm_medium=email&utm_campaign=custom&utm_content=2022-07-06?copied=1

F.4th 274 (8th Cir. Oct.12, 2022) (same). Lastly, the undersigned is particularly qualified to realistically evaluate the risks of continued litigation, as he tried an analogous case to an unfavorable verdict for plaintiffs in *Brieger v. Tellabs, Inc.*, 659 F. Supp. 2d 967 (N.D. Ill. 2009). *See* Gyandoh Decl., ¶ 48.

The bottom line is there is still a long way to go in this Action, including having to defeat Defendants' anticipated motion to dismiss, and if successful, spending a significant amount of resources to prosecute this case, all with no guarantee of victory. Where as here, "the parties can reasonably anticipate great expense to both parties if they are forced to litigate the issues present in this action [and] [t]he Settlement Class Members also benefit from the potential receipt of a monetary payment without the expense and risks associated with litigation, including the risk of a smaller or no award," *Tweedie v. Waste Pro of Fla., Inc.*, No. 8:19-cv-1827-TPB-AEP, 2021 WL 3500844, at * 10 (M.D. Fla. May 4, 2021) (Report recommending preliminary settlement approval), this first factor is satisfied.

2. Possible Range of Recovery at Trial and Point in the Range of Recovery at Which Settlement is Fair, Adequate, and Reasonable

"In considering the question of possible recovery, the focus is on the possible recovery at trial." *Williams v. Reckitt Benckiser LLC*, NO. 20-23564-CIV-COOKE/GOODMAN, 2021 WL 8129371, at *20 (S.D. Fla. Dec. 15, 2021) (citation

omitted). "A district court must first determine the appropriate standard of damages (in order to calculate the range of recovery), and then determine where in this range of recovery a fair, adequate and reasonable settlement amount lies." *Perez v. Asurion Corp.*, 501 F. Supp. 2d 1360, 1380-81 (S.D. Fla. 2007) (citing *Behrens v. Wometco Ener., Inc.*, 118 F.R.D. 534, 541 (S.D. Fla. 1988). Plaintiffs estimated a damages best case scenario of $3.8 million assuming all their claims were sustained and Defendants overcharged the Plan participants for fees related to investment options and recordkeeping by 100%. Gyandoh Decl., ¶ 19. On the other hand, given the unlikely scenario the Court would find Defendants overcharged Plan participants by 100%, the realistic damages as calculated by Plaintiffs was from between $1.5 million and $2 million. *See* Gyandoh Decl., ¶ 19. The proposed Settlement Amount of $1,000,000 is an appropriate discount to avoid the costs of litigation and potential risk for Plaintiffs to receive less or no damages. It amounts to roughly 26% (of $3.8 million at the high end) to 67% (of $1.5 million at the low end) of the range of potential damages. *Id.*

This percentage of recovery is above the typical percentage district courts have approved. *See Medoff v. CVS Caremark Corp.*, No. 09-CV-554-JNL, 2016 WL 632238, at *6 (D.R.I. Feb. 17, 2016) (noting that 5.33% is "well above the median percentage of settlement recoveries in comparable securities class action cases."); *see*

also Mehling v. New York Life Ins. Co., 248 F.R.D. 455, 462 (E.D. Pa. 2008) (recovery representing 20% of estimated damages in ERISA class action approved); *Brotherston v. Putnam Invs, LLC*, No. 15-13825-WGY (ECF No. 220) (D. Mass. April 29, 2020) (preliminarily approved approximately 28% recovery).

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

"Particularly in class action suits, there is an overriding public interest in favor of settlement [because it] is common knowledge that class action suits have a well-deserved reputation as being most complex." *Strube v. Am. Equity Inv. Life Ins. Co.*, 226 F.R.D. 688, 698 (M.D. Fla. 2005) (citing *Cotton v. Hinton*, 559 F.2d 1326, 1331 (5th Cir. 1977)). ERISA breach of fiduciary duty cases such as this have been recognized as being especially complex. *See, e.g.*, *Pledger v. Reliance Trust Co.*, No. 1:15-CV-4444-MHC, 2021 WL 2253497, at *7 (N.D. Ga. Mar. 8, 2021) ("Effectively and successfully litigating an ERISA breach of fiduciary action requires a specialized knowledge and expertise that was demonstrated by Class Counsel. This litigation involved highly technical knowledge of investment plans, investment knowledge, and industry practices."); *Smith v. Krispy Kreme Doughnut Corp.*, No. 05-cv-00187, 2007 WL 119157, at *2 (M.D.N.C. Jan. 10, 2007) (recognizing that "ERISA law is a highly complex and quickly-evolving area of the law").

This Action has been litigated for over three years, including mediations at both

the trial and appeals stages. Further proceedings would entail complex presentations and expert testimony from both sides as to whether Defendants breached their fiduciary duties by retaining imprudent investment funds in the Plan, whether Plan participants incurred losses by investing in those funds, and whether Defendants failed to monitor and control the Plan's recordkeeping fees. Further, presenting evidence regarding the appropriate measure and amount of damages, if necessary, would also be time and resource-consuming. The Parties would have expended much time and resources to prepare and litigate the case fully through trial. This factor is thus satisfied and weighs in favor of preliminary approval. *See, e.g.*, *See Fla. Educ. Ass'n v. Dep't of Educ.,* No.: 4-17-cv-414-RH/CAS, 2019 WL 8272779 at *3 (N.D. Fla. Nov. 4, 2019) (approving a preliminary settlement because "[T]he litigation is complex, has been protracted, already having consumed almost two years, and if not settled likely will go on for considerable additional time (including appeals) at substantial additional expense. In evaluating this factor, courts 'should consider the vagaries of litigation and compare the significance of immediate recovery by way of compromise to the mere possibility of relief in the future, after protracted and expensive litigation.'") (quoting *Lipuma v. American Express Co*., 406 F. Supp. 2d 1298, 1324 (S.D. Fla. 2005).

4. Opposition to the Settlement

Although Plaintiffs, who are all Settlement Class Members, approve the Settlement, this factor cannot be fully analyzed until Class notice has been sent. Accordingly, if the Court preliminarily approves the Settlement and authorizes the Class Notice, Class Counsel will address any opposition to the Settlement in the final approval papers before the Fairness Hearing.

5. Stage of the Proceeding at which Settlement was Achieved

"With respect to the stage of the proceedings and the amount of discovery completed, [t]here is no precise yardstick to measure the amount of litigation that the parties should conduct before settling." *Williams v. Nat. Sec. Ins. Co.*, 237 F.R.D. 685, 695 (M.D. Ala. 2006). Throughout the litigation the Parties have engaged in significant exchange of information that aided in the settlement of this case. *See* Gyandoh Decl. ¶¶ 17-27; ¶ 28.

The Parties did not blindly enter negotiations armed with little to no information nor settled the case prematurely. Rather, each side entered the negotiations with a full understanding of the issues and potential pitfalls related to litigation of the claims. *Cin-Q Autos, Inc.,* 2022 WL 911388, at *25 (M.D. Fla. Mar. 29, 2022). At this stage, Plaintiffs have ample information to evaluate the merits of their case and assess the risk versus reward of proceeding to trial. This factor is thus satisfied. *See, e.g.*, *Dorado v. Bank of Amr, N.A.*, 2017 WL 5241042, at *5 (S.D. Fla. Mar. 24, 2017) (finding factor

satisfied where "[t]he case settled after meaningful discovery occurred, which permitted Plaintiff to evaluate the strengths and any weaknesses in her claim.")

Moreover, this Settlement was reached by experienced counsel for both Parties, through a mediation presided over by a seasoned neutral mediator, after several years of investigation, two stages of mediation, and substantial motion practice, which all support approval of the Settlement. *See e.g., Jairam*, 2020 WL 5848620, at *5 ("Here, the Agreement was negotiated at arm's length by experienced counsel who were fully informed of the facts and circumstances of this litigation and of the strengths and weaknesses of their respective positions. The Agreement was reached after the parties had engaged in mediation and extensive settlement discussions and after the exchange of information, including information about the size and scope of the Settlement Class. Counsel for the parties were therefore well-positioned to evaluate the benefits of the Settlement, considering the expense, risk, and uncertainty of protracted litigation."). Class Counsel also believes the Settlement is an excellent result for the Settlement Class, *see* Gyandoh Decl., ¶ 48, which weighs in favor of approving the Settlement. *See, e.g.*, *Family Med. Pharmacy, LLC*, 2017 WL 1042079, at *5 ("In considering the settlement, the district court may rely upon the judgment of experienced counsel for the parties.") (internal citations, quotations omitted).

V. CLASS CERTIFICATION IS APPROPRIATE

Plaintiffs seek preliminary certification of the defined Settlement Class (*see* Section III *supra*). To be certified, a class must first satisfy the four basic prerequisites of Rule 23(a): (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy of representation and that it "satisfies at least one of the class types under Rule 23(b)." *Rivera v. Equifax Info. Services., LLC*, 2022 WL 986443, at *6 (N.D. Ga. Mar. 30, 2022) (*Sellers v. Rushmore Loan Mgmt. Services, LLC*, 941 F.3d 1031, 1039 (11th Cir. 2019)).

A. The Proposed Class Satisfies the Requirements of Rule 23(a)

1. The Class is Sufficiently Numerous

Rule 23(a)(1) calls for certification if "the class is so numerous that joinder of all members is impracticable." FED. R. CIV. P. 23(a)(1). With 5,2300 participants with account balances on or around December 31, 2018, this factor is easily satisfied.[5] *See*, *Huang, et al. v. Trinet HR III, Inc.*, *et al.*, 2022 WL 13631836, at *5 (M.D. Fl. Oct. 21, 2022) ("Plaintiffs have satisfied the numerosity requirement. The Eleventh Circuit has indicated that having more than forty class members is generally enough to satisfy the numerosity requirement.").

2. Common Questions of Law and Fact Abound

[5] *See* Gyandoh Decl. ¶ 31 (citing 2018 Form 5500 filed with the Dept. of Labor)

Plaintiffs must also demonstrate the existence of common questions of law or fact. FED. R. CIV. P. 23(a)(2). Commonality "does not require that all the questions of law and fact raised by the dispute be common or that common questions of law or fact predominate over individual issues." *Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1268 (11th Cir. 2009). "Even a single common question will do." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 at 359 (2011) (cleaned up). Consequently, "[t]he commonality requirement is satisfied when there is at least one common question." *Pizarro v. Home Depot, Inc.*, 2020 WL 6939810, at *8 (N.D. Ga. Sept. 21, 2020).

This Action presents many common questions of law and fact, applicable to all members of the Settlement Class, including: (1) whether Defendants were fiduciaries of the Plan; and (2) whether the Plan and the Participants were injured by such breaches. All of these questions are sufficient to satisfy plaintiffs' burden under Rule 23(a)(2) because they all "are focused solely on Defendants and their actions, and will require the same proof for all class members." *In re Nortel Networks Corp. ERISA Litig.*, 2009 WL 3294827, at *8 (M.D. Tenn. Sept. 2, 2009).

3. Plaintiffs' Claims are Typical of the Class

Typicality is met when the plaintiffs' "claims 'arise from the same event or pattern or practice and are based on the same legal theory' as the claims of the class." *Belton v. Georgia*, 2011 WL 925565, at * 5 (N.D. Ga. Mar. 14, 2011). "The typicality

requirement may be satisfied despite substantial factual differences when there is a strong similarity of legal theories." *Williams v. Mohawk Indus., Inc.*, 568 F.3d 1350, 1357 (11th Cir. 2009) (internal citations omitted). Here, Plaintiffs easily satisfy the typicality prong of Rule 23 because "[a]s common investors in the Challenged Funds, plaintiffs and proposed class members allege similar harm resulting from defendants' alleged fiduciary breaches. In fact, the harm may be identical." *Karg et al. v. Transamerica Corp.*, 2020 WL 3400199, at * 3 (N.D. Iowa Mar. 25, 2020).

4. Plaintiffs and Class Counsel Will Adequately Protect the Interest of the Class

Under Rule 23(a)(4), the representative parties must fairly and adequately protect the interests of the class. FED. R. CIV. P. 23(a)(4). When considering the adequacy of a class representative, the Eleventh Circuit considers: "(1) whether any substantial conflicts of interest exist between the representatives and the class; and (2) whether the representatives will adequately prosecute the action." *Drug Co. v. Geneva Pharms., Inc.*, 350 F.3d 1181, 1189 (11th Cir. 2003) (internal citation omitted).

i. Plaintiffs Have No Conflicts with Other Members of the Class and Will Vigorously Prosecute This Action On Behalf of the Class

Here, Named Plaintiffs understand the nature of their claims and duties as class representatives to vigorously prosecute this case through its conclusion. *See* Dean

Decl. ¶¶ 5-6; Van DeCreek Decl. ¶¶ 5-6; Kirk Decl. ¶¶ 5-6; Leutz Decl. ¶¶ 5-6; Rothchild Decl. ¶¶ 5-6; Jones Decl. ¶¶ 5-6; Bower Decl. ¶¶ 5-6; *see Sacerdote v. New York Univ.,* 2018 WL 840364, at *4 (S.D.N.Y. Feb. 13, 2018) (holding all Plan participants are aligned because the named Plaintiffs "have identical legal and effectively identical financial interests in this action as do the proposed class members."). Plaintiffs have met and exceeded that duty by, *inter alia*: (a) providing information to counsel prior to the initiation of the action and reviewing of the Complaint; (b) providing documents and assisting counsel in discovery matters; and (c) maintaining communication with counsel and monitoring the progress of the litigation. *See* Dean Decl. ¶¶ 5-6; Van Decreek Decl. ¶¶ 5-6; Kirk Decl. ¶¶ 5-6; Leutz Decl. ¶¶ 5-6; Rothchild Decl. ¶¶ 5-6; Jones Decl. ¶¶ 5-6; Bower Decl. ¶¶ 5-6.

Moreover, had this litigation continued, Plaintiffs were committed to seeing this action through to the end and undertaking any responsibilities required of them as class representatives, including continuing to assist counsel in discovery matters, presenting for a deposition, participating in any mediation or other proceedings, and testifying at depositions and at trial. *See* Dean Decl. ¶¶ 5-6; Van Decreek Decl. ¶¶ 5-6; Kirk Decl. ¶¶ 5-6; Leutz Decl. ¶¶ 5-6; Rothchild Decl. ¶¶ 5-6; Jones Decl. ¶¶ 5-6; Bower Decl. ¶¶ 5-6. Courts have relied upon similar declarations as evidence of the named plaintiffs' adequacy. *See, e.g.*, *Huang*, 2022 WL 13631836, at * 9 (noting

"Courts have found similar declarations sufficient to show the named plaintiffs' adequacy."); *Pizarro*, 2020 WL 6939810, at *11 (finding plaintiffs "demonstrated their willingness and ability to serve as class representatives" by responding to discovery requests, presenting for depositions, and submitting affidavits); *Henderson,* 2018 WL 6332343, at *7 (finding adequacy prong met where, among other things, plaintiffs "submitted affidavits attesting to their participation in [the] action and vowing to vigorously pursue the case."); *Fuller, et al. v. SunTrust Banks, Inc., et al.*, 2018 U.S. Dist. LEXIS 113108, at *17 (N.D. Ga. June 27, 2018) ("Although the affidavits are pro forma documents prepared by counsel, each Plaintiff signed at the bottom acknowledging that the affidavit contained their true contentions").

Accordingly, Plaintiffs are adequate representatives of the proposed Class. [6]

ii. Plaintiffs' Counsel Have No Conflicts With the Class, Are Qualified and Experienced, and Will Vigorously Prosecute This Action for the Class

The inquiry into the adequacy of class counsel is now decoupled from the Rule 23(a)(4) inquiry into the adequacy of the class representatives and is analyzed under factors set forth in Rule 23(g). Rule 23(g)(1)(A) instructs the court to consider, among other things: (1) the work counsel has done in identifying or investigating potential

[6] The Former Named Plaintiffs have also submitted declarations attesting to their involvement in the Prior Action. *See* Alfonso Declaration (Ex. 9) and Chiappa Declaration (Ex. 10)

claims in the action; (2) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action; (3) counsel's knowledge of the applicable law; and (4) the resources counsel will commit to representing the class. FED. R. CIV. P. 23(g)(1)(A).

Here, Capozzi Adler satisfies all prerequisites. *First*, Capozzi Adler has done significant work identifying and investigating potential claims in this action. This work included requesting documents from the Company pursuant to ERISA § 104(b)(4) and engaging consulting experts. Gyandoh Decl., ¶ 4-8. *Second,* Capozzi Adler and the undersigned counsel have significant experience handling ERISA matters and have knowledge of the applicable law. *Id*. at ¶¶ 34-48. Mark K. Gyandoh, partner and chair of the Fiduciary Practice Group at Capozzi Adler, has been litigating ERISA fiduciary breach lawsuits for 18 years and he and Capozzi Adler serve as counsel in over two dozen fiduciary breach actions across the country. *Id*. at ¶¶ 34-42. Capozzi Adler has defeated numerous motions to dismiss, won appeals, and settled analogous cases across the country. *Id*. at ¶ 44-46. *Third*, with three office locations, and numerous attorneys, Capozzi Adler has committed the necessary resources to represent the class. *Id.* at ¶¶ 39; 47.

Accordingly, appointment of Capozzi Adler as Class Counsel is warranted. *See, e.g, Huang, et al., v. TriNet HR III, Inc., et al*., No. 8:20-cv-2293-VMC-TGW (M.D.

FL. Oct. 21, 2022) (ECF 85) (appointing Capozzi Adler as Class Counsel). *See also* Gyandoh Decl. ¶ 41 (listing other class counsel appointments).

B. The Class May Be Properly Certified Under Rule 23(b)(1) (A) and/or (B)

The proposed Class may be certified under Rule 23(b)(1)(A) and/or (B), as numerous courts have done in similar cases. *See* Gyandoh Decl., ¶ 62, Exhibit 11.

1. Certification Under Rule 23(b)(1)(B) is Most Appropriate

Many courts have relied upon Rule 23(b)(1)(B) in certifying classes in analogous cases because it is particularly suited for cases alleging the breach of fiduciary obligations to plaintiffs. *See, e.g.*, *Mehling v. New York Life Ins. Co. et al.*, 246 F.R.D. 467, 478 (E.D. Pa. 2007) (certifying the class pursuant to Rule 23(B)(1)(B) in an ERISA fiduciary duty case). Courts within the Eleventh Circuit "have certified § 502(a)(2) breach of fiduciary duty cases under Rule 23(b)(1)(B)." *Pizarro*, 2020 WL 6939810, *13; *Henderson*, 2018 WL 6332343, at *9 (same); *In re Suntrust Banks*, *Inc. ERISA Litig.*, 2016 WL 4377131, at *8 (N.D. Ga. Aug. 17, 2016) (same).

Here, the proposed Class meets the requirements of FED. R. CIV. P. 23(b)(1), given the nature of this action and the relief sought on behalf of the Class. Accordingly, class certification should be granted under Rule 23(b)(1)(B), consistent with the Advisory Committee Notes to Rule 23 and the overwhelming weight of case

law.[7]

2. Certification is Also Appropriate Under Section 23(b)(1)(A)

Once a court determines that a class of participants and beneficiaries seeking recovery from an ERISA fiduciary satisfies subsection (b)(1)(B) of Rule 23, it is not necessary to consider the alternative subsections of Rule 23(b). *See, e.g.*, *Koch v. Dwyer*, No. 98-CV-5519, 2001 WL 289972, at *5 n.2 (S.D.N.Y. Mar. 23, 2001) ("Since class certification is proper under Rule 23(b)(1)(B), it need not be determined whether Plaintiff has also satisfied the requirements of Rule 23(b)(1)(A) or 23(b)(2)."). Nevertheless, it is not uncommon for courts to certify ERISA class actions under both subsections 23(b)(1)(B) and 23(b)(1)(A). *See, e.g.*, *In re: Nortel Networks Corp. ERISA Litig.*, 2009 WL 3294827, at *16 (M.D. Tenn. Sept. 2, 2009); *see also* Gyandoh Decl., ¶ 62, Exhibit 11.

VI. THE PROPOSED NOTICE PLAN SHOULD BE APPROVED

A. Description of the Notice Plan[8]

---

[7] *See* Gyandoh Decl. ¶ 62, Exhibit 11 (listing decisions certifying Rule 23(b)(1)(B) classes).

[8] As an initial matter, Class Counsel has asked the Court to approve the selection of Analytics Consulting LLC as the Settlement Administrator for the Settlement. *See* Preliminary Approval Order, ¶ 8. Analytics is an industry leader in class action settlement administration and has successfully handled dozens of class settlements. *See* https://www.analyticsllc.com/.

The Class Notice will be sent by first-class mail to the Class Members' last known address at least 90 days prior to the Fairness Hearing. Because each Settlement Class Member currently has or had during the Class Period, a Plan account, and the Plan has a social security number and a last-known address for each such person, there is usually a relatively high rate of success in reaching class members in analogous actions.

Also, by at least 90 days prior to the Fairness Hearing, the Class Notice, along with other documents related to the litigation such as the Settlement Agreement with all of its exhibits and a list of frequently asked questions, will be posted on a dedicated Settlement website established by the Court-approved Settlement Administrator at Class Counsel's direction. At Class Counsel's direction, the Settlement Administrator will also establish and monitor a dedicated, toll-free Settlement telephone number with an Interactive Voice Response ("IVR") system which will have answers to frequently asked questions and also provide potential Class Members with contact information for Class Counsel should they have any additional questions regarding the Settlement.

B. The Proposed Notice Plan Meets the Requirements of Due Process

The Notice Plan satisfies all due process considerations and meets the requirements of FED. R. CIV. P. 23(e). The proposed Class Notice describes in plain

English: (i) the terms of the Settlement; (ii) the nature and extent of the release of claims; (iii) the maximum attorneys' fees and Case Contribution Awards sought; (iv) the procedure and timing for objecting to the Settlement; and (v) the date and place for the Fairness Hearing. Courts within this Circuit have approved as fair similar notices and/or notice plans. *See, e.g.*, *Henderson v. Emory Univ.*, No. 1:16-cv-02920-CAP, 2020 WL 9848976 at*4-6 (N.D. Ga. Jun. 11, 2020) (Order Granting Preliminary Approval of Class Action Settlement); *Hanley v. Tampa Bay Sports and Entm't LLC,* No. 8:19-CV-00550-CEH-CPT, 2020 WL 357002 at *4 (M.D. Fla. Jan. 7, 2020) (same); *In re HealthSouth Corp. ERISA Litig.*, No. 03- cv-1700, 2006 WL 2109484, at *3 (N.D. Ala. June 28, 2006) (same); *In re Mirant Corp. ERISA Litig.*, No. 03-cv-1027, slip op. (N.D. Ga. Nov. 16, 2006) (same).

In sum, the proposed Notice Plan satisfies the requirements of due process and should be approved.

VII. CONCLUSION

Plaintiffs propose the Fairness Hearing be scheduled at least 120 days after entry of the Preliminary Approval Order in order to provide sufficient time for potential objectors to be heard. The submitted proposed preliminary approval order sets forth the proposed schedule of events. For the reasons set forth above, the Settlement meets the standard for preliminary approval under Rule 23.

Dated: February 14, 2023

Respectfully submitted,

CAPOZZI ADLER, P.C.

/s/ Mark K. Gyandoh
Mark K. Gyandoh, Esquire
(admitted *pro hac vice*)
Merion Station, PA 19066
Telephone: (610) 890-0200
Fax: (717) 233-4103
Email: markg@capozziadler.com

JOHNSON FISTEL, LLP

Michael I. Fistel, Jr.
Georgia Bar No.: 262062
Mary Ellen Conner
Georgia Bar No.: 195077
40 Powder Springs Street
Marietta, GA 30064
Telephone: (470) 632-6000
Fax: (770) 200-3101
Email: michaelf@johnsonfistel.com
Email: maryellenc@johnsonfistel.com
Counsel for Plaintiffs and the Putative Class

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 7.1(D) of the Local Rules of the Northern District of Georgia, counsel for Defendants hereby certifies that this Memorandum was prepared in a font and point selection approved by this Court and authorized in Local Rule 5.1B.

CERTIFICATE OF SERVICE

I hereby certify that on February 14, 2023, a true and correct copy of the foregoing document was filed with the Court utilizing its ECF system, which will send notice of such filing to all counsel of record.

By: *<u>/s/ Mark K. Gyandoh</u>*