IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
STATESVILLE DIVISION

Benjamin Reetz, individually and as the representative of a class of similarly situated persons, and on behalf of the Lowe's 401(k) Plan, Plaintiff, v. Lowe's Companies, Inc., Administrative Committee of Lowe's Companies, Inc., and Aon Hewitt Investment Consulting, Inc., Defendants.	Case No. 5:18-cv-00075-KDB-DCK

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY APPROVAL OF PARTIAL CLASS ACTION SETTLEMENT WITH LOWE'S DEFENDANTS

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INTRODUCTION

After three years of hard-fought litigation, Plaintiff Benjamin Reetz has reached a settlement of his class action claims against Lowe's Companies, Inc. ("Lowe's") and the Administrative Committee of Lowe's Companies, Inc. ("Administrative Committee") (collectively, the "Lowe's Defendants" or "Settling Defendants") in this ERISA suit relating to the Lowe's 401(k) Plan ("Plan") and the Aon Growth Fund.[1] While Plaintiff's claims against the principal defendant, Aon Hewitt Investment Consulting, Inc. ("Aon"), as the Plan's fiduciary investment consultant and investment manager remain to be tried and are not released, this partial settlement represents a significant down payment toward recovery of the losses that Plaintiff alleges the Plan sustained on account of the selection and retention of the Aon Growth Fund for the Plan. Moreover, the Settlement provides for critical prospective relief that will allow for reconsideration of both the decision to select Aon as the Plan's delegated investment manager and the adoption of the Aon Growth Fund for the Plan. Accordingly, Plaintiff respectfully requests that the Court grant preliminary approval of the Settlement.

Under the terms of the proposed Settlement, the Lowe's Defendants will pay a gross settlement amount of $12.5 million into a common fund for the benefit of Settlement Class. This represents a fair and reasonable settlement amount considering the nature of Plaintiff's claims, which focus on Aon's self-interested conduct, and Aon's ultimate role as a "delegated" investment manager with unilateral decision-making authority over Plan investments. In addition, the Settlement provides for the one thing Aon can't provide: prospective relief. Specifically, the Lowe's Defendants have agreed to issue a request for proposal ("RFP") for a delegated fiduciary

[1] A copy of the Class Action Settlement Agreement ("Settlement" or "Settlement Agreement") is attached as Exhibit A to the accompanying Declaration of Kai Richter ("Richter Decl."). Unless otherwise specified herein, all capitalized terms have the meaning assigned to them in Article I of the Settlement Agreement.

investment manager for the Plan within 12 months of the Effective Date of the Settlement, and as part of the RFP process, the Administrative Committee will: (1) engage an outside consulting firm with experience conducting similar RFPs; (2) invite candidates in the RFP process to freely propose alternative investment options, investment strategies, and/or investment lineup structures to the Committee; and (3) consider all options presented. This is effectively what Plaintiffs allege should have happened years ago, before Aon recommended restructuring the Plan lineup and was selected as delegated fiduciary without an RFP process.

For these reasons and the reasons set forth below, the Settlement is fair, reasonable, and adequate, and merits preliminary approval so that the proposed Notices of Settlement can be sent to the Settlement Class. Among other things:

- The Settlement was negotiated at arm's length by experienced and capable counsel with assistance from a mediator, after significant discovery;
- The proposed Settlement Class is consistent with the class previously certified by the Court;
- The Settlement Class has been vigorously represented by Plaintiff and Class Counsel throughout the litigation;
- The Settlement provides for significant monetary relief;
- The Settlement proceeds will be distributed to Settlement Class Members pursuant to an efficient and equitable Plan of Allocation, under which current participants' Plan accounts will be automatically credited with their share of the proceeds and former participants will receive either a check or a rollover to another retirement account (at their election);
- The Settlement Agreement provides for significant prospective relief;
- The class release is appropriately tailored to the claims that were asserted against the Lowe's Defendants in the action, and preserves Plaintiff's claims against Aon; and
- The proposed Notices provide easy-to-understand information to Settlement Class members about the Settlement and their right to be heard regarding the Settlement, and will be distributed via first-class mail.

Accordingly, Plaintiff respectfully requests that the Court enter an order: (1) preliminarily approving the Settlement; (2) approving the proposed Notices; (3) certifying the proposed Settlement Class; (4) scheduling a final approval hearing; and (5) granting such other relief as set forth in the proposed Preliminary Approval Order submitted herewith, including approving an appropriate bar order that forecloses any contribution or indemnification claims between the Settling Defendants and Aon, and grants Aon an appropriate set off against any future judgment that may be entered against it. Neither the Settling Defendants nor Aon oppose entry of the proposed order.

BACKGROUND

I. PLEADINGS AND MOTION TO DISMISS

Plaintiff filed this action on April 27, 2018. *Dkt. 1.* In his Class Action Complaint, Plaintiff asserted claims for (1) breaches of the fiduciary duties of loyalty and prudence under 29 U.S.C. § 1104(a)(1); and (2) failure to monitor fiduciaries. *Dkt. 1.* In summary, Plaintiff alleged that Aon engaged in an imprudent and self-serving scheme to replace the Plan's eight existing equity investment options with a new and underperforming Growth Fund managed by Aon, and transferred over $1 billion to this fund, with the consent of the Lowe's Defendants. *Id.* ¶ *1.*

The Lowe's Defendants moved to dismiss the Complaint on June 29, 2018 for failure to state a claim. *Dkt. 38.* On February 14, 2019, Magistrate Judge David Keesler recommended that the motion be denied. *Dkt. 54.* The Lowe's Defendants filed an objection, *Dkt. 55*, but on September 6, 2019, this Court entered an order largely adopting Judge Keesler's recommendation, *Dkt. 58.* The Court denied the motion as to Plaintiff's breach of fiduciary duty claim, *id. at 12*, and dismissed only the portion of Plaintiff's failure to monitor claim related to Lowe's alleged failure to monitor Aon, *id. at 16.*

Plaintiff filed a First Amended Complaint ("FAC") on March 23, 2020, adding as defendants the individual members of the Administrative Committee, while leaving the substance of Plaintiff's allegations unchanged. *Dkt. 84.* On October 29, 2020, Defendants stipulated to class certification, *Dkt. 94*, and the Court approved the stipulation on November 5, 2020, *Dkt. 95*.[2] As part of the same stipulation, Plaintiff agreed to dismiss the individual members of the Administrative Committee as defendants, and Lowe's agreed that it "will be responsible" for any judgment based on their acts or omissions. *Id.*

II. DISCOVERY, MEDIATION, AND SETTLEMENT

Following the Court's ruling on the motion to dismiss, the parties engaged in extensive discovery. In total, the parties have produced more than 400,000 pages of documents: the Lowe's Defendants produced more than 169,000 pages, Aon produced more than 244,000 pages, and Plaintiff produced more than 2,400 pages. *Richter Decl. ¶ 11.* Plaintiff also subpoenaed six third parties and received nearly 25,000 pages of documents in response. *Id. ¶ 12.* In addition, the parties have taken 17 depositions and have served expert reports (and/or rebuttal reports) from nine expert witnesses, including five experts retained by Plaintiff. *Id. ¶¶ 13–14.*

The parties engaged in an initial mediation session on November 12, 2020, but were unable to reach an agreement. *Id. ¶¶ 16–17.* Subsequently, the parties each moved for summary judgment on December 17, 2020, *see Dkt. 134, 137, 140,* and the Court denied the motions on February 12, 2021, *see Dkt. 198.* The Lowe's Defendants and Plaintiff then engaged in a second mediation on March 22, 2021, which ultimately resulted in a settlement between them shortly before trial was scheduled to begin. *Richter Decl. ¶ 17.*

[2] The Court's order was preliminary at the time it was issued, *id.*, but automatically became final because no objections to class certification were received from the class after notice was provided to the class, *see Dkt. 181.*

III. OVERVIEW OF SETTLEMENT TERMS

A. The Settlement Class

The Settlement Agreement applies to the following Settlement Class:

> All participants and beneficiaries of the Lowe's 401(k) Plan whose Plan account balances were invested in the Aon Growth Fund at any time on or after October 1, 2015, through the date of preliminary approval, excluding the Settling Defendants, any of their directors, and any officers or employees of the Settling Defendants with responsibility for the Plan's investment or administrative functions.

See Settlement Agreement ¶ *1.51*. This Settlement Class is consistent with the class previously certified by the Court, and now includes a class period end date (the date of preliminary approval). Based on information provided by the Settling Defendants, there are approximately 73,000 Settlement Class members who were invested in the Aon Growth Fund during the Class Period. *See Richter Decl.* ¶ *4.*

B. Monetary Relief

Under the Settlement, Lowe's will contribute a Gross Settlement Amount of $12,500,000 to a Qualified Settlement Fund (the "Settlement Fund"). *Settlement Agreement* ¶¶ *1.30, 1.44, 4.2.* After accounting for any Attorneys' Fees and Costs, Administrative Expenses, and class representative Service Award approved by the Court, the Net Settlement Amount will be distributed to Settlement Class members in accordance with the Plan of Allocation in the Settlement. *Id.* ¶ *4.8.* Under the Plan of Allocation, the Settlement Administrator[3] shall determine an Average Settlement Score for each Settlement Class Member. *Settlement Agreement* ¶ *5.1(a)*. For purposes of making this determination, the Average Settlement Score shall be calculated based

[3] The proposed Settlement Administrator is Analytics Consulting, LLC ("Analytics"). *See Settlement Agreement* ¶ *1.49.* Analytics has extensive experience administering ERISA settlements and other class action settlements, *see Richter Decl.* ¶ *32 & Ex. D,* including ERISA class action settlements in North Carolina and elsewhere this circuit. *See, e.g.*, *Sims v. BB&T Corp.*, 2019 WL 1995314, at *2 (M.D.N.C. May 6, 2019); *Intravaia v. Nat'l Rural Elec. Coop. Ass'n*, No. 1:19-cv-00973, Dkt. 97 at 2 ¶ 3 (E.D. Va. Aug. 6, 2020).

on the amount invested by each class member in the Aon Growth Fund at the beginning of each quarter during the Class Period. *Id.* The Settlement Administrator shall then determine the settlement payment for each class member by calculating each such class member's pro-rata share of the Net Settlement Fund based on his or her Average Settlement Score compared to the sum of the Average Settlement Scores for all Settlement Class Members. *Id. ¶ 5.1(b).*

The Plan accounts of Participant Class Members who are currently enrolled in the Plan will be automatically credited with their share of the Net Settlement Amount. *Id. ¶ 5.2(b).* Former Participant Class Members who no longer have a Plan account may elect to have their share of the Net Settlement Amount rolled over into an individual retirement account or other eligible employer plan by submitting a Former Participant Rollover Form. *Id. ¶ 5.3*. Any former participants who do not submit a Former Participant Rollover Form will receive their share via check. *Id ¶ 5.3(a)(ii)*. Under no circumstances will any monies revert to Lowe's. Any checks that are uncashed after 120 days will revert to the Qualified Settlement Fund and will be used to defray administrative costs of the Plan. *Id. ¶ 5.6(b).*

C. Prospective Relief

The Settlement also provides significant prospective relief. In particular, the Settling Parties have agreed to the following additional terms: (1) within twelve (12) months after the Settlement Effective Date, the Administrative Committee will issue an RFP for a delegated fiduciary investment manager for the Plan; (2) the Committee will engage an independent consulting firm (unrelated to Aon Hewitt) with experience conducting similar RFPs to assist with the RFP process; (3) the candidates in the RFP process will be free to propose alternative investment options, investment strategies, and/or investment lineup structures to the Administrative Committee; and (4) as part of the process, the Administrative Committee will

consider all options presented (including maintaining the current investment manager, investment lineup structure, and/or investment strategies). *Id.* ¶ *6.1*.

D. Release of Claims and Bar Order

In exchange for the relief provided by the Settlement, the Settlement Class will release the Lowe's Defendants and affiliated persons and entities (the "Released Parties") from all claims:

- That were asserted in the Action against the Settling Defendants or could have been asserted against the Settling Defendants, including but not limited to those based on (1) the selection, retention, or monitoring of the Aon Growth Fund, (2) the mapping of Plan assets to the Aon Growth Fund; (3) the selection, retention, or monitoring of Aon Hewitt; (4) the performance, fees, and other characteristics of the Aon Growth Fund, (5) Aon Hewitt's performance or fees, or the services provided by Aon Hewitt to the Plan; or (6) the restructuring or modification of the Plan's investment lineup;
- That would be barred by *res judicata* based on the Court's entry of the Final Approval Order;
- That arise from the direction to calculate, the calculation of, and/or the method or manner of the allocation of the Net Settlement Fund pursuant to the Plan of Allocation; or
- That arise from the approval by the Independent Fiduciary[4] of the Settlement Agreement.

Id. ¶¶ *1.38, 8.1(a).* Claims against Aon are not released by the Settlement. *Id.* ¶¶ *1.38, 8.5.* Likewise, claims to enforce the Settlement Agreement, and claims for individual vested benefits that are due under the terms of the Plan also are not released. *Id.*

In addition, the Settlement calls for entry of a Bar Order to address potential claims for contribution or indemnity between the Settling Defendants and Aon. *Id.* ¶ *2.3(g).* Under the terms of the proposed Bar Order, (i) the Settling Defendants will be precluded from asserting any contribution or indemnification claims that they may have against Aon relating to the Action; (ii) Aon will be precluded from asserting any such contribution or indemnification claims it may

[4] The role of the Independent Fiduciary is discussed *infra* at 9.

have against the Settling Defendants; and (iii) any judgment entered against Aon in the Action will be subject to a judgment reduction credit based on what the Court ultimately determines to be the "proportionate fault" of Aon and the Settling Defendants. *Id.*

E. Class Notice and Settlement Administration

Settlement Class Members will be sent notice of the settlement ("Notice") via U.S. Mail. *Id. ¶ 3.2, & Exs. 1 & 2*. The Notice sent to Former Participant Class Members also will include a Former Participant Rollover Form. *See id. ¶ 3.2(c) & Ex. 3*. These Notices provide information to the Settlement Class regarding, among other things: (1) the nature of the claims in this Action; (2) the scope of the Settlement Class; (3) the terms of the Settlement; (4) the process for submitting Former Participant Rollover Forms; (5) class members' right to object to the settlement and the deadline for doing so; (6) the class release; (7) the proposed bar order; (8) the identity of Class Counsel and the amount of compensation they will seek in connection with the Settlement; (9) the amount of the proposed service award to Plaintiff as class representative; (10) the date, time, and location of the Fairness Hearing; and (11) class members' right to appear at the Fairness Hearing. *Id., Exs. 1 & 2*.

To the extent that Settlement Class Members would like more information about the Settlement, the Settlement Administrator will establish a Settlement Website on which it will post the Notices, the Former Participant Rollover Form, a copy of the operative First Amended Complaint (*Dkt. 84*), all documents filed with the Court in connection with the Settlement, and any other documents or information mutually agreed upon by the Settling Parties. *Id. ¶ 3.3*. Further, the Settlement Administrator will establish a toll-free telephone line through which Settlement Class Members may contact the Settlement Administrator directly. *Id ¶ 3.3(c)*.

F. Attorneys' Fees and Expenses

The Settlement Agreement requires that Class Counsel file their motion for attorneys' fees at least 14 days before the deadline for objections to the proposed Settlement. *Id.* ¶ *7.1*. As explained in the Notices that will be sent to the Settlement Class, Class Counsel will seek no more than one-third of the Gross Settlement Amount ($4,166,666.67) in attorneys' fees.[5] *Id.* ¶ *1.7 & Exs. 1 & 2*. In addition, the Settlement Agreement provides for recovery of litigation costs and Administrative Expenses, and a Service Award of up to $10,000 to the Named Plaintiff as the class representative, subject to Court approval and Independent Fiduciary review. *Id.* ¶¶ *7.1–7.2*.

G. Review by Independent Fiduciary

As required under ERISA, the Lowe's Defendants will retain an Independent Fiduciary to review and authorize the Settlement on behalf of the Plan. *Id.* ¶ *2.2; see also* Prohibited Transaction Exemption 2003-39, 68 Fed. Reg. 75632, as amended, 75 Fed. Reg. 33830 ("PTE 2003-39"). The Independent Fiduciary will issue its report at least 30 days before the final Fairness Hearing so that the Court may consider it. *Settlement Agreement* ¶ *2.2(b).*

ARGUMENT

I. STANDARD OF REVIEW

Federal Rule of Civil Procedure 23(e) requires judicial approval of any settlement agreement that will bind absent class members. The first step in approving any proposed settlement in a class action is preliminary approval. *Horton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 855 F.Supp. 825, 827 (E.D.N.C. 1994). At this stage, the Court reviews the proposed settlement

[5] This one-third cap is consistent with fee awards in other ERISA class actions. *See Kruger v. Novant Health, Inc.*, 2016 WL 6769066, at *2 (M.D.N.C. Sept. 29, 2016) ("[C]ourts have found that '[a] one-third fee is consistent with the market rate' in a complex ERISA 401(k) fee case such as this matter"); *accord Sims v. BB&T Corp.*, 2019 WL 1993519, at *2 (M.D.N.C. May 6, 2019) (approving one-third fee to Nichols Kaster, PLLP and co-counsel)); *Intravaia v. Nat'l Rural Elec. Coop. Ass'n*, No. 1:19-cv-00973, Dkt. 114 at 1 ¶ 1 (E.D. Va. Feb. 25, 2021) (same).

to determine whether it is sufficient to warrant public notice and a hearing. *Id*. If so, the final decision on approval is made after a fairness hearing at which class members have an opportunity to present any objections and be heard. *Id*.; *see also* Manual for Complex Litigation (Fourth) § 13.14, at 172–73 (4th ed. 2004).

In considering a proposed settlement, "the Court must make a determination as to the fairness, reasonableness, and adequacy of the settlement terms." *Gaston v. LexisNexis Risk Solutions, Inc.*, 2021 WL 244807, at *5 (W.D.N.C. Jan. 25, 2021) (citing Fed. R. Civ. P. 23(e)(2)). "The Fourth Circuit has bifurcated this analysis into consideration of the fairness of settlement negotiations and the adequacy of the consideration to the class." *Id.* (citing *In re Jiffy Lube Secs. Litig.*, 927 F.2d 155, 158–59 (4th Cir. 1991)). "However, at the preliminary approval stage, the Court need only find that the settlement is within 'the range of possible approval.'" *Id.* (quoting *Scott v. Family Dollar Stores, Inc.*, 2018 WL 1321048, at *3 (W.D.N.C. Mar. 14, 2018); *Horton*, 855 F. Supp. at 827). As discussed below, the present Settlement clearly falls within that range.[6]

II. THE COURT SHOULD APPROVE THE SETTLEMENT UNDER RULE 23(E)

A. The Settlement is Fair

Courts in the Fourth Circuit use the following factors in analyzing a class settlement for fairness: "(1) the posture of the case at the time the proposed settlement was reached, (2) the extent of discovery that had been conducted, (3) the circumstances surrounding the settlement

[6] "It has long been clear that the law favors settlement." *Sims*, 2019 WL 1995314, at *3 (quoting *United States v. Manning Coal Corp.*, 977 F.2d 117, 120 (4th Cir. 1992)). "This is particularly true in class actions." *Id.* (citations omitted). Accordingly, there is a "a strong initial presumption that [a class action] compromise is fair and reasonable." *In re Zetia (Ezetimibe) Antitrust Litig.*, 2019 WL 6122038, at *3 (E.D. Va. Oct. 1, 2019) (quoting *In re MicroStrategy, Inc. Sec. Litig.*, 148 F. Supp. 2d 654, 663 (E.D. Va. 2001)); 4 NEWBERG ON CLASS ACTIONS ("NEWBERG") § 11:41 (4th ed. 2002).

negotiations, and (4) counsel's experience in the type of case at issue." *Gaston*, 2021 WL 244807, at *6 (citing *Jiffy Lube*, 927 F.3d at 158–59). Each factor weighs in favor of preliminary approval.

1. The Posture of The Case

At the time the proposed settlement was reached, the Settling Parties were only a few weeks from trial. The mature posture of this case demonstrates that it was ripe for settlement. Further, the "motion practice in this case provided each side with … additional insight to evaluate the merits" of their respective positions. *See Gaston*, 2021 WL 244807, at *6. As the Court noted in its summary judgment order, the summary judgment record consisted of "more than 250 pages of supporting, opposition and reply briefs (together with untold pages of exhibits)." *Dkt. 198 at 2.*

2. The Extent of Discovery

The extensive discovery that was undertaken also supports a finding of fairness. As discussed above, Plaintiff "obtained substantial discovery in this case[.]" *See Gaston*, 2021 WL 244807, at *6. Before the case was even filed, Class Counsel conducted a thorough investigation, including submitting FOIA requests to the Department of Labor. *See Richter Decl. ¶ 9.* Once the litigation began, Class Counsel reviewed hundreds of thousands of pages of documents, took several depositions, and subpoenaed multiple third parties. *See supra* at 4. In addition, Class Counsel retained five separate experts, reviewed their reports, and also engaged in discovery of Defendants' experts. *Id.* "Developing a case to this extent 'clarifie[ed] plaintiffs' previous understanding of the strength and weaknesses of their claims and afford[ed] plaintiffs the ability to confirm the fairness, reasonableness, and adequacy of the proposed partial settlement.' " *In re Mills Corp. Sec. Litig.*, 265 F.R.D. 246, 254–55 (E.D. Va. 2009) (quoting *MicroStrategy*, 148 F. Supp. 2d at 665).

3. The Circumstances Surrounding the Settlement Negotiations

"Where a settlement is the result of genuine arm's-length negotiations, there is a presumption that it is fair." *Gaston*, 2021 WL 244807, at *6. That is exactly the situation presented here. The record reflects that counsel for the Settling Parties engaged in extensive arm's length negotiations over multiple months with an experienced, independent mediator. *Richter Decl.* ¶¶ *16–17*. In addition, counsel for both sides are well-respected members of the ERISA class action bar, which "further minimizes concerns that the [Settling Parties] colluded to the detriment of the class's interests." *MicroStrategy*, 148 F. Supp. 2d at 665. "In the absence of any evidence to the contrary, it is presumed that no fraud or collusion occurred." *Galiastre v. Capt. George's Seafood Rest., LP*, 2019 WL 2288441, at *3 (E.D. Va. May 29, 2019).

4. Counsel's Experience in the Type of Case at Issue

Finally, "the opinion of experienced and informed counsel in favor of settlement should be afforded due consideration in determining whether a class settlement is fair and adequate." *Gaston*, 2021 WL 244807, at *6. Here, Class Counsel are "experienced litigators who serve as class counsel in ERISA actions involving defined-contribution plans[.]" *Moreno v. Deutsche Bank Americas Holding Corp.*, 2017 WL 3868803, at 11 (S.D.N.Y Sept. 5, 2017). Indeed, "Class Counsel is one of the relatively few firms in the country that has the experience and skills necessary to successfully litigate a complex ERISA action such as this." *Karpik v. Huntington Bancshares Inc.*, 2021 WL 757123, at *9 (S.D. Ohio Feb. 18, 2021). As set forth in the accompanying attorney declaration, Class Counsel have won favorable rulings on class certification and dispositive motions in several ERISA cases, recently tried two other ERISA class actions, successfully litigated an appeal before the First Circuit in *Putnam*, and have negotiated class action settlements that have received court approval in numerous cases in addition to this case. *Richter Decl.* ¶¶ *22–23*. Based on their experience, the firm's attorneys have been interviewed by several media outlets in connection with

their ERISA work, and the firm's undersigned counsel has spoken at multiple national forums on ERISA litigation. *Id.* ¶ *24.* Accordingly, "it is entirely warranted for this Court to pay heed to their judgment in approving, negotiating, and entering into a putative settlement." *Mills Corp.*, 265 F.R.D. at *255; *see also In re NeuStar, Inc. Sec. Litig.*, 2015 WL 5674798, at *12 (E.D. Va. Sept. 23, 2015).

Moreover, Plaintiff himself has submitted a declaration in support of the Settlement as the appointed class representative. *See Reetz Decl.* ¶¶ *4–7.* This Court has previously found both Plaintiff and Class Counsel to be adequate to represent the interests of the class. *See Dkt. 97 at 3,* ¶ *4.*

B. The Settlement Terms Are Adequate and Reasonable

The Court also must determine whether "the terms of the proposed settlement are adequate and reasonable for the purposes of preliminary approval; that is, they are 'within the range of possible approval.'" *Gaston*, 2021 WL 244807, at *6. "In an analysis of the adequacy of a proposed settlement, the relevant factors to be considered may include: (1) the relative strength of the case on the merits, (2) any difficulties of proof or strong defenses the plaintiff and class would likely encounter if the case were to go to trial, (3) the expected duration and expense of additional litigation, (4) the solvency of the defendants and the probability of recovery on a litigated judgment, (5) the degree of opposition to the proposed settlement, (6) the posture of the case at the time settlement was proposed, (7) the extent of discovery that had been conducted, (8) the circumstances surrounding the negotiations, and (9) the experience of counsel in the substantive area and class action litigation." *Id.* (citing *Jiffy Lube*, 927 F.2d at 159). Once again, these factors support preliminary approval of the settlement.

1. Relative Strength of the Plaintiff's Case Against the Lowe's Defendants and Applicable Defenses

The first two factors of the adequacy inquiry "compel the Court to examine how much the class sacrifices in settling a potentially strong case in light of how much the class gains in avoiding the uncertainty of a potentially difficult case." *Mills Corp.*, 265 F.R.D. at 256. Considering the relevant circumstances here, the Settlement is both adequate and reasonable, and should be approved. Indeed, the Settlement represents a "best of both worlds" scenario for the class, which preserves its claims against Aon as the primary defendant while still assuring the class a substantial monetary recovery and critical prospective relief.

The claims against Aon have always been the strongest claims in this case. When Plaintiff filed the action, only the Lowe's Defendants—not Aon—filed a motion to dismiss. Once discovery was complete, the record reflected significant evidence of disloyalty by Aon but did not support a breach of loyalty claim against the Lowe's Defendants. *See Dkt. 163 (redacted) & 168 at 1 n.2* ("Based on discovery in this case, Plaintiff does not intend to continue to pursue a breach of loyalty claim against Lowe's, as he does against Aon."). And Plaintiff's summary judgment briefing makes clear that his case was focused on Aon, with the claims against Aon always addressed first and the Lowe's Defendants presented as secondary defendants who Plaintiff alleged simply did not take adequate precautions to protect the Plan from Aon (the entity that the Lowe's Defendants believed to be their trusted investment advisor and delegated investment manager). *See Dkts. 135 (redacted), 136, 185 (redacted), 186.*

Based on the relevant factors that are considered under applicable trust law,[7] there is no

[7] "In determining the contours of an ERISA fiduciary's duty, courts often must look to the law of trusts." *Tibble v. Edison Int'l*, 575 U.S. 523, 528–29 (2015); *Tatum v. RJR Pension Inv. Comm.*, 761 F.3d 346, 357 (4th Cir. 2014) ("[I]n interpreting ERISA, the common law of trusts informs a court's analysis.").

question that most, if not all, of the alleged fault rests with Aon. *See* Restatement (Third) of Trusts § 102 cmt. b(2) (listing four factors that may be considered when evaluating the relative fault of two breaching trustees: (1) whether one trustee "mislead the other(s) into joining in the breach"; (2) whether "one trustee commit[ted] the breach intentionally ... while the other(s) did so by simple negligence"; (3) whether "one trustee, having greater experience or expertise, essentially control[led] the actions of the other(s), such as where a trustee without business experience regularly relied on the judgment of the experienced trustee"; and (4) and whether "one trustee act[ed] essentially alone while the joint and several liability of the other(s) resulted merely from a failure to exercise reasonable care to prevent the breach or from improper delegation or monitoring"). Thus, the Settlement with the Lowe's Defendants is reasonable in relation to the Defendants' alleged relative fault and preserves the primary class claims for trial (i.e., those asserted against Aon).[8]

Moreover, the class gains much by settling its claims against the Lowe's Defendants. The $12.5 million partial settlement amount is a meaningful recovery that represents approximately 5% to 18% of the total estimated damages calculated by Plaintiff's expert (depending on loss model). *See Richter Decl. ¶ 7.* This is on par with settlements in many class action cases that provide a *full* release of *all* claims. *See, e.g., In re Newbridge Networks Sec. Litig.*, 1998 WL 765724, at *2 (D.D.C. Oct. 23, 1998) ("[A]n agreement that secures roughly six to twelve percent of a *potential* recovery ... seems to be within the targeted range of reasonableness."); *In re*

[8] At the time the Settling Parties reached a settlement, the Lowe's Defendants argued in a pending motion that they had no exposure for monitoring Aon because (1) the Court had already dismissed Plaintiff's claim that Lowe's failed to adequately monitor Aon, *see Dkt. 58 at 16*; and (2) they believed no monitoring claim was alleged against the Committee in the FAC, *see Dkt. 214 at 1*. Even if Plaintiff had succeeded in defeating this motion, any liability on the part of the Administrative Committee for failing to adequately monitor Aon would have been derivative in nature, and would not have yielded additional damages.

Checking Acct. Overdraft Litig., 830 F. Supp. 2d 1330, 1350 (S.D. Fla. 2011) (recovery of nine percent was reasonable); *In re Rite Aid Corp. Sec. Litig.*, 146 F.Supp.2d 706, 715 (E.D. Pa. 2001) (noting that since 1995, class action settlements have typically "recovered between 5.5% and 6.2% of the class members' estimated losses"). Of course, because the claims against Aon are not released by the Settlement, the Class has an opportunity for a much larger total recovery once the litigation is concluded that is potentially an order of magnitude greater or more (depending on the Court's ultimate liability determination with respect to Aon at trial). Accordingly, the *partial* settlement represents an adequate monetary recovery, and clearly falls within the range of reasonableness.

As a basis for comparison, it is useful to consider the settlement that was reached in another recent case involving the Insperity 401(k) Plan. *See Pledger v. Reliance Trust Co.*, No. 1:15-cv-04444 (N.D. Ga. Oct. 12, 2020), Dkt. 280-1 (memorandum in support of motion for preliminary approval) and Dkt. 280-2 (settlement agreement). In that case, Reliance Trust (which was represented by the same counsel as Aon in this case) served as the discretionary investment manager to the Insperity 40(k) plan. *See Pledger*, No. 1:15-cv-04444 (N.D. Ga. April 15, 2016), Dkt. 37 at ¶¶ 18, 35 (Amended Complaint). Similar to here, the plaintiffs alleged that "Reliance Trust acted to benefit itself and the other defendants by selecting and retaining high-cost and poorly performing investments for the Plan, including investing $500 million of the Plan's assets in its own newly-created and untested proprietary target-date funds." *Id. at ¶ 2*. In addition, the plaintiffs alleged that Insperity Holdings (the plan sponsor) was "liable for Reliance Trust's acts or omissions in carrying out delegated responsibilities because Insperity Holdings knowingly participated in or failed to remedy Reliance Trust's breaches of fiduciary duties." *Id. at ¶¶ 23, 202(d)*. After a two-week trial, the plaintiffs reached a settlement with Reliance Trust that

"resolve[d] *all* claims against *all* Defendants." *Pledger*, No. 1:15-cv-04444, Dkt. 280-1 at 8 (emphasis added). Under the terms of that settlement, Reliance Trust paid $39.8 million to resolve the case, and Insperity Holdings and its affiliated entities paid nothing. *Id.; see also Pledger*, No. 1:15-cv-04444, Dkt. 280-2 at ¶ 5.4 (providing that "Reliance Trust, or its agents or insurers, will deposit" all monies into the settlement fund). Thus, the class in this case is already $12.5 million ahead of the class in *Pledger*, as Plaintiff has negotiated a $12.5 million settlement payment from the plan sponsor while preserving all claims against the investment manager (which have yet to be tried).

That is not all. In addition to this monetary relief, the Lowe's Defendants have agreed to critical prospective relief. Specifically, the Lowe's Defendants have agreed to "issue a request for proposal ('RFP') for a delegated fiduciary investment manager for the Plan." *Settlement Agreement* ¶ *6.1*. As part of the RFP process "[t]he Administrative Committee will engage an independent consulting firm (unrelated to Aon Hewitt) with experience conducting similar RFPs." *Id.* Further, "[t]he candidates in the RFP process will be free to propose alternative investment options, investment strategies, and/or investment lineup structures to the Administrative Committee," and "the Administrative Committee will consider all options presented." *Id.* In other words, the Administrative Committee has agreed to reevaluate through an RFP process all of the relevant decisions (regarding investment lineup structure, the delegated investment manager, and specific investment strategies and investment options) that led to the selection of the Aon Growth Fund for the Plan. This prospective relief addresses the core issues raised by the lawsuit, and strongly supports approval of the Settlement. *Richter Decl.* ¶ *8*; *see also Sims*, 2019 WL 1995314, at *3, *5 (noting value of "[n]on-monetary relief" and approving settlement agreement that "require[d] the defendants to solicit requests for proposals and hire an independent consultant to

evaluate the Plan's investment options and make other recommendations"); *Moreno v. Deutsche Bank Americas Holding Corp.*, 1:15-cv-09936-LGS, Dkt. 348 at 4–5 (S.D.N.Y. Mar. 7, 2019) (finding that "non-monetary benefits", including independent fiduciary review of the proprietary investments in the plan, "have significant value for Plan participants").

2. Anticipated Duration and Expenses of Additional Litigation

The third *Jiffy Lube* factor asks the Court "to weigh the settlement in consideration of the substantial time and expense litigation of this sort would entail if a settlement was not reached." This factor strongly supports the Settlement here. It is well-recognized that ERISA class cases involving retirement plans "often lead[] to lengthy litigation." *Krueger v. Ameriprise Fin., Inc.*, 2015 WL 4246879, at *1 (D. Minn. July 13, 2015). Indeed, these cases can extend for a decade before final resolution, sometimes going through multiple appeals. *See, e.g., Tussey v. ABB, Inc.*, 850 F.3d 951 (8th Cir. 2017) (recounting lengthy procedural history of case that was initially filed in 2006, and remanding to district court a second time); *Tibble v. Edison Int'l*, 2017 WL 3523737, at *15 (C.D. Cal. Aug. 16, 2017) (outlining remaining issues ten years after suit was filed in 2007); *Abbott v. Lockheed Martin Corp.*, 2015 WL 4398475, at *4 (S.D. Ill. July 17, 2015) (noting that the case had originally been filed on September 11, 2006). One of the chief advantages of the Settlement in this case is that avoids further litigation between the Settling Parties and the substantial expenses (including expert fees) that would be incurred in connection with ongoing litigation between them in this court and potential appeals. This favors approval of the Settlement. *See Gaston*, 2021 WL 244807, at *6 ("[T]he Parties anticipate incurring substantial additional costs in pursuing this litigation further. The level of additional costs would significantly increase as the appellate process proceeded and any effort that might be required if the matter is remanded for further proceedings. Thus, the likelihood of substantial future costs favors approving the proposed settlement.") (citing *Sims*, 2019 WL 1995314, at *4–5; *Horton*, 855 F. Supp. at 833).

3. Remaining Factors

The remaining *Jiffy Lube* factors are either neutral or support the Settlement. The solvency of the Lowe's Defendants has not been an issue in this case. *C.f. Sims*, 2019 WL 1995314, at *5 ("Class Counsel have not expressed any concerns as to the solvency of the defendants or their ability to recover if they were to proceed to trial."). Thus, this factor "is largely beside the point given the other factors weighing in favor of a negotiated resolution." *Henley v. FMC Corp.*, 207 F. Supp. 2d 489, 494 (S.D. W. Va. 2002).[9]

Likewise, the presence or absence of objections is not relevant at this stage because notice of the Settlement has not yet been provided to the class. Accordingly, it makes sense to preliminarily approve the Settlement and provide for notice and an opportunity for class members to be heard. In response to the earlier class notice, there were no objections, *see Dkt. 181 at ¶ 6* (noting that "no objections to class certification have been received by any of the Parties"), and there is no reason to believe that there will be significant opposition to the Settlement. As noted above, both Plaintiff and Class Counsel have submitted declarations in support of the Settlement.

Finally, the posture of the case, the extent of discovery that has been conducted, the circumstances surrounding the negotiations, and the experience of counsel support the Settlement for the reasons outlined above. *See supra* at II.A.1–4. Based on the totality of circumstances, it was reasonable and appropriate for the Settling Parties to reach a settlement on the terms that were negotiated here. *See Kruger*, 2016 WL 6769066, at *5 ("[S]ettlement of a 401(k) excessive fee case benefits the employees and retirees in multiple ways.").

[9] Even if collectability of a judgment were an issue, the Settlement puts that issue to rest by providing a guaranteed payment.

III. THE NOTICE PLAN IS REASONABLE AND SHOULD BE APPROVED

In addition to reviewing the substance of the proposed Settlement, the Court must ensure that notice is sent in a reasonable manner to all class members who would be bound by the settlement. *See* Fed. R. Civ. P. 23(e)(1). The "best notice practicable" under Rule 23 specifically includes "individual notice to all class members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B). That is precisely the type of notice proposed here. The Settlement Agreement provides that the Settlement Administrator will provide direct notice of the Settlement to the Settlement Class via first class mail. *Settlement Agreement ¶ 3.2(b).* This type of notice is presumptively reasonable. *See Phillips Petroleum Co. v. Shutts,* 472 U.S. 797, 812 (1985). Moreover, mailing individual notices is also consistent with the notice program that the Court approved in connection with the prior class notice. *See Dkt. 102 at ¶¶ 4–5* (motion for approval of class notice); *Dkt. 105* (order approving class notice). This further demonstrates the reasonableness of the notice program in connection with the Settlement. *See Gaston*, 2021 WL 244807, at *7 ("[S]ettlement notices should be delivered or communicated to class members in the same manner as certification notices.") (citing Manual for Complex Litigation (Fourth), § 21.312 (4th ed. 2004)).

The content of the Notices is also reasonable. The Notices include, among other things: (1) a summary of the lawsuit; (2) a clear definition of the Settlement Class; (3) a description of the material terms of the Settlement; (4) a disclosure of the release of claims; (5) a description of the proposed bar order; (6) instructions for submitting a rollover form (in the event that Former Participant Class Members so elect); (7) instructions as to how to object to the Settlement and a date by which Settlement Class members must object; (8) the date, time, and location of the final approval hearing; (9) contact information for the Settlement Administrator; and (10) information regarding Class Counsel and the amount that Class Counsel may seek in attorneys' fees and costs. *Settlement Agreement, Exs. 1 & 2.* This information is "reasonably calculated, under all the

circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *See Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306, 314 (1950).

Finally, to the extent that Settlement Class Members would like further information, the Notices will be supplemented through the Settlement Website and a telephone support line. *See supra* at 8. This further supports approval of the notice program. *See Gaston*, 2021 WL 244807, at *7 (approving notices that were supplemented by "(1) a settlement website; [and] (2) a call center"). Such additional means of notice are consistent with other ERISA settlements that have been approved. *See, e.g.*, *Sims*, 2019 WL 1995314, at *2 (describing notice program that included "mailed notices", a "Settlement website" and "toll-free phone number"); *Kruger v. Novant Health, Inc.*, 2016 WL 6769054, at *4–5 (M.D.N.C. May 18, 2016) (approving mailed notices supplemented by settlement website).

IV. THE SETTLEMENT CLASS IS CONSISTENT WITH THE CERTIFIED CLASS AND CONTAINS ONLY MINOR MODIFICATIONS TO EFFECTUATE THE SETTLEMENT

"When the Court is presented with a proposed settlement, the Court [also] must determine whether the proposed settlement class satisfies the requirements for class certification under Federal Rule of Civil Procedure 23." *Gaston*, 2021 WL 244807, at *3. Here, the proposed Settlement Class is consistent with the class that the Court previously certified for litigation purposes, and contains only minor modifications to clarify the class period end date and the applicable Defendants for purposes the carve out provision:

> All participants and beneficiaries of the Lowe's 401(k) Plan whose Plan account balances were invested in the ~~Hewitt~~ Aon Growth Fund at any time on or after October 1, 2015, through the date of ~~judgment~~ preliminary approval, excluding the Settling Defendants, any of their directors, and any officers or employees of the Settling Defendants with responsibility for the Plan's investment or administrative functions.

Settlement Agreement ¶ *1.51*; *compare id.*, *with Dkt. 97* (order approving class for litigation purposes). For the reasons previously stated in the Court's preliminary class certification order, the proposed Settlement Class meets the requirements of Rule 23 and should be approved. *See Dkt. 97 at 1–3*. There are no material differences between the Settlement Class and the existing class, and it is appropriate to modify the existing class definition to effectuate the Settlement. *See Sims*, 2019 WL 1995314, at *1.

V. THE COURT SHOULD ENTER AN APPROPRIATE BAR ORDER

Because the Settlement is a partial settlement that does not include Aon, the Settlement also calls for entry of a bar order that forecloses any contribution or indemnification claims between the Settling Defendants and Aon, and provides Aon a setoff against any future judgment that may be entered against it. *See Settlement Agreement* ¶ *2.3(g)*. This bar order is necessary to facilitate settlement,[10] and is consistent with the approach outlined by the Fourth Circuit in *Jiffy Lube*.

As the Fourth Circuit recognized, "[t]he justification for imposing a bar to contribution in such settlements is that in multi-defendant actions, the right to contribution removes the incentive to settle since the non-settling defendants could still file claims for contribution against a joint tortfeasor who has been discharged of direct liability through settlement." *Jiffy Lube*, 927 F.2d at 160. In turn, "[i]f the non-settling defendant loses his right to contribution, [set off] provisions … become necessary to ensure that the non-settling defendant pays no more than [its] share of any future judgment that may be entered against [it] in favor of plaintiffs." *Id.*

[10] The proposed bar order is a precondition of the Settlement. *See Settlement Agreement* ¶¶ *2.3(g), 10.1(e)*. Without it, the Lowe's Defendants could be subject to future claims for indemnification or contribution, eliminating their incentive to settle with Plaintiff.

One of the types of setoff methods authorized by the Fourth Circuit is the "proportionate fault" method, "in which the [factfinder] assesses the relative culpability of both settling and non-settling defendants, and the non-settling defendant pays a commensurate percentage of the judgment." *See id.* at 160 n.3. This is the method provided by the Settling Parties in the Settlement Agreement, *see Settlement Agreement, ¶ 2.3(g)(iii)*, and Aon has indicated that it is also acceptable to Aon. Accordingly, the Court should adopt this setoff method consistent with numerous other cases in this circuit and elsewhere.[11]

"A separate hearing on fairness from the perspective of the non-settling defendant is not required" under this method. *Jiffy Lube*, 927 F.2d at 160; *see also Gerber v. MTC Elec. Techs. Co., Ltd.*, 329 F.3d 297, 303 (2d Cir. 2003) ("By awarding a credit that is at least the settling defendants' proven share of liability, the non-settling defendants' rights are protected even without a determination of the fairness of the settlement."); Restatement (Third) of Torts: Apportionment

[11] *See, e.g.*, *McDermott, Inc. v. AmClyde*, 511 U.S. 202, 211, 221 (1994) (adopting the proportionate share approach under federal common law (admiralty), reasoning that "the proportionate share approach is superior.... Just as the other defendants are not entitled to a reduction in liability when the plaintiff negotiates a generous settlement, so they are not required to shoulder disproportionate liability when the plaintiff negotiates a meager one."); *Eichenholtz v. Brennan*, 52 F.3d 478, 486–87 (3d Cir. 1995) ("[T]he proportionate fault rule satisfies the statutory contribution goals of equity, deterrence, and the policy goal of encouraging settlement.") (citation omitted); *Franklin v. Kaypro Corp.*, 884 F.2d 1222, 1231 (9th Cir. 1989) ("The goal of equity is also satisfied. Settling defendants pay an amount to which they voluntarily agree. The bar on further contribution extinguishes further risk on their part. Nonsettling defendants never pay more than they would if all parties had gone to trial. This comports with the equitable purpose of contribution."); *U.S. Fid. & Guar. Co. v. Patriot's Point Dev. Auth.*, 772 F. Supp. 1565, 1577 (D.S.C. 1991) ([T]his Court adopts the pure proportionate or comparative fault rule as the settlement bar rule to be applied to the claims in this case."); *see also Meyers v. Lamer*, 743 F.3d 908, 914 (4th Cir. 2014) (recognizing that "the great majority of the States employ a comparative-negligence system that awards damages as a pro rata percentage of fault"); Restatement (Third) of Torts: Apportionment Liab. § 16, cmt. c (2000) ("No perfect method exists for apportioning liability among a plaintiff, a settling tortfeasor, and a nonsettling tortfeasor.... Nevertheless, the rule adopted in this Section provides the nonsettling tortfeasor with a credit against the judgment in the amount of the comparative share of the settling tortfeasor ... because on balance it better provides for fairness in loss allocation and has administrability advantages.").

Liab. § 16, cmt. c (2000) ("[T]he comparative-share credit obviates the need for courts to review the bona fides of partial settlements and contributes to an equitable distribution of liability among the plaintiff, settling tortfeasors, and nonsettling tortfeasors."). In any event, as noted above, Aon has indicated that this setoff method is acceptable to Aon as well as the Settling Parties. For this reason as well, the proposed bar order provision and setoff method should be approved.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court grant preliminary approval of the proposed Settlement, and enter the accompanying proposed Preliminary Approval Order.

Respectfully Submitted,

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