IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

ROBERT GLASSCOCK, individually, and as representative of a Class of Participants and Beneficiaries on Behalf of the Serco Inc. 401(k) Retirement Plan;

Plaintiff,

v.

SERCO INC.,

Defendant.

Civil Action No. 1:20-cv-00092-RDA-JFA

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT

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INTRODUCTION

On February 22, 2021, this Court preliminarily approved the Parties' Class Action Settlement Agreement, which resolves Plaintiff's claims against Defendant Serco Inc. ("Serco") under the Employee Retirement Income Security Act ("ERISA") relating to Defendant's administration and management of the Serco 401(k) Retirement Plan (the "Plan"). *See* ECF No. 96 (order granting preliminary approval). The Court found on a preliminary basis that the terms of the Settlement are "sufficiently fair, reasonable, and adequate to warrant sending notice of the Settlement to the Settlement Class," and approved the distribution of the Settlement Notice as specified in the Settlement Agreement. *Id.* at 2-4.[1]

Through the Court-appointed Settlement Administrator, Angeion Group LLC, notice was timely disseminated to the Settlement Class according to the terms of the Settlement Agreement and the Court's February 22, 2021 Order.

Despite the Parties' disagreements over the merits of Plaintiff's claims, the Parties worked hard to reach a fair and equitable settlement that takes into account the risks and expense of continued litigation, the stage of the proceedings, the discovery exchanged between the Parties, the complexity of the claims, and the relevant law.

Based on these considerations, and the other factors relevant to the final fairness evaluation discuss below, Plaintiff and Class Counsel respectfully submit that final approval of the Settlement Agreement is warranted, and request that the Court grant Plaintiff's Motion.[2]

[1] The Settlement Agreement can be found on the docket at ECF No. 92-1. Unless otherwise specified, all capitalized terms used herein have the meaning as set forth in the Settlement Agreement.

[2] Defendant does not oppose this Motion as party to the Settlement.

BACKGROUND[3]

I. THE COMPLAINT

On January 28, 2020, Plaintiff Robert Glasscock, a former employee of Serco and a former participant in its 401(k) Plan, filed his class action complaint, asserting that Serco breached fiduciary duties under ERISA in the management of the Plan. ECF No. 1 (Complaint) and 18 (Amended Complaint). In summary, Plaintiff alleged that Defendant failed to select prudent investment options, failed to monitor the investments in a prudent manner, and caused the Plan to pay excessive amounts in investment management and administrative fees. ECF No. 18 (Amended Complaint), ¶¶ 93-99.

II. MOTION PRACTICE

On April 27, 2020, Defendant moved to dismiss the Complaint for failure to state a claim. ECF No. 6. In response, Plaintiff filed an Amended Complaint on May 18, 2020 and included additional allegations regarding the Plan's use of rebates and alleged improper fees paid to Voya, Financial Services, the Plan's recordkeeper. See ECF No. 18. Defendant then filed a renewed motion to dismiss the Amended Complaint on June 1, 2020. ECF No. 20. On October 16, 2020, Plaintiff Filed a Motion for Class Certification, supported by a Declaration by fiduciary expert Jeffery Schaff. ECF No. 57. Both motions were pending, and the dismissal motion was fully briefed, when the parties reached a settlement.

III. DISCOVERY

[3] Plaintiff described the procedural history of the litigation in his Memorandum in Support of Motion for Preliminary Approval of Settlement. ECF No. 93. For ease of reference, Plaintiff has recounted that history here.

The Parties promptly proceeded with formal discovery. As part of the discovery process, Defendants produced more than 100,000 pages of documents, including (among others things) minutes and meeting materials from Serco's 401(k) Committee; 401(k) Committee materials presented to the Serco Board; all reports by the Plan's independent investment advisor and other third parties regarding the Plan's administrative expenses; third-party consultant studies regarding the Plan; service provider contracts and invoices for service providers to the Plan; and 401(k) Committee financial summary reports. ECF No. 95-1, Declaration of Arthur Stock in Support of Plaintiffs' Motions for Final Approval of Class Action Settlement; Awards of Attorneys' Fees, Attorneys' Costs, and Administrative Expenses; and Class Representative's Compensation ("Stock Decl.") ¶ 2. Defendant also responded to two sets of Plaintiff's interrogatories. *Id*. In addition, Plaintiff subpoenaed the Plan's Investment Advisor, Sageview Advisory Group, LLC, and received over 20,000 pages of documents from Sageview. *Id*. Following review of those documents, Plaintiff took the Rule 30(b)(6) deposition of Sageview. *Id*. Class Counsel and two fiduciary experts engaged by Plaintiff spent hundreds of hours analyzing the documents produced in this action. *Id.* ¶ 2. Defendant also issued discovery. Plaintiff answered seventeen interrogatories and over thirty document requests, produced supplemental responses to Defendant's interrogatories, and sat for a deposition. *Id.* ¶ 4.

After this substantial work, the parties began engaging in arm's-length negotiations and reached the instant Settlement, facilitated by a respected mediator with specific expertise in 401(k) ERISA class litigation. *Id.* ¶ ¶ 5-6.

IV. SETTLEMENT TERMS

In granting preliminary approval of the Settlement Agreement, the Court preliminarily certified the following Settlement Class:

> All persons who have been Participants, Beneficiaries or Alternate Payees of the Plan from January 1, 2014 through the date of this Preliminary Order [February 22, 2021] except for past and present members of Defendant's 401(k) Committee. ECF No. 96 at 3, ¶ 4.

This Settlement Class is consistent with certified classes in several similar ERISA suits, as it includes all participants in the Plans except those with fiduciary responsibilities relating to the Plans.[4]

A. Relief to the Settlement Class

Under the Settlement, Defendant will contribute a Gross Settlement Amount of $1,200,000 to a Qualified Settlement Fund (the "Settlement Fund"). Settlement Agreement ¶¶ 2.26, 5.4. After accounting for any Attorneys' Fees and Costs, Administrative Expenses, and Class Representative service awards approved by the Court, the Net Settlement Amount will be distributed to eligible Class Members in accordance with the Plan of Allocation in the Settlement. *Id.* ¶ 5.8.

Under the Plan of Allocation, the Settlement Administrator will divide the Net Settlement Amount into 24 equal Quarterly Settlement Allocations. Settlement Agreement ¶ 6.2.1. Each Quarterly Settlement Allocation will be allocated proportionally based on each Class Member's account balance at the close of each quarter of the Class Period (that Class Member's "Quarterly Balance"). *Id.* ¶ 6.2.2. For purposes of making this determination, the settlement administrator will calculate the total of all Quarterly Balances for that quarter. *Id.* ¶ 6.2.3. For

[4] *See, e.g.*, *Wildman v. Am. Century Servs. LLC*, No. 4:16-737, 2017 WL 6045487 (W.D. Mo. Dec. 6, 2017) ("*Wildman I*") (certifying litigation class of all plan participants and beneficiaries excluding Defendants, members of the board, and "employees with responsibility for the Plan's investment or administrative functions"); *Moreno v. Deutsche Bank Americas Holding Corp.*, No. 1:15-cv-09936, 2017 WL 3868803, at *11 (S.D.N.Y Sept. 5, 2017) ("*Moreno I*") (same); *Urakhchin v. Allianz Asset Mgmt. of Am., L.P.*, No. 8:15-cv-1614, 2017 WL 2655678, at *9 (C.D. Cal. June 15, 2017) ("*Urakhchin I*") (same); *see also Moreno v. Deutsche Bank Americas Holding Corp.*, No. 1:15-cv-09936, ECF No. 335 at ¶ 3 (S.D.N.Y. Oct. 9, 2018) ("*Moreno II*") (certifying similar class for settlement purposes); *Urakhchin v. Allianz Asset Mgmt. of Am., L.P.*, No. 8:15-cv-1614, 2018 WL 3000490, at *5-6 (C.D. Cal. Feb. 6, 2018) ("*Urakhchin II*") (same).

each Class Member who had a balance in a given quarter, the Settlement Administrator will divide that Class Member's Quarterly Balance for such quarter by the total Quarterly Balances for such quarter where (i.e. the numerator is the Class Member's Quarterly Balance for a given quarter and the denominator is the sum of all Class Members' Balances for that quarter). *Id*. This is each Class Member's Quarterly Proportion. *Id*. The Settlement Administrator will then multiply each Class Member's Quarterly Proportion for a given quarter by the Quarterly Settlement Allocation for that quarter, resulting in a Class Member's Quarterly Payment. Settlement Agreement ¶ 6.2.4. The Settlement Administrator will then add all the Quarterly Payments for each respective Class Member, resulting in the Class Member Total Payment. *Id*. ¶ 6.2.5. Class Members other than Class Representative who no longer have an account in the Plan and who have a Class Member Total Payment of less than $10 (ten dollars) (the "De Minimis Amount") will receive no allocation from the Net Settlement Amount.[5] *Id*. The Settlement Administrator will then, taking into account the Class Members who will receive nothing because they do not satisfy the De Minimis Amount, recalculate the amount to distribute to Class Members to arrive at the amount to be paid to each remaining Class Member. *Id*.

For Class Members with a Plan account at the time of distribution, their Payment will be automatically credited with their share of the Settlement Fund. Settlement Agreement ¶ 6.3.1. Class Members who no longer have a Plan account ("Former Participants") will be issued a check directly by the Settlement Administrator. *Id*. ¶ 6.4.1.

B. Release of Claims

[5] "[T]he justification for this ... is obvious, as this *de minimis* recovery would cost more in processing than its value, and thus would increase administrative costs and diminish recovery to class members overall while providing marginal benefits to the few class members." *Sims v. BB&T Corp.*, 2019 Nos. 1:15–cv–732, 1:15–cv–841, 2019 WL 1995314, at *4 (M.D.N.C. May 6, 2019).

In exchange for the relief provided by the Settlement, the Settlement Class will release Defendant and affiliated persons and entities as described in the Settlement Agreement (the "Released Parties") from all claims:

- That were asserted in this Lawsuit or that might have been asserted in the Lawsuit under any legal or equitable basis related in any way to the Plan;
- That relate in any way to the fees, expenses, and investments of the Plan;
- That assert a claim for breach of fiduciary duty against any Plan fiduciary;
- That relate to the compensation or services of any Plan service provider;
- That relate to or arise out of the defense or settlement of the Lawsuit, including any claim that the Settlement Agreement or any aspect of its implementation violates any applicable law or right of any Class Member; or
- That would have been barred by the doctrine of res judicata or claim preclusion had the Lawsuit been fully litigated to a final judgment.
- Including any and all actual or potential claims, actions, demands, rights, obligations, liabilities, damages, attorneys' fees, expenses, costs, and causes of action, whether arising under local, state, or federal law, whether by statute, contract, common law, equity, or otherwise, whether brought in an individual, representative, or any other capacity, whether involving legal equitable, injunctive, declarative, or any other type of relief (including, without limitation, indemnification or contribution), whether, known or unknown, suspected or unsuspected, asserted or unasserted, foreseen or unforeseen, actual or contingent, liquidated or unliquidated, that have been, could have been, or could be brought by or on behalf of all or any member of the Settlement Class or the Plan at any point prior to the Court's final approval of the Settlement.

Settlement Agreement ¶ 2.27.

III. PRELIMINARY APPROVAL OF THE SETTLEMENT

On February 22, 2021, the Court issued an Order granting preliminary approval of the proposed Settlement. ECF No. 96. In its Order, the Court preliminarily certified the Settlement Class for Settlement purposes and found that the terms of the Settlement were "sufficiently fair, reasonable, and adequate to warrant sending notice of the proposed settlement to the proposed settlement class . . ." *Id.* at 2. The Court therefore approved the distribution of the Settlement Notices as specified in the Settlement Agreement. *Id.* at 3-4. In addition, the Court appointed Angeion Group LLC ("Angeion") to serve as the Settlement Administrator, distribute the Settlement Notices, and carry out the other duties specified in the Settlement Agreement. *Id.* at 2-4.

VI. CLASS NOTICE AND REACTION TO THE SETTLEMENT

Pursuant to the Court's Order preliminarily approving the Settlement, Angeion emailed Settlement Notices to each of the Class members identified by the Plan's recordkeeper. *See* Declaration of Markham Sherwood in Support of Motion for Final Approval ("Sherwood Decl.") ¶¶ 6-7. If an email address was not available or an email could not be delivered, Angeion sent the Class Member a Postcard Notice by U.S. Mail. On March 24, 2021, Angeion sent 29,776 Settlement Notices by email to Class Members, and mailed 755 Postcard Notices. *Id.*

Prior to sending these Notices, Angeion cross-referenced the addresses on the class list with the United States Postal Service National Change of Address Database. *Id.* ¶ 8. Thirty (30) Postcard Notices were returned as undeliverable. *Id.* ¶ 9. Angeion performed a skip trace in an attempt to ascertain valid addresses re-mailed twenty-three (23) Postcard Notices. *Id.* ¶ 9. 22,452 of the email Notices were returned as undeliverable. On May 22, 2021, Angeion sent Postcard Notices to each of those individuals. *Id.* ¶ 9. As a result, the notice program was highly effective.

If any Class Members desired further information, Angeion established a settlement website at www.GlasscockLitigation.com, and the email address info@GlasscockLitigation.com for email inquiries. *Id.* ¶ 11. Among other things, the Settlement Website includes: (1) a "Frequently Asked Questions" page containing a clear summary of essential case information; (2) a "Home" page and "Important Deadlines" page, each containing clear notice of applicable deadlines; (3) case and settlement documents for download (including the Settlement Notices, Former Participant Claim Form, Amended Class Action Complaint, Settlement Agreement, Preliminary Approval Order, and Plaintiffs' Motion for Approval of Attorneys' Fees, Expenses, and Class Representative Service Awards and related documents);

(4) contact information for Class Counsel and Defendant's Counsel; and (5) email, phone, and U.S. mail contact information for Angeion. *Id.* In addition, Angeion created and maintained a toll-free telephone support line (1-844-806-8078) as a resource for Class Members seeking information about the Settlement. *Id.* ¶ 12. This telephone number was referenced in the Notices, and also appears on the settlement website. *Id.*

The deadline to submit objections to the Settlement is June 6, 2021. ECF No. 96 at 5 (providing at least thirty (30) calendar days prior to Fairness Hearing). As of June 1, 2021, out of more than 30,000 class members, no objections have been filed or received by Class Counsel or Defendant's Counsel.

ARGUMENT

I. STANDARD OF REVIEW

"It has long been clear that the law favors settlement." *United States v. Manning Coal Corp.*, 977 F.2d 117, 120 (4th Cir. 1992). "This is particularly true in class actions." *Clark v. Duke Univ.*, No. 1:16-CV-1044, 2019 WL 2588029, at *4 (M.D.N.C. June 24, 2019). Federal Rule of Civil Procedure 23(3)(2) instructs a court to approve a class action settlement if it is "fair, reasonable, and adequate."

"The Fourth Circuit has bifurcated the analysis into consideration of fairness, which focuses on whether the proposed settlement was negotiated at arm's length, and adequacy, which focuses on whether the consideration provided the class members is sufficient." *Clark*, 2019 WL 2588029, at *4 (quotation marks and citations omitted). This is the same standard the Court applied in preliminarily approving the Settlement. In so doing, the Court found that "the Settlement is

sufficiently fair, reasonable, and adequate." ECF No. 96 at 2. An analysis of the Settlement at the final approval stage yields the same conclusion.

II. THE SETTLEMENT IS FAIR

To evaluate a settlement's fairness and whether the settlement was negotiated at arm's length, the Court considers four factors: "(1) the posture of the case at the time settlement was proposed, (2) the extent of discovery that had been conducted, (3) the circumstances surrounding the negotiations, and (4) the experience of counsel in the area [of law at issue]." *In re Jiffy Lube Sec. Litig*, 927 F.2d 155, 159 (4th Cir. 1991). Here, each of these four factors indicate the settlement is fair and reasonable.

A. Posture of the Case and Extent of Discovery Conducted

Both the posture of the case and the extent of discovery undertaken reflect that the case was ripe for settlement. The case was settled following a thorough investigation, extensive consultation with two fiduciary experts, briefing on Defendant's motion to dismiss and on class certification, substantial discovery activity, culminating in informed arm's-length negotiations before a respected mediator. Stock Decl. ¶ 5.

Plaintiff vigorously pursued discovery in this litigation, resulting in the production of more than 100,000 pages of documents and extensive class data from Defendant, as well as from the Plan's investment advisor, Sageview Advisory Group LLC. *See* Stock Decl. ¶ 2. Plaintiff also engaged two highly qualified fiduciary experts, who independently analyzed the materials that were produced and one of whom, Jeffery Schaff prepared a comprehensive damages analysis. *Id.*; *see also* ECF No. 74-2. This rigorous examination supports approval of the Settlement. *See In re Neustar, Inc. Sec. Litig.*, No. 1:14CV885 (JCC/TRJ), 2015 WL 5674798, at *10 (E.D. Va. Sept. 23, 2015) ("*NeuStar I*") (finding fairness factor satisfied where the parties

had engaged in formal discovery and plaintiff's counsel had "conducted in-depth reviews of publicly available information.").

B. Circumstances Surrounding Negotiations and Experience of Counsel

"In the absence of any evidence to the contrary, it is presumed that no fraud or collusion occurred." *Galiastre v. Capt. George's Seafood Restaurant, LP*, No. 2:17cv379, 2019 WL 2288441, at *3 (E.D. Va. May 29, 2019). Here, the record reflects that counsel for the parties engaged in extensive arm's-length negotiations before an experienced mediator. Stock Decl. ¶ 6.

Moreover, 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." *In re MicroStrategy, Inc. Sec. Litig.*, 148 F. Supp.2d 654, 665 (E.D. Va. 2001). Class Counsel have extensive experience in class action litigation, and litigating ERISA class actions, including both trial experience and settlement negotiation experience. See Class Counsel firm biographies, ECF No. 92-3 through 92-8. Accordingly, "it is entirely warranted for this Court to pay heed to their judgment in approving, negotiating, and entering into a putative settlement." *In re The Mills Corp. Secs. Litig.*, 265 F.R.D. 246, 255 (E.D. Va. 2009) ("*Mills*"); *see also Neustar I*, 2015 WL 5674798, at *12.

III. THE SETTLEMENT PROVIDES SIGNIFICANT RELIEF

To evaluate the adequacy of a settlement, the Court must examine:

> (1) the relative strength of the plaintiffs' case on the merits; (2) the existence of any difficulties of proof or strong defenses the plaintiffs are likely to encounter if the case goes to trial; (3) the anticipated duration and expenses of additional litigation; (4) the solvency of the defendants and the likelihood of recovery on a litigated judgment; and (5) the degree of opposition to the settlement.

Solomon v. Am. Web Loan, Inc, No. 4:17CV145, 2020 WL 3490606, at *4 (E.D. Va. June 26, 2020) (quoting *Jiffy Lube*, 927 F.2d at 158-59). Once again, each of the relevant factors support approval of the settlement.[6]

A. Relative Strength of Plaintiff's Case 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,* 265 F.R.D. at 256. Both of these measures confirm that the settlement provides adequate relief to the class.

The Settlement represents a substantial achievement for Class Members, particularly when compared with the potential range of recovery in this case. The $1.2 million Settlement amount represents between 34% and 46% of the total approximate damages calculated by Plaintiff's expert. *See* Stock Decl., ¶ 7. This compares favorably with recoveries in other ERISA class actions. *See Sims*, 2019 WL 1995314, at *5 (approving $24 million settlement that represented 19% of estimated damages, including damages due to excessive recordkeeping expenses); *Urakhchin v. Allianz Asset Mgmt. of Am., L.P.*, No. 8:15-cv-01614, 2018 WL 8334858 (C.D. Cal. July 30, 2018) ("*Urakhchin III*") (approving $12 million settlement in ERISA case involving proprietary funds and allegations of excessive fees, where that amount represented approximately one-quarter of estimated total plan-wide losses of $47 million); *Johnson v. Fujitsu Tech. & Business of Am., Inc.*, No. 5:16-cv-03698-NC, 2018 WL 2183253, at *6-7 (N.D. Cal. May 11, 2018) (approving $14

[6] The fourth *Jiffy Lube* factor has little bearing on the analysis here. The solvency of the Defendant has not been an issue in this case. *See 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).

million settlement in ERISA case involving alleged excess fees, where that amount represented "just under 10% of the Plaintiffs' most aggressive 'all in' measure of damages"); *accord 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").

Moreover, the recovery will be distributed equitably to class members pursuant to a uniform allocation plan based on their quarterly account balances in the Plan. *See* Settlement Agreement ¶ 6.2. This is also consistent with settlements approved in other cases.[7]

While Plaintiff is confident in his case, proceeding to trial presented significant risks. "[N]o matter how confident one may be of the outcome of litigation, such confidence is often misplaced." *Mills*, 265 F.R.D. at 256. In two recent class action trials involving defined contribution plans, the defendants were the prevailing party. *See Sacerdote v. New York Univ.*, 328 F. Supp. 3d 273 (S.D.N.Y. 2018); *Wildman v. Am. Century Servs., LLC*, 362 F. Supp. 3d 685, 711 (W.D. Mo. 2019) ("*Wildman II*"). And in another recent case involving recordkeeping expenses, the court granted summary judgment in favor of the defendants. *See Pledger v. Reliance Trust Co.*, No. 1:15-cv-04444-MHC, 2019 WL 10886802 (N.D. Ga. March 28, 2019).

Moreover, even if Plaintiff prevailed on the issue of liability, significant issues would have remained regarding damages. *See Sacerdote*, 328 F. Supp. 3d at 280 (finding that "while there were deficiencies in the Committee's [fiduciary] processes—including that several members displayed a concerning lack of knowledge relevant to the Committee's mandate—plaintiffs have

[7] *See, e.g., Velazquez v. Mass. Fin. Servs.*, No. 1:17-cv-11249, ECF No. 91-1, ¶ 6.4.3 (June 14, 2019); *Sims v. BB&T*, No. 1:15-cv-00732, ECF No. 436-2, ¶ 6.4.2 (Nov. 30, 2018); *Urakhchin v. Allianz Asset Mgmt. of Am., L.P.*, No. 8:15-cv-1614, ECF No. 174-3, ¶ 6.4.3 (Dec. 26, 2017); *Kruger v. Novant Health, Inc.,* No. 1:14cv208, ECF No. 44-2, ¶ 6.4 (M.D.N.C. Nov. 9, 2015).

not proven that ... the Plans suffered losses as a result."); *Wildman II*, 362 F. Supp. 3d at 710 (finding plaintiffs failed to prove a loss to the plan). Thus, "the damages issue would have become a battle of experts at trial, with no guarantee of the outcome." *Mills*, 265 F.R.D. at 256.

Indeed, Plaintiff faced significant attack by Defendant on the sufficiency of Plaintiff's fund comparisons to support liability and damages, specifically attacking comparisons between actively and passively managed funds and share-class comparisons. ECF No. 27, at 8-13. Defendant also challenged Plaintiff's standing to assert claims over excessive fees, arguing lack of injury and failure to invest in a broader group of Plan offerings. *Id*. at pp. 2-7. These arguments are contained in Defendant's motion to dismiss that remained under submission at the time the parties reached settlement.

Given the substantial recovery that was obtained, and risks of further litigation, it was reasonable and appropriate for Plaintiffs to reach a settlement on the terms that were negotiated. *See Kruger v. Novant Health, Inc.*, No. 1:14cv208, 2016 WL 6769066, at *5 (M.D.N.C. Sept. 29, 2016) ("settlement of a 401(k) excessive fee case benefits the employees and retirees in multiple ways").

B. 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." *Mills*, 265 F.R.D. at 256 (citation omitted). "This factor is based on a sound policy of conserving the resources of the Court" and avoiding "unnecessary and unwarranted expenditure of resources and time" by the parties. *Id*.

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., No. 11–CV–02781 (SRN/JSM), 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*, CV 07-5359 SVW (AGRx), 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 it provides immediate and guaranteed relief to the Class.

C. Reaction to the Settlement

The lack of opposition to the Settlement also favors Court approval. The objection filing deadline is June 6, 2021, and to date there is a complete absence of negative reaction to the Settlement. *See, e.g.*, *Skochin v. Genworth Fin., Inc.*, No. 3:19CV49, 2020 WL 6532833, at *14 (E.D. Va. Nov. 5, 2020) ("It is also significant that objections were lodged by 0.021% of the class. . . [T]he fact that so few members of the class objected to, or opted out of, the settlement is a testament to the conclusion that the Notice was adequate as well as to whether the settlement is fair and reasonable.").

To the extent any objection is filed, Plaintiff will respond no later than June 22, 2021 in accordance with the Court's Order Granting Preliminary Approval. *See* ECF No. 96, ¶ 10.

IV. THE SETTLEMENT IS FAIR AND REASONABLE

Finally, in this District, "'there is a strong initial presumption that the compromise is fair and reasonable.'" *Mills*, 265 F.R.D. at 258 (quoting *MicroStrategy*, 148 F. Supp. 2d at 663). In evaluating a settlement's reasonableness, this Court has recognized that a "settlement is a

compromise, a yielding of the highest hopes in exchange for certainty and resolution." *Id.* (citation and quotations omitted). This Settlement was the product of thorough deliberation after adversarial briefing and expert review of thousands of pages of documents. For this and all the reasons explained above, the Settlement is reasonable.[8]

V. THE CLASS NOTICE WAS REASONABLE

The class notice program in this case also was reasonable and satisfied the requirements of due process and Rule 23. The "best notice" practicable under the circumstances 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 that was provided here.

As noted above, the Settlement Administrator delivered the Court-approved Settlement Notices to Class Members by email, and by U.S. mail where an email address is unavailable or email was undeliverable. Moreover, the Notices were supplemented through the Settlement Website and telephone support line. *See* Sherwood Decl., ¶¶ 9-12. This is more than sufficient to meet the standard under Rule 23, and is consistent with other ERISA settlements that have been approved. *See, e.g.*, *Sims v. BB&T Corp.*, Nos. 1:15–cv–732, 1:15–cv–841, ECF No. 439 (M.D.N.C. Dec. 13, 2018) (approving substantially similar notice plan); *Moreno II*, No. 1:15-cv-09936, ECF No. 335 (same); *Urakhchin II*, 2018 WL 3000490, at *6-7 (same).

The content of the Settlement Notices also was reasonable. The Settlement Notices included, 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

[8] As required by the Settlement Agreement, Defendant has retained Fiduciary Counselors Inc. to act as an Independent Fiduciary to review and authorize the Settlement on behalf of the Plan. Settlement Agreement, 3.1; 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 ¶ 3.1.5.

claims; (5) instructions for submitting a claim (in the event one is required); (6) instructions as to how to object to the Settlement and a date by which Settlement Class members must object; (7) the date, time, and location of the final approval hearing; (8) contact information for the Settlement Administrator; and (9) information regarding Class Counsel and the amount that Class Counsel may seek in attorneys' fees and expenses. ECF No. 92-1 (Settlement Agreement, Exs. 2 & 3). This information was "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." *Mullane v. Central Hanover Bank and Trust Co*., 339 U.S. 306, 314 (1950); *see also NeuStar I*, 2015 WL 5674798, at *12 (approving substantially similar method of notice).

VI. THE COURT SHOULD CERTIFY THE CLASS FOR FINAL APPROVAL

In its Order for Preliminary Approval of the Settlement, the Court preliminarily certified the following Settlement Class:

> All persons who have been Participants, Beneficiaries or Alternate Payees of the Plan from January 1, 2014 through the date of this Preliminary Order [February 22, 2021] except for past and present members of Defendant's 401(k) Committee.

ECF No. 96 at 3, ¶ 4.

In his memorandum of law in support of their motion for preliminary approval, Plaintiff established that: (1) the class is sufficiently numerous; (2) Plaintiff raised common issues in the Amended Complaint; (3) Plaintiff's claims are typical of other class members' claims; (4) Plaintiff is an adequate class representative; (5) Class Counsel is experienced and competent; (6) class certification is appropriate under Fed. R. Civ. P. 23(b)(1)(A) due to the risk of inconsistent adjudications; and (7) class certification is appropriate under Fed. R. Civ. P. 23(b)(1)(a) and (b0(1)(B) because any individual adjudication would be dispositive of the interests of other class members. *See* ECF No. 93 at 11-13. Nothing has changed since the Court preliminarily certified the class for preliminary approval, and no class member has objected to class certification or

indicated that they wish to proceed individually. Accordingly, the Court should reaffirm its approval of Settlement Class for purposes of final approval. *See Sims v. BB&T Corp.*, 2017 WL 3730552 (M.D.N.C. Aug. 28, 2017) (certifying similar class for litigation purposes).

CONCLUSION

For the reasons set forth above, Plaintiff respectfully requests that the Court enter an order granting final approval of the Settlement.

Dated: June 1, 2021

Respectfully submitted,

/s/ David Hilton Wise
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CERTIFICATE OF SERVICE

I hereby certify that on June 1, 2021, I electronically filed the foregoing Plaintiff's Memorandum of Points and Authorities in Support of Motion for Final Approval of Class Action Settlement with the Clerk of the Court using the CM/ECF system, which will send notice of such filing to all counsel or record.

/s/ David Hilton Wise
David Hilton Wise