UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO

Wendy Berry, Lorri Hulings, and Kathleen Sammons, individually and as representatives of a class of similarly situated persons, and on behalf of the FirstGroup America, Inc. Retirement Savings Plan, Plaintiffs, v. FirstGroup America, Inc., FirstGroup America, Inc. Employee Benefits Committee, and Aon Hewitt Investment Consulting, Inc., Defendants.	Case No. 1:18-cv-00326-MWM Judge Matthew W. McFarland

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF PARTIAL CLASS ACTION SETTLEMENT WITH DEFENDANT AON HEWITT INVESTMENT CONSULTING, INC.

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INTRODUCTION

After over four years of hard-fought litigation, Plaintiffs Wendy Berry, Lorri Hulings, and Kathleen Sammons ("Plaintiffs") have reached a partial settlement of their class action claims with Aon Hewitt Investment Consulting, Inc. ("Aon Hewitt") in this Employee Retirement Income Savings Act ("ERISA") action relating to the FirstGroup America, Inc. Retirement Savings Plan ("Plan") and the Aon Hewitt Funds.[1] While Plaintiffs' claims against FirstGroup America, Inc. ("FirstGroup") and the FirstGroup America, Inc. Employee Benefits Committee ("the Committee") (collectively, the "Non-Settling Defendants") remain to be tried and are not released, this partial settlement represents a significant recovery to a portion of the losses that Plaintiffs allege the Plan sustained due to the selection and retention of the Aon Hewitt Funds for the Plan.

Under the proposed Settlement terms, Aon Hewitt will pay a Gross Settlement Amount of $4,500,000.00 into a common fund for the benefit of the Settlement Class. This sum represents a significant recovery for the Settlement Class for their ERISA claims. As discussed below, the Settlement is fair, reasonable, and adequate, and it merits preliminary approval so that the proposed Notice can be sent to the Settlement Class. Among other things, the proposed Settlement supports preliminary approval because:

- The Settlement was negotiated at arm's length by experienced and capable counsel, after the Court's rulings on a motion to dismiss and motion for Rule 23 class certification and after extensive fact and expert discovery;
- The proposed Settlement Class is consistent with the Court's order certifying the Rule 23 class;
- The Settlement Class has been vigorously represented by the Class Representatives and Class Counsel throughout the litigation;
- The Settlement provides for significant monetary relief that will be distributed

[1] A copy of the Class Action Settlement Agreement ("Settlement" or "Settlement Agreement") is attached as Exhibit A to the accompanying Declaration of Brock J. Specht ("Specht Decl.").

fairly and equitably to Class Members;

- The Settlement proceeds will be allocated among 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 Released Claims are appropriately tailored to the claims that were asserted against Aon Hewitt and preserve Plaintiffs' claims against FirstGroup and the Committee;

- The proposed Notice provides a plain language explanation of the Settlement to Settlement Class Members and will be distributed by first-class mail; and

- The Settlement Agreement provides Settlement Class Members the opportunity to raise any objections to the Settlement and appear at the Fairness Hearing.

Accordingly, Plaintiffs respectfully request that the Court: (1) preliminarily approve the Settlement; (2) approve the proposed Notices and authorize distribution of the Notices; (3) schedule a final approval hearing; and (4) enter the accompanying Preliminary Approval Order, which incorporates an appropriate bar order. As a party to the Settlement, Aon Hewitt does not oppose this motion.

BACKGROUND

I. PLEADINGS AND MOTION TO DISMISS

Plaintiffs filed this action on May 11, 2018, asserting claims against Defendants under ERISA. (Compl., ECF No. 1.) Plaintiffs brought this action on behalf of the Plan pursuant to 29 U.S.C. ¶ 1132(a) to recover losses to the Plan under 29 U.S.C. § 1109(a) and to obtain other appropriate relief under ERISA. (*Id.*) On August 3, 2018, Plaintiffs filed a First Amended Complaint. (ECF No. 35.) On September 7, 2018, FirstGroup and the Committee moved to dismiss the claims asserted against them. (ECF No. 37.) The Court denied the motion to dismiss on March 18, 2021. (ECF No. 59.)

Thereafter, on September 30, 2021, Plaintiffs filed their Second Amended Complaint.

(ECF No. 71.) In the Second Amended Complaint, Plaintiffs asserted claims against Defendants for breach of their fiduciary duties of loyalty and prudence; breach of their duty to follow the Plan's Investment Policy Statements; and against FirstGroup for failure to monitor fiduciaries. (*Id.* ¶¶ 90–116.) Defendants filed answers to the Second Amended Complaint on October 14, 2021. (ECF Nos. 72, 73.)

II. DISCOVERY, CLASS CERTIFICATION, AND SETTLEMENT

The Parties have engaged in extensive fact and expert discovery. Defendants produced more than 312,000 pages of documents, and the Class Representatives produced over 7,000 pages of documents. (Specht Decl. ¶ 11.) Plaintiffs also subpoenaed several third parties and received over 300 documents as a result of the subpoenas. (*Id.* ¶ 12.) Class Counsel took fourteen (14) fact witness depositions, and Defendants deposed each of the Class Representatives. (*Id.* ¶ 13.) Following fact discovery, the Parties completed expert discovery, which entailed exchanging expert reports and rebuttal reports and conducting depositions of eight expert witnesses. (*Id.* ¶ 15.)

On February 16, 2022, Plaintiffs moved for Rule 23 class certification. (ECF No. 79.) Thereafter, the Parties stipulated to class certification, and the Court entered an order certifying the Rule 23 class. (ECF Nos. 83, 92.) From approximately August 2022 until October 2022, Aon Hewitt's counsel and Class Counsel engaged in arm's-length negotiations, culminating in the present proposed Settlement Agreement. (Specht Decl. ¶ 16.)

III. OVERVIEW OF SETTLEMENT TERMS

A. The Settlement Class

The Settlement Agreement applies to the following Settlement Class:

> All participants and beneficiaries of the FirstGroup America, Inc. Retirement Savings Plan at any time on or after October 1, 2013 through the date of preliminary approval, who had any portion of their account invested in the Aon Hewitt Funds, excluding Defendants, any of their directors, and current or former members of the Employee Benefits Committee or Employee Retirement Benefits Committee who

served on such committee since October 1, 2013.

(Settlement Agreement ¶ 1.50, Ex. A.) 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). Plaintiffs estimate that roughly 26,000 Settlement Class members were invested in the Aon Hewitt Funds during the Class Period. (Specht Decl. ¶ 3.)

B. Monetary Relief

Under the Settlement, Aon Hewitt will pay a Gross Settlement Amount of $4,500,000.00 to a Qualified Settlement Fund (the "Settlement Fund"). (Settlement Agreement ¶¶ 1.29, 4.2, Ex. A.) After deducting any Attorneys' Fees and Costs, Administrative Expenses, and Class Representative Service Awards 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[2] shall determine an Average Settlement Score for each Settlement Class Member. (*Id.* ¶ 5.1.) For purposes of making this determination, the Average Settlement Score shall be calculated based on the amount invested by each class member in the Aon Hewitt Funds 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 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.*) If the dollar amount of the settlement payment to a Former Participant Class Member is calculated by the Settlement Administrator to be less than $5.00, then that Former Participant Class Member's *pro rata* share shall be zero for all purposes,

[2] The proposed Settlement Administrator is Analytics Consulting, LLC ("Analytics"). (*See* Settlement Agreement ¶ 1.48, Ex. A.) Analytics has extensive experience in administering ERISA settlements and other class action settlements. (Specht Decl. ¶ 28.)

and his or her share shall be reallocated amongst the other Class Members. (*Id.*)

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.*) 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.*) Any Former Participant Class Members who do not submit a Former Participant Rollover Form will receive their share via check. (*Id.*) Under no circumstances will any monies revert to Aon Hewitt; any checks that are uncashed after 120 days will revert to the Qualified Settlement Fund and be used to defray administrative costs of the Plan. (*Id.*)

C. Release of Claims and Bar Order

In exchange for the relief provided by the Settlement, the Settlement Class will release Aon Hewitt and affiliated persons and entities (the "Released Parties") from claims:

- that were asserted or could have been asserted in the Action against Aon Hewitt, including but not limited to those based on: (1) the selection, retention, or monitoring of the Aon Hewitt Funds; (2) the selection, retention, or monitoring of Aon Hewitt; (3) the performance, fees, and other characteristics of the Aon Hewitt Funds; (4) Aon Hewitt's performance or fees, or the services provided by Aon Hewitt to the Plan; or (5) 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 of the Settlement Agreement.

(*Id.* ¶ 1.37.) Claims against FirstGroup and the Committee are not released by the Settlement. (*Id.*).

Likewise, claims to enforce the Settlement Agreement, and claims for individual vested benefits that are due under the terms of the Plan are also not released. (*Id.*)

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

D. 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 to Settlement Agreement, Ex. A.) The Notice sent to Former Participant Class Members also will include a Former Participant Rollover Form. (*Id.* & Ex. 3 to Settlement Agreement.) 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 the Named Plaintiffs as class representatives; (10) the date, time, and location of the Fairness Hearing; and (11) class members' right to appear at the Fairness Hearing. (*Id.*)

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 Second Amended Complaint, 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).)

E. Attorneys' Fees and Expenses

The Settlement Agreement requires that Class Counsel file their motion for attorneys' fees and expenses at least 14 days before the deadline for objections to the proposed Settlement. (*Id.* ¶ 6.1.) 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 ($1,500,000) in attorneys' fees.[3] (*Id.* ¶ 1.7 & Exs. 1 & 2 to Settlement Agreement.) In addition, the Settlement Agreement provides for recovery of out-of-pocket litigation costs, Administrative Expenses, and Class Representative Service Awards of up to $5,000 to each Named Plaintiff, subject to Court approval and Independent Fiduciary review. (*Id.* ¶¶ 6.1–6.2.)

F. Review by Independent Fiduciary

The Settling Parties will seek the retention of 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

[3] This cap of one-third of the settlement fund is consistent with fee awards in other ERISA class actions. *See Karpik v. Huntington Bancshares, Inc.*, 2021 WL 757123 (S.D. Ohio Feb. 18, 2021) (approving one-third fee for Nicholas Kaster, PLLP and co-counsel in ERISA class action settlement); *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.").

the Court may consider it. (Settlement Agreement ¶ 2.2, Ex. 1.)

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. In doing so, courts review class action settlements to ensure that they are not "the product of fraud or overreaching by, or collusion between, the negotiating parties and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerns." *Clark Equip. Co. v. Int'l Union, Allied Indus. Workers of Am., AFL-CIO*, 803 F.2d 878, 880 (6th Cir. 1986) (quoting *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615 (9th Cir. 1982)). At the same time, the Sixth Circuit recognizes that "federal policy favor[s] settlement of class actions" such as this one. *Int'l Union, United Auto., Aerospace, & Agr. Implement Workers of Am. v. Gen. Motors Corp.*, 497 F.3d 615, 632 (6th Cir. 2007).

District Courts in the Sixth Circuit review class action settlements using a three-step process: (1) preliminary settlement approval; (2) notice to the class of the proposed settlement; and (3) a fairness hearing, after which the district court decides whether to grant final approval. *Bailey v. Verso Corp.*, 337 F.R.D. 500, 505 (S.D. Ohio 2021) (quoting *In re Telectronics Pacing Sys., Inc.*, 137 F. Supp. 985, 1026 (S.D. Ohio 2001)). "A court should base its preliminary approval of the proposed settlement agreement 'upon its familiarity with the issues and evidence of the case as well as the arms-length nature of the negotiations prior to the settlement.'" *Kizer v. Summit Partners, L.P.*, 2012 WL 1598066, at *7 (E.D. Tenn. May 7, 2012) (quoting *Brotherton v. Cleveland*, 141 F.Supp.2d 894, 903 (S.D. Ohio 2001)).

In 2018, Rule 23(e) was amended to specify uniform standards for settlement approval. *See* Fed. R. Civ. P. 23(e) advisory committee note (2018). The amended rule states that, at the preliminary approval stage, the court must determine whether it "will likely be able to: (i) approve

the proposal under Rule 23(e)(2); and (ii) certify the class for purposes of judgment on the proposal." Fed. R. Civ. P. 23(e)(1)(B). Rule 23(e)(2), in turn, specifies the following factors the court must ultimately consider at the final approval stage in determining whether a settlement is "fair, reasonable, and adequate":

> (A) the class representatives and class counsel have adequately represented the class;
> (B) the proposal was negotiated at arm's length;
> (C) the relief provided for the class is adequate, taking into account:
> (i) the costs, risks, and delay of trial and appeal;
> (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
> (iii) the terms of any proposed award of attorney's fees, including timing of payment; and
> (iv) any agreement required to be identified under Rule 23(e)(3); and
> (D) the proposal treats class members equitably relative to each other.

"The goal of this amendment is not to displace any [existing] factor, but rather to focus the court . . . on the core concerns of procedure and substance that should guide the decision whether to approve the proposal." Fed. R. Civ. P. 23(e) advisory committee note (2018). Courts within the Sixth Circuit have generally continued to apply the same "within the range of possible approval" standard to preliminary approval after the 2018 amendments. *See Garner Properties & Mgmt., LLC v. City of Inkster*, 333 F.R.D. 614, 626 (E.D. Mich. 2020); *Wallburn v. Lend-A-Hand Servs., LLC*, 2020 WL 2744101, at *7 (S.D. Ohio May 26, 2020).

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

A. The Settlement Is Fair

At the preliminary approval stage, district courts in the Sixth Circuit balance the following factors to determine whether a proposed settlement is "fair, reasonable, and adequate":

> (1) the risk of fraud or collusion; (2) the complexity, expense, and likely duration of the litigation; (3) the amount of discovery completed; (4) the likelihood of success on the merits; (5) the opinion of class counsel and representatives; (6) the

reaction of absent class members[4]; and (7) public interest in the settlement.

Bailey, 337 F.R.D. at 505 (quoting *Ostendorf v. Grange Indem. Ins. Co.*, 2020 WL 5366380, at *2 (S.D. Ohio Sept. 8, 2020)). At this stage, the district court need not make a finding as to every factor, but instead, may grant preliminary approval if "the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class, and falls with the range of possible approval." *In re Telectronics Pacing Sys., Inc.*, 137 F. Supp. 2d at 1015 (quoting Manual for Complex Litig. § 30.44 (2d ed. 1985)). Here, each factor weighs in favor of preliminary approval of the proposed Settlement Agreement.

1. The Risk of Fraud or Collusion

Courts consistently approve class action settlements reached through arms-length negotiations after meaningful discovery. *See Koenig v. USA Hockey*, 2012 WL 12926023, at *4 (S.D. Ohio Jan. 10, 2012) ("Based on the pleadings filed, as well as the discovery and mediation efforts, the Parties have a clear view of the strengths and weaknesses of their cases.") (citation omitted); *Garner*, 333 F.R.D. at 627. That is precisely the situation presented here. Extensive fact and expert discovery has been completed, and at all times the parties negotiated at arm's length. (Specht Decl. ¶¶ 9–17.) Further, no evidence of collusion exists in this case. This factor thus weighs in favor of preliminary settlement approval.

2. The Complexity, Expense, and Likely Duration of the Litigation

While both Settling Parties continue to firmly believe in the merits of their respective claims and defenses, given the time and expense associated with continued litigation, the Settling

[4] This factor is not applicable at the preliminary approval stage. If preliminary approval is granted, notice of this settlement will be distributed, and Settlement Class Members will have the opportunity to object to the settlement before final approval.

Parties agree that a compromise is appropriate. Although fact and expert discovery is now closed, substantial litigation expenses loom before Plaintiffs' claims are resolved, including dispositive motion practice and trial. *See Bailey*, 337 F.R.D. at 506 (finding that the expense of briefing summary judgment but for the proposed settlement weighed in favor of preliminary approval).

In addition, Plaintiffs' claims entail complex legal theories. As other courts have recognized, "ERISA is a complex field that involves difficult and novel legal theories and often leads to lengthy litigation." *Krueger v. Ameriprise*, 2015 WL 4246879, at *1 (D. Minn. July 13, 2015); *see also In re Marsh ERISA Litig.*, 265 F.R.D. 128, 138 (S.D.N.Y. 2010) ("Many courts have recognized the complexity of ERISA breach of fiduciary duty actions."). Indeed, it is not unusual for these cases to extend for a decade or longer before final resolution. *See Shanechian v. Macy's*, 2013 WL 12178108, at *5 (S.D. Ohio June 25, 2013) (finding ERISA case that had already lasted for six years could last for six more years absent a settlement); *Tussey v. ABB Inc.*, 2017 WL 6343803, at *3 (W.D. Mo. Dec. 12, 2017) (requesting proposed findings more than ten years after suit was filed on December 29, 2006); *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 on August 16, 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).

For all of these reasons, the uncertain length and expense of continued litigation supports preliminary settlement approval.

3. The Amount of Discovery Completed

The extensive discovery that was completed also supports preliminary approval of the proposed settlement. The Parties completed both fact and expert discovery, which entailed the exchange of tens of thousands of documents, dozens of witness depositions, the receipt of hundreds of documents obtained via subpoena, and the exchange of nine expert reports across all Parties.

This discovery gave the Settling Parties a clear view of the facts and law, as well as the strengths and weaknesses of their case.

Courts in this district have approved settlements where the proceedings were much less advanced. *See In re Nationwide Fin. Servs. Litig.*, 2009 WL 8747486, at *4 (S.D. Ohio Aug. 19, 2009) (approving settlement before the motion to dismiss stage); *Barnes v. Winking Lizard, Inc.*, 2019 WL 1614822, at *3 (N.D. Ohio Mar. 26, 2019) (approving settlement before any motion practice where the parties had conducted only informal discovery to inform their views of the case); *Moore v. Aerotek, Inc.*, 2017 WL 2838148, at *4 (S.D. Ohio June 30, 2017), *report and recommendation adopted*, 2017 WL 3142403 (S.D. Ohio July 25, 2017) (approving settlement where parties did not complete any formal discovery); *Levell v. Monsanto Research Corp.*, 191 F.R.D. 543, 557 (S.D. Ohio 2000) (same). Based on the extensive record that was developed and the stage of the proceedings, the Settling Parties have sufficient information to evaluate the settlement. Therefore, this factor weighs in favor of preliminary settlement approval.

4. The Likelihood of Success on the Merits

The most important factor to consider in approving a class settlement is the Plaintiffs' likelihood of success on the merits, particularly when weighed against the recovery provided in the proposed settlement agreement. *See In re Gen. Tire & Rubber Co. Sec. Litig.*, 726 F.2d 1075, 1086 (6th Cir. 1984).

During the expert discovery phase, Plaintiffs' damages expert, Dr. Brian C. Becker, calculated damages to the Plan under two scenarios, which resulted in between $25.2 million and $42.4 million from October 1, 2013 to February 28, 2022. (Specht Decl. ¶ 4.) This *partial* settlement with Aon Hewitt represents approximately 10.6% to 17.8% of the Plan's *total* damages, which aligns with settlements in 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 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"). Accordingly, this partial settlement represents an adequate monetary recovery.

While Class Counsel is confident in the strength of Plaintiffs' claims, this case also entails real and significant risk. *See In re Nationwide*, 2009 WL 8747486, at *4 (noting that the risk of continued litigation includes the risk of no recovery at all); *Shanechian*, 2013 WL 12178108, at *4 (noting difficulty of proving both liability and damages at trial even where the plaintiffs prevailed on previous motion to dismiss and class certification rulings). This is illustrated by three recent trial judgments in favor of the defendants in ERISA breach of fiduciary duty cases involving defined contribution plans, including one involving Aon Hewitt. *See Reetz v. Lowe's Cos.*, 2021 WL 4771535 (W.D.N.C. Oct. 12, 2021), *appeal filed* No. 21-2267 (4th Cir. Nov. 10, 2021); *Wildman v. Am. Century Servs., LLC*, 362 F. Supp. 3d 685 (W.D. Mo. 2019); *Sacerdote v. New York Univ.*, 2018 WL 3629598 (S.D.N.Y. July 31, 2018). Moreover, even if Plaintiffs established a fiduciary breach, it is "difficult" to measure damages in cases alleging imprudent or otherwise improper investments. *See* Restatement (Third) of Trusts § 100 cmt. b(1). Thus, significant issues would have remained regarding proof of loss. *See Sacerdote*, 328 F. Supp. 3d at 280 ("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 not proven that . . . the Plan suffered losses as a result").

Given the risks of litigation, the negotiated Settlement Agreement is fair and reasonable.

See Kruger v. Novant Health, Inc., 2016 WL 6769066, at *5 (M.D.N.C. Sept. 29, 2016) (stating that settlement of a 401(k) class action "benefits the employees and retires in multiple ways").

5. The Opinion of Class Counsel and Representatives

"The Sixth Circuit has held that, in the context of approving class action settlements, the Court 'should defer to the judgment of experienced counsel who has competently evaluated the strength of his proofs.'" *Smith v. Ajax Magnethermic Corp.*, 2007 WL 3355080, at *5 (N.D. Ohio Nov. 7, 2007) (quoting *Williams v. Vukovich*, 720 F.2d 909, 922–23 (6th Cir. 1983)).

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." *Karpkik v. Huntington Bancshares Inc.*, 2021 WL 757123, at *9 (S.D. Ohio Feb. 18, 2021). As detailed in the accompanying Declaration of Brock J. Specht, Nichols Kaster has (1) won favorable rulings on dispositive motions and/or class certification in over a dozen ERISA cases; (2) tried three ERISA class actions; (3) successfully litigated on appeal before the First Circuit in *Brotherston v. Putnam Invs., LLC*, 907 F.3d 17 (1st Cir. 2018); and (4) negotiated numerous ERISA class action settlements in addition to the present Settlement. (Specht Decl. ¶¶ 21–23.) Accordingly, Class Counsel are adequate to represent the class and were well-equipped to negotiate the Settlement. *See Sims v. BB&T Corp.*, 2017 WL 3730552, at *5 (M.D.N.C. Aug. 28, 2017) ("[T]he Court finds that the plaintiffs' interests would be 'fairly and adequately' represented by appointment of . . . Nichols Kaster as class counsel.") Based on their experience handling ERISA cases, and the record that was developed, Class Counsel has concluded that the Settlement is fair and reasonable. (Specht Decl. ¶¶ 17, 27.)

The Settlement Class Members also have been adequately represented by the Class

Representatives in this case. The Class Representatives have fulfilled their duties to the class by, among other things, reviewing the complaints, producing documents, reviewing and signing written discovery responses, testifying at their depositions, and communicating regularly with Class Counsel. (*See* Plaintiff Declarations, ECF Nos. 79-4–79-9; *see also* Specht Decl. ¶ 14.) These actions constitute adequate representation. *See Willis v. Big Lots, Inc.*, 242 F. Supp. 3d 634, 649–50 (S.D. Ohio 2017) (finding class representatives adequately represented class by reviewing pleadings, responding to requests for production and interrogatories, and being available for depositions). Therefore, this factor weighs in favor of preliminary settlement approval.

6. The Public Interest in the Settlement

As courts in this district have noted, generally speaking, the public interest favors the settlement of class action litigation. *See Hainey v. Parrott*, 617 F. Supp. 2d 668, 679 (S.D. Ohio 2007). Additionally, this Settlement confers broader public benefits, as "the protection of retirement funds is a great public interest" and "private attorneys general have a major role to play in ERISA litigation." *Fastener Dimensions, Inc. v. Mass Mutual Life Ins. Co.*, 2014 WL 5455473, at *9 (S.D.N.Y. Oct. 28, 2014); *see also Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 597 n.8 (8th Cir. 2009) (noting that the Secretary of Labor "depends in part on private litigation to ensure compliance with the statute). This factor also supports preliminary settlement approval.

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), Ex. A.) This type of notice is presumptively reasonable. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985). Moreover, the Notice will be supplemented by a Settlement Website and telephone support line. (Settlement Agreement ¶ 3.3, Ex. A.) This Notice meets the Rule 23 standard and is consistent with other ERISA settlements that have been approved. *See Reetz v. Lowe's Companies, Inc.*, No. 5:18-cv-00075-KDB-DCK, ECF No. 234 (W.D.N.C. June 9, 2021) (approving substantially similar notice plan); *Brotherston v. Putnam Invs., LLC*, No. 1:15-cv-13825-WGY, ECF No. 220 (D. Mass. Apr. 29, 2020) (same); *Sims v. BB&T Corp.*, Nos. 1:15-cv-732, 1:15-cv-841, ECF No. 439 (M.D.N.C. Dec. 13, 2018) (same); *Moreno v. Deutsche Bank*, No. 1:15-cv-09936-LGS, ECF No. 335 (S.D.N.Y. Oct. 9, 2018) (same); *Urackhchin v. Allianz Asset Mgmt. of Am., L.P.*, 2018 WL 3000490, at *6–7 (C.D. Cal. Feb. 6, 2018) (same).

The content of the Notice is also reasonable. The Notice includes, 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 description of the claims being released; (5) instructions for submitting a Former Participant Rollover Form (if applicable); (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; (9) information regarding Class Counsel and the amount that Class Counsel will seek in attorneys' fees; and (10) the proposed class representative service awards to be paid from the Settlement Amount. (Exs. 1 and 2 to the Settlement Agreement, Ex. A.) This Notice is clearly reasonable because it "'fairly apprise[s] the prospective members of the class of the terms of the proposed settlement' so that class members may come to their own conclusions about whether the settlement services their interests." *Graybill v. Petta Enters., LLC*, 2018 WL 4573289, at *3 (S.D.

Ohio Sept. 25, 2018) (quoting *Int'l Union*, 497 F.3d at 630 (citation omitted)).

IV. THE SETTLEMENT CLASS IS CONSISTENT WITH THE CERTIFIED CLASS

The proposed Settlement Class is consistent with the certified Rule 23 class:

> All participants and beneficiaries of the FirstGroup America, Inc. Retirement Savings Plan at any time on or after October 1, 2013 through the date of preliminary approval, who had any portion of their account invested in the Aon Hewitt Funds, excluding Defendants, any of their directors, and current or former members of the Employee Benefits Committee or Employee Retirement Benefits Committee who served on such committee since October 1, 2013.

(Settlement Agreement ¶ 1.50, Ex. A.) The proposed Settlement Class meets the requirements of Rule 23 and should be approved. (*See* ECF No. 83.)

V. THE COURT SHOULD ENTER AN APPROPRIATE BAR ORDER

Because the Settlement is a partial settlement that does not include FirstGroup and the Committee, the Settlement also calls for entry of a bar order that forecloses any contribution or indemnification claims between Aon Hewitt and the Non-Settling Defendants, and provides the Non-Settling Defendants a setoff against any future judgment that may be entered against them. (Settlement Agreement ¶ 2.3(g), Ex. A.) "Entry of a bar order that is required by a proposed settlement agreement is within a court's authority and discretion." *Gordon v. Dadante*, 2008 WL 1805787, at *14 (N.D. Ohio Apr. 18, 2008), *aff'd* 336 F. App'x 540 (6th Cir. 2009). This bar order is necessary to facilitate settlement because without it, Aon Hewitt could be subject to future claims for indemnification or contribution, eliminating its incentive to settle with Plaintiffs. *See In re Jiffy Lube Sec. Litig.*, 927 F.2d 155, 160 (4th Cir. 1991) (explaining the right to contribution would remove any incentive to settlement because any non-settling defendant could still file a claim for contribution from the settling defendant).

One type of setoff method recognized by the Sixth Circuit and other courts is the "proportionate fault" method, in which "each defendant pays damages corresponding to its degree

of fault." *In re Greektown Holdings, LLC*, 728 F.2d 567, 576 n.7 (6th Cir. 2013). When this method is used, the Sixth Circuit has explained that no evidentiary fairness hearing is required. *Id.*; *see also Gerber v. MTC Elec. Techs. Co.*, 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 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.").

Here, the Settlement Agreement provides for the proportionate fault method. (Settlement Agreement § 2.3(g), Ex A.) The Court should adopt this method, consistent with other courts.[5]

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court (1) preliminarily approve the Settlement; (2) approve the proposed Notices and authorize distribution of the Notice; (3) schedule a final approval hearing; and (4) enter the accompanying Preliminary Approval Order, which includes approving an appropriate bar order that forecloses contribution or indemnification claims between Aon Hewitt and the Non-Settling Defendants and grants the Non-Settling Defendants an appropriate set off against any future judgment that may be entered against them.

[5] *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.").

Dated: December 12, 2022

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CERTIFICATE OF SERVICE

I, Brock J. Specht, hereby certify that I served this document on counsel of record via ECF on December 12, 2022.

/s/ Brock J. Specht
Brock J. Specht