**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF OHIO**

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| 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,<br><br>Plaintiffs,<br><br>v.<br><br>FirstGroup America, Inc., FirstGroup America, Inc. Employee Benefits Committee, and Aon Hewitt Investment Consulting, Inc.,<br><br>Defendants. | Case No. 1:18-cv-00326-JPH<br><br>Judge Jeffery P. Hopkins |

**Plaintiffs' Reply Memorandum of Law in Support of Motion for Preliminary Approval of Partial Class Action Settlement with Defendant Aon Hewitt Investment Consulting, Inc.**

**TABLE OF CONTENTS**

# TABLE OF AUTHORITIES

## Cases

## INTRODUCTION

This case involves claims against two defendants, Aon Hewitt and FirstGroup, both of whom are accused of breaching fiduciary duties owed to the FirstGroup America, Inc. Retirement Savings Plan (the "Plan") and its participants under the Employee Retirement Income Security Act (ERISA).[1] Plaintiffs, representing the Plan and a certified class of Plan participants, ECF No. 92, have resolved their claims against Aon Hewitt and, pursuant to Fed. R. Civ. P. 23(e), now move for preliminary approval of their settlement with Aon Hewitt.

A common feature of partial settlements of this type—where claims against one defendant are resolved entirely while another defendant elects not to settle—is a "bar order" whereby a district court may "properly bar[]" the settling and non-settling defendants from filing "contribution and indemnification claims" against each other related to the underlying liability to the plaintiffs. *Gerber v. MTC Electronic Techs. Co., Ltd.*, 329 F.3d 297, 305 (2d Cir. 2003) (Sotomayor, J.). "Orders barring claims of non-settling defendants for contribution or indemnification are an integral part of settlement," *Nat'l Credit Union Admin. Bd. v. Goldman, Sachs & Co.*, 2015 WL 7871349, at *1 (S.D.N.Y. Dec. 4, 2015) (quotation omitted), because, absent the bar, the settling defendant would have no "incentive to settle since non-settling defendants could still file claims for contribution against [the settling defendant] who has been discharged of direct liability through settlement," *In re Jiffy Lube Sec. Litig.*, 927 F.2d 155, 160 (4th Cir. 1991). Although a bar order has the effect of extinguishing those claims, the non-settling defendant is compensated by means of a "judgment reduction" that offsets—or potentially eliminates—any ultimate liability the non-settling defendant may have to the plaintiffs in the underlying action. *In re Greektown Holdings, LLC*, 728 F.3d 567, 576 n.7 (6th Cir. 2013).

[1] "Aon Hewitt" refers to Defendant Aon Hewitt Investment Consulting, Inc.; "FirstGroup" collectively refers to Defendants FirstGroup America Inc., and the FirstGroup America, Inc. Employee Benefits Committee.

The proposed bar order here is no different. It includes a judgment reduction under the "proportionate fault method," *id.*, which reduces FirstGroup's liability for any future judgment obtained by Plaintiffs by the amount of proportionate fault attributable to Aon Hewitt. In exchange for this judgment reduction, the bar order properly precludes any claims between FirstGroup and Aon Hewitt arising from this action.

Nevertheless, FirstGroup now objects to the proposed settlement. Importantly, FirstGroup does not challenge either the overall fairness of the settlement or the appropriateness of including a bar order in general. Instead, FirstGroup objects to particular aspects of the proposed bar order, arguing that its scope is too broad because it supposedly extinguishes purportedly "independent" contractual claims that FirstGroup may have against Aon Hewitt either (i) for FirstGroup's attorneys' fees and costs in defending this action or (ii) for the full extent of FirstGroup's liability to the class.

Neither contention has any merit. The Court can easily conclude that FirstGroup's supposedly "independent" claim for attorneys' fees and costs is not independent at all, since the fees and costs FirstGroup is concerned about derive directly from the Plaintiffs' action here. Moreover, the bar order, as originally agreed to by Plaintiffs and Aon Hewitt, is fully reciprocal, precluding Aon Hewitt from maintaining any like-kind claim for fees and costs against FirstGroup under the language of the Investment Management Agreement ("IMA") between FirstGroup and Aon Hewitt. ECF No. 109-6 (IMA). But the Court need not resolve this question because Aon Hewitt and the Plaintiffs have since agreed to revise the language of the proposed bar order to preserve any claims between Aon Hewitt and FirstGroup that seek to recover only attorneys' fees and costs incurred in defending this action. To the extent FirstGroup's hypothetical claim for recovery of attorneys' fees and costs in defense of this action is truly independent of its liability to

Plaintiffs and the Plan, the settling parties' amendment of the bar order resolves this concern.

FirstGroup's broader objection that the bar order eliminates an "independent" contractual claim against Aon Hewitt to be indemnified for "the full extent" of any liability in this action rests on a fiction—namely, that Aon Hewitt agreed contractually to bear responsibility for all investment losses to the Plan no matter the extent to which those losses resulted from FirstGroup's breach. There is no such language in the FirstGroup/Aon Hewitt IMA. Instead, the IMA includes reciprocal indemnity language providing that each contracting party will indemnify the other "if and to the extent" that losses to the Plan result from a party's breach. The exact same proportionate fault methodology is incorporated into the bar order, ensuring that FirstGroup will never be responsible for more than the share of Plan losses that is proportionally attributable to its breach. In other words, the proposed bar order adequately compensates FirstGroup for the loss of its indemnity rights by reducing any judgment Plaintiffs obtain against FirstGroup by the amount of Aon Hewitt's proportional fault, which is the full extent of FirstGroup's entitlement to indemnification under its contract with Aon Hewitt. FirstGroup has no legitimate basis to complain because its position remains essentially unchanged. Accordingly, the Court should reject FirstGroup's objection and preliminarily approve the settlement.

## BACKGROUND

### FirstGroup's Decision to Hire Aon Hewitt and to Select the Aon Hewitt Funds

This case stems from FirstGroup's decision in 2013 to hire Aon Hewitt as a "delegated fiduciary" to manage the investments in the Plan and to replace the Plan's then-existing lineup of investment funds with a newly launched portfolio of funds managed by Aon Hewitt. *See* Second Amended Complaint ¶ 2, ECF No. 71.[2] This was done by means of the 2013 IMA. ECF No. 109-

[2] The Complaint refers to Aon Hewitt under its former name, Hewitt. In parts of the record Aon Hewitt is variously referred to as Hewitt EnnisKnupp, HEK, Aon Hewitt Investment Consulting, and AHIC.

6. Under the IMA, as of October 1, 2013, Aon Hewitt would be "responsible for selection, evaluation and replacement of the plan menu, investment options and target date funds." ECF No. 109-6 at PAGEID 4436. However, pursuant to an amendment to the IMA executed by FirstGroup on September 24, 2013, FirstGroup and Aon Hewitt agreed to substantially limit Aon Hewitt's responsibilities for selecting Plan investments. In the amendment FirstGroup acknowledged that it had been provided with information related to the newly created funds managed by Aon Hewitt in its Collective Investment Trust and agreed that Aon Hewitt was "entitled to carry out its obligations … by selecting exclusively from among the Funds" available in the Collective Trust and had "no obligation to consider … investment funds or vehicles of any kind not available from time to time under the Collective Trust." ECF No. 079-49 at PAGEID 2531-32.

**The IMA's Reciprocal Indemnification Provisions**

The IMA contains reciprocal indemnification clauses whereby Aon Hewitt and FirstGroup agreed to indemnify each other for any losses, claims, or expenses "if and to the extent the expenses are caused by" the other party. ECF No. 109-6 at PAGEID 4432. These provisions state in relevant part:

> (a) [Aon Hewitt] shall indemnify and hold [FirstGroup] … harmless from and against any and all claims, actions, losses, damages, liabilities, and expenses (including reasonable attorneys' fees and expenses) ***if and to the extent*** the expenses are caused by [Aon Hewitt]'s breach of fiduciary duty….
>
> (b) [FirstGroup] shall indemnify and hold [Aon Hewitt] … harmless from and against any and all claims, actions, losses, damages, liabilities, and expenses (including reasonable attorneys' fees and expenses) … ***if and to the extent*** the expenses are caused by (i) [FirstGroup's] … breach of its fiduciary obligations to the Plan….

ECF No. 109-6 at PAGEID 4432 (emphases added).

**The Settlement Agreement's Proposed Bar Order**

The Settlement Agreement contains the terms of a proposed bar order that, in effect, mirror

the IMA's reciprocal apportionment of financial responsibility for any breach of fiduciary duty between Aon Hewitt and FirstGroup. Sections 2.4(g)(i) and (ii) of the Settlement Agreement bar both Aon Hewitt and FirstGroup from "asserting any Barred Claims" against the other. ECF No. 144-3 at PAGEID 12404. Section 2.4(g)(iii) then provides that any judgment entered against FirstGroup "shall be reduced by the amount that represents the proportionate share of fault that is attributable to Aon Hewitt." *Id.*

The Settlement Agreement defines "Barred Claims" as follows:

> "Barred Claims" means (a) Claims asserted or that could have been asserted by the Non-Settling Defendants against Aon Hewitt for indemnity and/or contribution and/or third-party Claims of any type (including contractual indemnity claims) arising from this Action, or (ii) Claims asserted or that could have been asserted by Aon Hewitt against the Non-Settling Defendants for indemnity and/or contribution and/or third-party Claims of any type (including contractual indemnity claims) arising from this Action.

ECF No. 144-3 at PAGEID 12396.

**The Revised Definition of "Barred Claims"**

After receiving FirstGroup's objection to the settlement, Plaintiffs and Aon Hewitt have agreed in principle to clarify the definition of "Barred Claims" as follows:

> "Barred Claims" means (a) Claims asserted or that could have been asserted by the Non-Settling Defendants against Aon Hewitt for indemnity and/or contribution and/or third-party Claims of any type arising from this Action <u>to the extent the injury to the Non-Settling defendants is the Non-Settling defendants' liability to the Plaintiffs and the Plan</u> (including contractual indemnity claims <u>other than those that merely seek the recovery of attorneys' fees and litigation costs incurred in defending this Action</u>); or (ii) Claims asserted or that could have been asserted by Aon Hewitt against the Non-Settling Defendants for indemnity and/or contribution and/or third-party Claims of any type arising from this Action <u>to the extent the injury to Aon Hewitt is its liability to the Plaintiffs and the Plan</u> (including contractual indemnity claims <u>other than those that merely seek the recovery of attorneys' fees and litigation costs incurred in defending this Action</u>).

Second Declaration of Brock J. Specht in Support of Plaintiffs' Motion for Preliminary Approval of Class Action Settlement ("Second Specht Decl.") ¶ 2. The purpose of the amendment is to

clarify that the bar order precludes only those claims that FirstGroup may have against Aon Hewitt that derive from its liability to Plaintiffs in this action, as was the settling parties' intention all along. Second Specht Decl. ¶ 3. In addition, in response to FirstGroup's assertion that it must be permitted to retain a supposedly "independent" claim to recover from Aon Hewitt its attorneys' fees and costs in this action (whether or not it is adjudged liable to Plaintiffs and the Plan), the bar order includes language expressly and reciprocally preserving FirstGroup's and Aon Hewitt's contractual indemnity claims for recovery of such fees and costs.

## ARGUMENT

### I. FirstGroup's Objections to the Proposed Bar Order Lack Merit.

FirstGroup argues that settled law requires this Court to reject settlement agreements that preclude non-settling defendants from maintaining ***contractual*** indemnification claims, as distinct from common law contribution and indemnity claims. There is no such law.[3] Instead, as explained in the Sixth Circuit's opinion in *In re Greektown Holdings, LLC*, courts may properly bar "any claims" for contribution and indemnity in which "the damages are measured by the defendant's liability to the plaintiff." 728 F.3d 567, 579 (6th Cir. 2013) (quoting *TBG, Inc. v. Bendis*, 36 F.3d 916, 928 (10th Cir.1994). As long as the claim derives from "the non-settling defendant's liability to the plaintiff," the claim can be extinguished in a settlement bar order. *Id.* (quoting *Gerber v.*

[3] FirstGroup's contrary arguments are inapposite. Unlike *Garrison Southfield Park LLC I & II*, the proposed bar order here: (1) involves a *proportionate*—not *pro tanto*—method of contribution; (2) does not expose non-settling defendants to liability; and (3) is not subject to the statutory requirements of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"). *See Garrison Southfield Park LLC v. Closed Loop Refining & Recovery, Inc.*, 2021 WL 4397865, at *2, 14 (S.D. Ohio Sept. 27, 2021); *Garrison Southfield Park LLC v. Closed Loop Refining & Recovery, Inc.*, 2022 WL 472436, at *2–3 (S.D. Ohio Feb. 16, 2022). Similarly, FirstGroup's reliance on *In re Lawnmower Engine Horsepower Mktg. & Sales Pracs. Litig.* is misleading, because the settlement agreement and proposed order did not specifically request that the court bar contractual indemnity claims. 733 F. Supp. 2d 997, 1019 (E.D. Wis. 2010). Instead, the court applied the Illinois Joint Tortfeasor Contribution Act and other applicable state joint tortfeasor statutes, as required under the settlement agreement, as the source of law regarding the propriety of the settlement bar orders. *Id.* at 1021. Here, needless to say, state joint tortfeasor statutes do not govern the appropriateness of the bar order in this ERISA class action settlement. Therefore, FirstGroup's broad objection that the Court cannot enter a bar order including contractual indemnification claims must be dismissed.

*MTC Elec. Techs. Co., Ltd.*, 329 F.3d 297, 307 (2d Cir. 2003) (Sotomayor, J.) and citing *In re HealthSouth Corp. Secs. Litig.*, 572 F.3d 854, 863 (11th Cir.2009); *In re Heritage Bond Litig.*, 546 F.3d 667, 678–79 (9th Cir.2008)). In exchange, "the court can compensate the non-settling defendants for the loss of those claims by reducing any future judgment against them." *Id.*

This is precisely the situation present here. As originally drafted, the settling parties' bar order bars only those claims that FirstGroup may seek to maintain against Aon Hewitt that "aris[e] from this action"—that is, which derive from the claims that Plaintiffs are pursuing in this action on behalf of the Plan. The clarifying language that Plaintiffs and Aon Hewitt have since agreed to is even more plain, providing that FirstGroup is precluded from maintaining claims against Aon Hewitt only where its claimed injury is its "liability to the Plaintiffs and the Plan." Second Specht Decl. ¶ 2. This is entirely consistent with the Sixth Circuit's recognition that courts may appropriately bar "any claims in which the injury is the nonsettling defendant's liability to the plaintiff." *Greektown*, 728 F.3d at 579.

Under these core principles followed by the Sixth Circuit and other courts of appeals, FirstGroup's objections must be rejected.

**A. FirstGroup's objection that the bar order cannot extinguish its supposedly "independent" contractual claim for recovery of attorneys' fees and costs is insubstantial, and is in any event mooted by the settling parties' amendment to the bar order.**

FirstGroup first argues that it has an "independent right" to recover from Aon Hewitt its attorneys' fees and litigation expenses incurred in defending this matter, regardless of how the Court decides the action or how it distributes proportional fault, and that extinguishing that right with "no compensation" is "problematic." ECF No. 150 at PAGEID 12578 (quotations omitted). This argument strains credulity on a number of levels. First, to the extent FirstGroup has such a right under the IMA, Aon Hewitt has the same right against FirstGroup under the essentially

identical, reciprocal indemnification provisions of the IMA, and extinguishing each entity's rights vis-à-vis the other would provide exactly the "compensation" that FirstGroup claims is lacking. Second, despite this matter having been filed more than four and a half years ago, ECF No. 1, FirstGroup does not state that it is currently or has ever sought to recover any such fees from Aon Hewitt under this provision, nor has FirstGroup ever asserted that Aon Hewitt committed a "breach of fiduciary duty," as would be required to trigger the IMA's indemnification provision. ECF No. 109-6 at PAGEID 4432. To the contrary, FirstGroup has denied that Aon Hewitt engaged in any breaches as alleged. *E.g.*, ECF No. 72 at PAGEID 1563 (denying various allegations that investment options were added imprudently and were unreasonable for the Plan).

Whether FirstGroup's claim for attorneys' fees is truly "independent" of the claims in this action is also debatable. As the Eleventh Circuit explained in *In re HealthSouth Corp. Sec. Litig.*, a non-settling defendant's claims for attorneys' fees are not a "truly independent claim that might be *per se* inappropriate to bar." 572 F.3d at 865. The lack of "true independence" is particularly apparent here, where the fees requested were incurred in the partially settled action, and the recovery turns on the adjudication of whether and to what extent a breach of fiduciary duty caused the fees to be incurred. *See, e.g.*, *id.* at 864 n.10 (distinguishing a claim for attorneys' fees incurred in a "truly independent cause of action" discussed in *Gerber*, 329 F.3d at 306, from a claim for attorneys' fees incurred in the course of defending the partially settled litigation against the plaintiffs).

But the Court need not resolve the question, as FirstGroup's objection has been mooted by the settling parties' agreement in principle to a revised bar order that preserves claims seeking only the recovery of attorneys' fees and costs. In particular, under the proposed Settlement Agreement's revised definition of "Barred Claims," any claims "that merely seek the recovery of attorneys' fees

and litigation costs incurred in defending this Action" are explicitly excluded from the scope of the proposed bar order. Second Specht Decl. ¶ 2.

**B. Contrary to FirstGroup's objection, the IMA does not grant FirstGroup an unfettered right to be indemnified by Aon Hewitt for the full measure of Plaintiffs' losses regardless of FirstGroup's proportionate share of fault.**

FirstGroup's second argument is that, under the IMA, it is entitled to be indemnified for "***all***, not just a proportionate share" of its losses in this action. ECF No. 150 at PAGEID 12578 (emphasis in original). The assertion seems to be that the IMA confers on FirstGroup the contractual right to recover "the full extent of any liability [it] might have to the Class" without regard to whether those losses were caused by Aon Hewitt. ECF No. 150 at PAGEID 12576. Based on this supposition, FirstGroup argues that the bar order's proportional fault judgment reduction mechanism does not provide adequate compensation for the extinguishment of its unqualified contractual rights to indemnification from Aon Hewitt.

This text of the IMA dooms this objection, however. As noted above, the IMA carefully apportions both Aon Hewitt's and FirstGroup's financial responsibility to each other for a breach of fiduciary duty according to each party's degree of fault. Specifically, either party to the IMA is entitled to be indemnified by the other for any losses and expenses "if and to the extent" those losses and expenses were caused by the other party. ECF No. 109-6 at PAGEID 4432. Thus, FirstGroup's assertion that this contractual language affords it the right to recover the costs of any judgment against it "regardless of [FirstGroup]'s supposed share of proportionate fault" makes no sense, ECF No. 150 at PAGEID 12579, and essentially ignores the reciprocal, proportionate nature of the IMA's indemnification provision. To the extent FirstGroup shares a proportion of the fault for the Plan losses alleged in the action, it has no right to recover that portion of the losses from Aon Hewitt—rather, absent a bar order, Aon Hewitt would have the right to recover that portion

from FirstGroup. ECF No. 109-6 at PAGEID 4432.[4]

Given the actual text of the IMA's reciprocal indemnity language, the proportionate fault judgment reduction adopted under the proposed bar order adequately compensates FirstGroup for the loss of any right to indemnification it does possess under the IMA. "[W]hen the scope of a bar order is limited to claims for contribution or indemnity, the court can compensate the non-settling defendants for the loss of those claims by reducing any future judgment against them." *Greektown Holdings*, 728 F.3d at 579. Here, the proposed bar order enforces the ***same*** proportionate fault system that FirstGroup and Aon Hewitt agreed to under the IMA. ECF No. 144-3 at PAGEID 12404 (providing that any judgment entered against FirstGroup "shall be reduced by the amount that represents the proportionate share of fault that is attributable to Aon Hewitt."). As courts routinely recognize, the proportionate fault rule is "the equivalent of a contribution claim" because the non-settling defendants are only responsible for their portion of the liability. *See, e.g.*, *Eichenholtz v. Brennan*, 52 F.3d 478, 487 (3d Cir. 1995); *McDermott, Inc. v. AmClyde*, 511 U.S. 202, 209 (1994) ("Under [the "proportionate share"] approach, no suits for contribution from the settling defendants are permitted, ***nor are they necessary***, because the non-settling defendants pay no more than their share of the judgment.") (emphasis added). Accordingly, by conferring on FirstGroup the functional "equivalent" of its extinguished contractual indemnity right, the bar order adequately compensates FirstGroup for the loss of that right.

[4] As a practical matter, it is likely that FirstGroup bears most, if not all, responsibility for the underlying breaches in this action. As described above, via the amendment to the IMA, FirstGroup authorized Aon Hewitt to replace the Plan's then-current investment lineup and with a lineup of new funds managed by Aon Hewitt and also relieved Aon Hewitt from any "obligation to consider … investment funds or vehicles of any kind not available from time to time under the [Aon Hewitt] Collective Trust." ECF No. 079-49 at PAGEID 2531-32. FirstGroup did this knowing that the Aon Hewitt funds did not yet exist, ECF No. 134-01 at PAGEID 9721, and without any inquiry into Aon Hewitt's track record as a fund manager, *id.* at PAGEID 9657-58. Moreover, FirstGroup understood that Aon Hewitt's presentations regarding the funds were part of a sales pitch. *Id.* at PAGEID 9654. Viewed within this factual context, FirstGroup's contention that the IMA places exclusive responsibility on Aon Hewitt for these actions is not credible.

### C. The proposed bar order appropriately precludes only those claims that derive from FirstGroup's liability to Plaintiffs and the Plan in this action.

Finally, FirstGroup argues that the proposed bar order would extinguish "unknown or unsuspected accrued or unaccrued claims … whether arising in contract (like the IMA) or any other legal theory." ECF No. 150 at PAGEID 12582. While this objection is far from clear, it appears that FirstGroup is implying that the bar order precludes claims that are independent of, and unrelated to, potential liability in this action. This is not true. The definition of Barred Claims, as originally agreed to by the settling parties, extends only to claims "arising from this Action"—that is, claims that derive from Plaintiffs' demands for the recovery of alleged losses from the claimed fiduciary breaches. *See In re U.S. Oil & Gas Litig.*, 967 F.2d 489, 492 (11th Cir. 1992) (upholding bar order that barred "'all claims' by non-settling defendants against settling defendants, or by settling defendants against non-settling defendants, ***related to the subject matter of the litigation***" (emphasis added)).

Nevertheless, out of an abundance of caution, the settling parties have agreed in principle to make express what the original definition of Barred Claims clearly implies. The revised definition states flatly that FirstGroup claims are precluded only "to the extent" FirstGroup's alleged "injury" is its "liability to the plaintiffs and the Plan" in the action. Second Specht Decl. ¶ 2. The clarified language leaves no doubt about the scope of bar order, and makes clear that it properly operates only on "claims in which the injury is the nonsettling defendant's liability to the plaintiff." *Greektown Holdings*, 728 F.3d at 579 (quotation omitted). In this context, the bar order's compensation to FirstGroup—a judgment reduction under the "proportionate fault method," *id.* at 576 n.7—provides FirstGroup "all of the protection to which [it is] entitled." *Nat'l Credit Union Admin. Bd. v. Goldman, Sachs & Co.*, 2015 WL 7871349, at *2 (S.D.N.Y. Dec. 4, 2015).

## II. Plaintiffs Do Not Oppose FirstGroup's Request for a Fairness Hearing

Plaintiffs do not oppose FirstGroup's request for a hearing if the Court deems it may be appropriate or useful.

## CONCLUSION

FirstGroup's objections to the proposed Settlement Agreement seek to protect rights that do not exist, or concern barred claims for which they are more than adequately compensated by the proportionate fault judgment reduction. Therefore, Plaintiffs respectfully request that the Court (1) overrule the objections and preliminarily approve the Settlement; (2) approve the proposed Notices and authorize distribution of the Notices; and (3) schedule a final approval hearing.

Respectfully submitted,

Dated: January 17, 2023

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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 January 17, 2023.

*/s/ Brock J. Specht*
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