

**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-JPH

Judge Jeffery P. Hopkins

**SUPPLEMENTAL MEMORANDUM OF LAW IN SUPPORT OF
PLAINTIFFS' UNOPPOSED MOTION FOR
PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT**

Plaintiffs filed a Motion for Preliminary Approval of Partial Class Action Settlement with Aon Hewitt Retirement Consulting, Inc. (“Aon Hewitt”) on December 12, 2022. ECF No. 144.¹ That motion sought preliminary approval of a partial settlement, which would have resolved Plaintiffs’ claims against Aon Hewitt in this matter while leaving Plaintiffs’ claims against the FGA Defendants unresolved.² That motion remains pending before the Court. In the interim, Plaintiffs continued to litigate their remaining claims against the FGA Defendants. The ongoing litigation included the FGA Defendants filing of an objection to the partial settlement between Plaintiffs and Aon Hewitt,³ and several other substantive motions that are also currently pending

¹ A copy of the Partial Class Action Settlement Agreement (“Partial Settlement Agreement”) is filed at ECF No. 144-3.

² “The FGA Defendants” means FirstGroup America, Inc. (“FirstGroup”) and the FirstGroup America, Inc. Employee Benefits Committee (“the Committee”).

³ See FGA Defendants’ Opposition to Plaintiffs’ Motion for Preliminary Approval of Partial Class Action Settlement with Defendant Aon Hewitt Investment Consulting, Inc., ECF No. 150.

before the Court.⁴

During this time, Plaintiffs and the FGA Defendants have also engaged in extensive, arm's-length settlement discussions, which have now resulted in a global settlement agreement with all of the Defendants that doubles the monetary relief obtained on behalf of the Plan and fully and finally resolves all aspects of this matter. The parties have memorialized this global settlement in an Amended Settlement Agreement.⁵ Rather than starting from scratch, the Amended Settlement Agreement is based on the prior partial Settlement Agreement between Plaintiffs and Aon Hewitt, with additional terms added to make the FGA Defendants a party to the agreement. As such, while most of the terms remain the same, the Amended Settlement Agreement builds on and supersedes the previous partial Settlement Agreement that was presented for preliminary approval.

Plaintiffs now respectfully request that the Court preliminarily approve the global settlement reached in this case as reflected in the Amended Settlement Agreement. The reasons supporting preliminary approval of the prior partial settlement with Aon Hewitt were previously discussed in Plaintiffs' Memorandum of Law in Support of Plaintiffs' Unopposed Motion for Preliminary Approval of Partial Class Action Settlement with Defendant Aon Hewitt Investment Consulting, Inc. ("Plaintiffs' Memorandum"), ECF No. 144-1, and those reasons continue to support preliminary approval here. For those reasons, and for the supplemental reasons provided below, the Amended Settlement Agreement is fair, reasonable, and adequate, and it merits preliminary approval. Accordingly, Plaintiffs respectfully request that the Court: (1) preliminarily approve the Amended Settlement Agreement; (2) approve the proposed Amended Notices and

⁴ See FGA Defendants' Motion for Summary Judgment (ECF No. 107), FGA Defendants' Motion to Exclude Opinions of Plaintiffs' Expert Brian C. Becker, Ph.D. (ECF No. 156), and related motions to seal (ECF Nos. 148, 158, 164, 165).

⁵ A copy of the Amended Class Action Settlement Agreement ("Amended Settlement Agreement") is attached as Exhibit A to the accompanying Declaration of Brock J. Specht ("Specht Decl.").

authorize their distribution; (3) schedule a final approval hearing; and (4) enter the accompanying Amended Preliminary Approval Order. As parties to the Amended Settlement Agreement, both Aon Hewitt and the FGA Defendants do not oppose its approval.

SUPPLEMENTAL PROCEDURAL HISTORY

The procedural history of this action is summarized in Plaintiffs' Memorandum, ECF No. 144-1 at PAGEID 12365–66, and is supplemented below:

I. ONGOING LITIGATION OF PLAINTIFFS' CLAIMS

Two days after Plaintiffs notified the Court that they had reached a settlement-in-principle with Aon Hewitt, the FGA Defendants filed a Motion for Summary Judgment. ECF Nos. 94; 107. In connection with the FGA Defendants' summary judgment motion, the FGA Defendants and Plaintiffs collectively filed more than 120 exhibits, as well as a 120-page document of Plaintiffs' Response to the FGA Defendants' Statement of Proposed Undisputed Facts and Plaintiffs' Statement of Proposed Disputed Issues of Material Fact. *See* ECF Nos. 109-1 *et seq.*; ECF Nos. 143-1 *et seq.*; ECF Nos. 147-1 *et seq.*; *see also* ECF No. 139-1. The FGA Defendants subsequently filed a Motion to Exclude Opinions of Plaintiffs' Expert Brian C. Becker, Ph.D (ECF No. 156), which Plaintiffs opposed (ECF No. 162), and to which the FGA Defendants replied (ECF No. 166). These motions, and related motions to seal (ECF Nos. 148, 158, 164, 165), remain pending.

Prior to this action's reassignment to Judge Hopkins on December 22, 2022 (ECF No. 149), a trial date was set for May 30, 2023. Amended Calendar Order, ECF No. 88 at PAGEID 2671. During a telephone status conference with the parties on April 19, 2023, the Court postponed the final pretrial conference and trial dates. *Specht Decl.* ¶ 5. A new trial date has not been scheduled. *Id.*

II. FGA DEFENDANTS' OPPOSITION TO THE PARTIAL SETTLEMENT AGREEMENT

Plaintiffs filed their Preliminary Approval Motion related to the partial settlement of their claims with Aon Hewitt on December 12, 2022. ECF No. 144. The FGA Defendants filed a response in opposition to preliminary approval on December 27, 2022, arguing that they were unfairly prejudiced by the terms of the Partial Settlement Agreement's proposed Bar Order provision and requesting a fairness hearing on this issue. ECF No. 150.

In response to the FGA Defendants' objections to the Partial Settlement Agreement, the parties met and conferred in an effort to address the FGA Defendants' concerns. *Specht Decl.* ¶ 3. Plaintiffs and Aon Hewitt agreed in principle to clarify the definition of "Barred Claims," ECF No. 154 at PAGEID 12605–06, but the parties reached an impasse in their efforts to draft language that would resolve the FGA Defendants' objections. *Specht Decl.* ¶ 3.

During a telephone status conference with the parties on April 19, 2023, the Court scheduled a hearing to address the fairness of the bar order provision for June 13, 2023. *Specht Decl.* ¶ 5. The June 13 hearing was subsequently postponed by the Court and has not been rescheduled. *Id.*

III. SETTLEMENT NEGOTIATIONS AND GLOBAL SETTLEMENT AGREEMENT

After reaching a settlement-in-principle with Aon Hewitt, Plaintiffs provided an initial demand to resolve all claims against the FGA Defendants. Joint Status Report, ECF No. 170 at PAGEID 13098. Plaintiffs and the FGA Defendants engaged in a series of negotiations with regard to monetary terms before Plaintiffs requested that the parties engage a private mediator to assist with further negotiations. Joint Status Report, ECF No. 170 at PAGEID 13098. Plaintiffs and the FGA Defendants attended a full-day in-person mediation on April 13, 2023, in Connecticut before Mr. David Geronemus of JAMS. Despite the good faith efforts of the involved parties, the mediation was unsuccessful at that time. *Specht Decl.* ¶ 4.

Arm's-length settlement negotiations between the parties resumed after a request for preliminary approval of a partial settlement with a similar bar order provision was denied in a separate, unrelated matter involving Aon Hewitt and a third party. *Specht Decl.* ¶ 6; *see* FGA Defendants' Notice of Supplemental Authority, ECF No. 172. These negotiations were successful, and the parties notified the Court that they reached a global settlement-in-principle on February 8, 2024. Notice of Global Settlement, ECF No. 173.

IV. OVERVIEW OF ADDITIONAL SETTLEMENT TERMS

Unless otherwise discussed below, the Amended Settlement Agreement maintains all of the material terms of the original Settlement Agreement previously presented to the Court, while incorporating the additional terms described herein, which provide additional benefits to the Settlement Class while fully resolving this matter.

A. Additional Monetary Relief

Under the Amended Settlement Agreement, the FGA Defendants will pay \$4,500,000.00 to a Qualified Settlement Fund (the "Settlement Fund"), doubling the monetary relief obtained by Plaintiffs in their Partial Settlement Agreement with Aon Hewitt, and resulting in a Gross Settlement Amount of \$9,000,000.00. *See* Amended Settlement Agreement ¶¶ 1.35, 4.2.

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. Amended Settlement Agreement, art. V, VI.

Consistent with the terms of the Partial Settlement Agreement, and as explained in the Amended Notices that will be sent to the Settlement Class, Class Counsel will seek no more than one-third of the total Gross Settlement Amount (\$3,000,000) in attorneys' fees. Amended Settlement Agreement ¶ 6.1 & Exs. 1 & 2 to Amended Settlement Agreement; *see* Partial

Settlement Agreement ¶ 6.1, Doc. No. 144-3 at PAGEID 12413–14. In addition, the Amended Settlement Agreement provides for recovery of out-of-pocket litigation costs, Administrative Expenses, and Class Representative Service Awards of up to \$10,000 to each Named Plaintiff, subject to Court approval and Independent Fiduciary review. Amended Settlement Agreement ¶¶ 6.1–6.2. The Plan of Allocation of the Net Settlement Amount in the Amended Settlement Agreement remains unchanged. *Compare* Amended Settlement Agreement, art. V, *with* Partial Settlement Agreement, art. V, Doc. No. 144-3 at PAGEID 12409–13.

B. Amended Release of Claims and Bar Order

The terms of the Amended Settlement Agreement resolve the FGA Defendants’ objections to the Bar Order provision contained in the Partial Settlement Agreement. This is particularly significant because the FGA Defendants’ objections to the previous Bar Order, if sustained, may have resulted in the termination of the Partial Settlement Agreement as a whole. *See* Partial Settlement Agreement ¶ 9.1(e), ECF No. 144-3 at PAGEID 12416–17.

Thus, in exchange for the relief provided by the Amended Settlement Agreement, the Settlement Class will release the Defendants and affiliated persons and entities (the “Released Parties”) from claims:

- that were asserted or could have been asserted in the Action, including but not limited to those based on: (1) the selection, retention, oversight, or monitoring of the Aon Hewitt Funds or other Plan investment options; (2) the selection, retention, oversight, or monitoring of Aon Hewitt; (3) the performance, fees, expenses, share classes, and other characteristics of the Aon Hewitt Funds or other Plan investment options; (4) Aon Hewitt’s performance as a delegated fiduciary to the Plan or its fees charged to the Plan, or the services provided by Aon Hewitt to the Plan; (5) the restructuring or modification of the Plan’s investment lineup; (6) alleged self-dealing, conflicts of interest, or prohibited transactions in relation to the Aon Hewitt Funds or other Plan investment options, or in relation to the selection, monitoring, oversight or retention of Aon as a Plan service provider; (7) the overall structure, management, or monitoring of the Plan’s investment menu; (8) the compliance with the Plan’s governing documents and investment policy statements with respect to the selection, retention, oversight, and monitoring of Aon Hewitt as a Plan service provider or the selection, retention, oversight, and monitoring of the Aon Hewitt

Funds or other Plan investment options; (9) disclosures or failures to disclose information concerning Aon Hewitt as a Plan service provider, the Aon Hewitt Funds, or other Plan investment options; and (10) any assertions with respect to any fiduciaries of the Plans (or the selection or monitoring of those fiduciaries) in connection with the foregoing.

- 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.

Amended Settlement Agreement, ¶ 1.42.

As before, claims to enforce the Amended Settlement Agreement and claims for individual vested benefits that are due under the terms of the Plan are not released. *Id.*

The Amended Settlement Agreement also seeks the entry of a Bar Order to address potential claims for contribution or indemnity between Aon Hewitt and the FGA Defendants. The terms of the proposed Bar Order provide, among other things, that: (i) Aon Hewitt will be precluded from asserting any contribution or indemnification claims that it may have against the FGA Defendants relating to the Action; and (ii) the FGA Defendants will be precluded from asserting any such contribution or indemnification claims they may have against Aon Hewitt. Amended Settlement Agreement, ¶ 2.4(g). Because both Aon Hewitt and the FGA Defendants are parties to the Amended Settlement Agreement, the terms of this updated version of the Bar Order have been negotiated and agreed to by all of the parties.

C. Amended Class Notice

Because the Amended Settlement Agreement represents a global resolution of Plaintiffs' Claims, the parties have prepared Amended Notices to the Settlement Class Members, which are attached as exhibits to the Amended Settlement Agreement. Amended Settlement Agreement, Exs.

1 & 2. As with the Notices that were drafted in connection with the Partial Settlement Agreement, the Amended Notices advise the Settlement Class Members of their rights and options under the settlement, with updated information to accurately reflect the terms of the Amended Settlement Agreement. *Compare* Amended Settlement Agreement, Exs. 1 & 2, *with* Partial Settlement Agreement, Exs. 1 & 2, ECF No. 144-3 at PAGEID 12423–40.

D. Comprehensive Review by Independent Fiduciary

As before, the parties will seek the retention of an Independent Fiduciary to review and authorize the Amended Settlement Agreement on behalf of the Plan. Amended Settlement Agreement ¶ 2.2; *see also* Prohibited Transaction Exemption 2003-39, 68 Fed. Reg. 75632, as amended 75 Fed. Reg. 33830 (“PTE 2003-39”). The Independent Fiduciary will issue its report at least 30 days before the final Fairness Hearing so that the Court may consider it. *See* Amended Settlement Agreement ¶ 2.2(b).

SUPPLEMENTAL ARGUMENT

I. THE COURT SHOULD APPROVE THE AMENDED SETTLEMENT AGREEMENT UNDER RULE 23(e)

A. The Amended Settlement Agreement Is Fair

As detailed in Plaintiffs’ Memorandum, a court may grant preliminary approval of a proposed settlement 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.” Plaintiffs’ Memorandum, ECF No. 144-1 at PAGEID 12373 (quoting *In re Telectronics Pacing Sys., Inc.*, 137 F. Supp. 985, 1015 (S.D. Ohio 2001)). For the reasons discussed in Plaintiffs’ Memorandum and the supplemental reasons provided below, each factor weighs in favor of preliminary approval of the proposed Amended Settlement Agreement.

1. The Risk of Fraud or Collusion

The parties reached a global settlement through extensive, arms-length negotiations with the assistance of an experienced mediator. *See supra* at 4–5; *see also* Plaintiffs’ Memorandum, ECF No. 144-1 at PAGEID 12366. For this reason and the reasons discussed in Plaintiffs’ Memorandum, ECF No. 144-1 at PAGEID 12373, this factor continues to weigh in favor of preliminary settlement approval.

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

While all parties continue to firmly believe in the merits of their respective claims and defenses, the time and expense associated with continued litigation weigh in favor of a global settlement. *See* Plaintiffs’ Memorandum, ECF No. 144-1 at PAGEID 12373–74 (discussing the complexity and typical duration of ERISA litigation). A global resolution at this stage of the litigation will also save significant financial and judicial resources associated with an adverse summary judgment order, a bench trial, and any related appeals.

The expense and likely duration of this action is also affected by the FGA Defendants’ objections to the Bar Order provision of the Partial Settlement Agreement. Although Plaintiffs maintain that the FGA Defendants’ objections to the Partial Settlement Agreement lacked merit, the objections placed the Partial Settlement Agreement in jeopardy of termination. *See* Partial Settlement Agreement, ECF No. 144-3 at PAGEID 12416–17. In addition, the full litigation of the FGA Defendants’ objections would result in additional expenses and delayed the distribution of settlement funds to the Settlement Class.

Accordingly, consistent with the reasons discussed in Plaintiffs’ Memorandum, ECF No. 144-1 at PAGEID 12373–74, the uncertain length and expense of continued litigation strongly supports preliminary approval of the Amended Settlement Agreement.

3. The Amount of Discovery Completed

The reasons this factor weighs heavily in favor of preliminary approval are unchanged. *See* Plaintiffs' Memorandum, ECF No. 144-1 at PAGEID 12374–75.

4. The Likelihood of Success on the Merits

As discussed in Plaintiffs' Memorandum, ECF No. 144-1 at PAGEID 12375–76, the monetary relief obtained under the Partial Settlement Agreement aligns with settlements in class action cases that provide a full release of all claims. The Amended Settlement Agreement now *doubles* the monetary relief secured on behalf of the Settlement Class.

Moreover, even after reaching a partial settlement with Aon Hewitt, this case continues to face real and significant litigation risks. A recent appellate decision affirming summary judgment in favor of ERISA defendants underscore that recovery in a case such as this is not guaranteed. *See, e.g., Falberg v. Goldman Sachs Group, Inc.*, 2024 WL 619297 (2d Cir. Feb. 14, 2024). The FGA Defendants' pending Motion to Exclude Opinions of Plaintiffs' Expert Brian C. Becker, Ph.D (ECF No. 156) is also an example of the litigation risks discussed in Plaintiffs' Memorandum that are associated with calculating damages. *See* Plaintiffs' Memorandum, ECF No. 144-1 at PAGEID 12376 (noting that significant issues regarding proof of loss is an ongoing risk of litigation).

In light of the risks of litigation and the substantial monetary recovery secured under the proposed settlement agreement, the Amended Settlement Agreement is both fair and reasonable.

5. The Opinion of Class Counsel and Representatives

Class Counsel and the Class Representatives have concluded that the Amended Settlement Agreement is fair and reasonable. *Specht Decl.* ¶ 10. For this reason and the reasons discussed in Plaintiffs' Memorandum, ECF No. 144-1 at PAGEID 12377–78, this factor weighs in favor of preliminary approval.

6. The Public Interest in the Settlement

In addition to the reasons discussed in Plaintiffs' Memorandum, ECF No. 144-1 at PAGEID 12378, the Amended Settlement Agreement is in the public interest because it provides a global resolution of Plaintiffs' claims. Among other things, the Settlement Class will benefit from the certainty of substantial monetary relief without further delay. Thus, this factor continues to favor preliminary approval.

II. THE NOTICE PLAN IS REASONABLE AND THE AMENDED NOTICES SHOULD BE APPROVED

The proposed process for providing direct notice of the Amended Settlement Agreement to the Settlement Class via first class mail remains unchanged. *Compare* Amended Settlement Agreement ¶¶ 3.2, 3.3, *with* Partial Settlement Agreement ¶¶ 3.2, 3.3, Doc. No. 144-3 at PAGEID 12404–06. With the necessary updates to accurately reflect the terms of the Amended Settlement Agreement, *supra* at 7–8, the Amended Notice and the proposed method of distribution are reasonable. Plaintiffs' Memorandum, ECF No. 144-1 at PAGEID 12378–80.

III. THE COURT SHOULD ENTER AN APPROPRIATE BAR ORDER

As described in Plaintiffs' Memorandum, the entry of a bar order is necessary to facilitate settlement; without it, the Defendants could be subject to future claims for indemnification or contribution, eliminating their incentives to settle with Plaintiffs. ECF No. 144-1 at PAGEID 12380 (citing *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). Here, the entry of a mutually agreeable Bar Order between Aon Hewitt and the FGA Defendants enables the global resolution of Plaintiffs' claims and resolves the FGA Defendants objections to the prior version of the Bar Order.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court (1) preliminarily approve the Amended Settlement Agreement; (2) approve the proposed Notices attached to the Amended Settlement Agreement 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.

Dated: February 29, 2024

NICHOLS KASTER, PLLP

By: /s/ Brock J. Specht

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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 February 29, 2024.

/s/ Brock J. Specht
Brock J. Specht