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-KLL

Judge Karen L. Litkovitz

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

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INTRODUCTION

On August 1, 2024, this Court preliminarily approved the Parties' Settlement Agreement, which resolves Plaintiffs' claims against Defendants under the Employee Retirement Income Security Act ("ERISA") relating to the FirstGroup America, Inc. Retirement Savings Plan (the "Plan"). The Court found on a preliminary basis that the Settlement Agreement "is fair, reasonable, and adequate" and ordered that notice of the Settlement be sent to members of the Settlement Class. *ECF No. 179, Order Prelim. Approving Am. Class Action Settlement ("Prelim. Approval Order") at ¶¶ 1, 4.*

This Court should now grant final approval of the Settlement. As discussed below, all of the criteria for final approval are satisfied, and events following this Court's decision to preliminarily confirm the Settlement confirm that the Court's earlier analysis was correct. First, as required by the U.S. Department of Labor regulations, an Independent Fiduciary reviewed the Settlement and confirmed that "[t]he Settlement terms, including the scope of the release of claims, the amount of cash received by the Plan and the amount of any attorneys' fee award or any other sums to be paid from the recovery, are reasonable in light of the Plan's likelihood of full recovery, the risks and costs of litigation, and the value of claims forgone." *Declaration of Brock J. Specht in Support of Plaintiffs' Motion for Final Approval of Class Action Settlement ("Fourth Specht Decl.")* ¶ *4, Ex. 1.* Second, the class Notice was sent to more than 29,000 Settlement Class Members, and none of the Settlement Class Members objected to the Settlement (and the deadline to file any objections has passed). *Id.* at ¶ 6; *Declaration of Jeff Mitchell in Support of Plaintiffs' Motion for Final Approval of Class Action Settlement ("Second Mitchell Decl.")* ¶¶ *8-12, 15*. The fact that the proposed Settlement enjoys the unanimous support of the Class Members strongly weighs in favor of approving the proposed settlement. *In re Broadwing, Inc. ERISA Litig.*, 252 F.R.D. 369, 376 (S.D. Ohio 2006). Accordingly, Plaintiffs respectfully request that the Court grant

their motion for final approval of the Settlement.

BACKGROUND

I. PROCEDURAL HISTORY

A. Pleadings and Court Proceedings

Plaintiffs filed this action on May 11, 2018, asserting claims against Defendants under ERISA. *ECF No. 1, Compl.* 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, Am. Compl.* On September 7, 2018, FirstGroup and the Committee moved to dismiss the claims asserted against them. *ECF No. 37, FGA Defs.' Mot. to Dismiss*. The Court denied the motion to dismiss on March 18, 2021. *ECF No. 59, Order on Defs.' Mots. to Dismiss.*

Thereafter, on September 30, 2021, Plaintiffs filed their Second Amended Complaint. *ECF No. 71, Second Am. Compl.* 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.* at ¶¶ 90-116. Defendants filed answers to the Second Amended Complaint on October 14, 2021. *ECF No. 72, FGA Defs' Answer to Second Am. Compl.*; *ECF No. 73, Def. Aon's Answer to Second Am. Compl.*

B. Discovery, Class Certification, and Settlement

The Parties have engaged in extensive fact and expert discovery. Defendants produced approximately 350,000 pages of documents, and the Class Representatives produced over 7,000 pages of documents. *ECF No. 184, Declaration of Brock J. Specht in Support of Pls.' Mot. for Attorneys' Fees & Costs, Admin. Expenses, & Class Reps.' Comp. Awards ("Third Specht Decl.") ¶ 11.* Plaintiffs also subpoenaed five non-parties and reviewed documents produced by the non-

parties. *Id.* Class Counsel took 14 fact witness depositions and defended the depositions of the three named Plaintiffs. *Id.* Class Counsel engaged three experts and assisted them in drafting their expert reports and either defended or deposed a total of seven expert witnesses. *Id.* Class Counsel also responded to the FGA Defendants'[1] motion for summary judgment and *Daubert* motion. *Id.*

On February 16, 2022, Plaintiffs moved for Rule 23 class certification. *ECF No. 79, Pls.' Mot for Class Certification.* Thereafter, the Parties stipulated to class certification, and the Court entered an order certifying the Rule 23 class. *ECF No. 83, Stipulation & Proposed Order Regarding Class Certification*; *92, Order Certifying Class.* From approximately August 2022 until October 2022, Aon Hewitt Investment Consulting, Inc.'s ("Aon") counsel and Class Counsel engaged in arm's-length negotiations, leading to a comprehensive settlement agreement. *ECF No. 144-2, Decl. of Brock J. Specht in Support of Pls.' Mot. for Prelim. Approval ("First Specht Decl.")* ¶¶ 16-17. Class Counsel drafted a settlement agreement and exhibits thereto (including the settlement notices, former participant rollover form, and proposed preliminary approval order) to resolve the claims against Aon. *ECF No. 144-3, Class Settlement Agreement.* Class Counsel also prepared Plaintiff's Preliminary Approval Motion papers and responded to FGA Defendants' objection to the proposed settlement. *ECF No. 144-144-6, Pls.' Mot. for Prelim. Approval & Supporting Docs.*; *ECF No. 154, Pls.' Reply Memo. in Support of Mot. Prelim. Approval*; *ECF No. 175, Supplemental Declaration of Brack J. Specht in Support of Pls.' Mot. Prelim. Approval of Am. Class Action Settlement ("Second Specht Decl.") ¶¶ 2-3.* In April 2023, Class Counsel participated in a mediation with the FGA Defendants before David Geronemus and prepared a lengthy mediation statement in advance. *Second Specht Decl.* ¶ *4*. Despite the good-faith efforts

[1] "FGA Defendants" means FirstGroup America, Inc. and FirstGroup America, Inc. Employee Benefits Committee.

of the parties, the mediation was unsuccessful. *Id.* The parties later resumed arm's-length settlement negotiations and achieved a global settlement-in-principle on February 8, 2024. *Id.* at ¶ 6; *Third Specht Decl. ¶ 11*. Class Counsel drafted the Settlement (including the settlement notices, former participant rollover form, and the proposed preliminary approval order) to reflect the global settlement. *Third Specht Decl. ¶ 11.*

C. Settlement Terms

Under the Settlement Agreement, Defendants have agreed to contribute a Gross Settlement Amount of $9 million to a Qualified Settlement Fund. *ECF No. 175-1, Am. Class Action Settlement Agreement ("Settlement") ¶ 1.35.* After accounting for Attorneys' Fees and Costs, Service Awards, a reserve, and all Administrative Expenses, the remaining sum ("Net Settlement Amount") will be distributed to eligible Settlement Class Members. *Id.* at ¶¶ 1.38, 4.8.

The Settlement and Plan of Allocation call for a pro rata distribution of the Net Settlement Amount to Settlement Class Members based on Settlement Class Members' average quarterly balances in the Aon Hewitt Funds during the Class Period. *Id.* at ¶ 5.1. 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 the Former Participant Class Member's pro rata share shall be zero for all purposes, and their share shall be reallocated amongst the other Settlement Class Members on a pro rata basis. *Id.*

Current Participants' accounts in the Plan will be automatically credited with their share of the Qualified Settlement Fund. *Id.* at ¶ 5.2 (b)-(c). Former Participant Class Members who do not have an account in the Plan will have the opportunity to elect a tax-qualified rollover of their payment or receive their settlement payment directly by check. *Id.* at ¶ 5.3, Ex. 3.

In exchange for this relief, the Settlement Class will release Defendants and the "Released Parties" as defined in ¶ 1.50 of the Settlement from all claims with respect to the Plan arising on

or before the date of the preliminary approval "that were asserted in the Action or could have been asserted in the Action[,]" "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 Amended Settlement Agreement." *Id.* ¶ 1.42. Certain claims, including those to enforce the Settlement, were excluded from the release. *Id.*

II. Preliminary Approval of Settlement

Plaintiffs filed a motion seeking preliminary approval of the partial settlement with Aon on December 12, 2022. *ECF No. 144, Pls.' Mot. Prelim. for Approval Partial Class Action Settlement with Aon*. On February 29, 2024, Plaintiffs filed a supplemental memorandum of law requesting that the Court approve the global settlement that the parties reached after Plaintiffs filed the motion seeking preliminary approval of the partial settlement with Aon. *ECF No. 174, Supplemental Memo. in Support of Pls.' Mot. for Prelim. Approval of Class Action Settlement*. The Court granted the motion and preliminarily approved the global settlement on August 1, 2024. *ECF No. 179, Prelim. Approval Order*. 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 Settlement Class. *Id.* at ¶¶ 1-4. In addition, the Court appointed Analytics Consulting LLC ("Analytics") to serve as the Settlement Administrator, distribute the Settlement Notices, and carry out the other administrative duties specified by the Settlement Agreement. *Id.* at ¶¶ 4-5, 7.

III. Class Notice and Reaction to Settlement

Pursuant to the Court's Order preliminarily approving the Settlement, Analytics distributed the approved Settlement Notices to each of the Settlement Class Members identified by the Plan's

recordkeeper. *See Second Mitchell Decl., ¶¶ 6-12.*[2] In total, Analytics mailed Notices to 29,259 Settlement Class Members by first-class mail, postage prepaid. *Id.* at ¶ 8.

Different Notices were mailed to Participant Class Members and Former Participant Class Members. *Id.* at ¶ 8, Ex. 1-2. The Notice provided to Participant Class Members informed them of their current Plan account status and that settlement benefits would be automatically distributed to their Plan accounts after the final approval of the Settlement. *Id.* at ¶ 8, Ex. 1. The Notice provided to Former Participant Class Members informed them of their former Plan account status and that their settlement benefits would be distributed to them in the form of a mailed payment unless they chose to complete and submit a Former Participant Rollover Form allowing them to have the benefit amount rolled into a qualified retirement account. *Id.* at ¶ 8, Ex. 2. The Former Participant Rollover Form was enclosed in the Former Participant Notice mailings. *Id.* at ¶ 9, Ex. 3. In the event that any Notices were returned, Analytics remailed the Notice to any forwarding address that was provided and utilized a skip trace in an attempt to ascertain a valid address for the Settlement Class Member in the absence of a forwarding address. *Id.* at ¶¶ 10-12. As a result, the notice program was very effective. Out of the 29,259 Notices of Settlement, only 1,040, or approximately 3.55% of the Notices, were ultimately undeliverable despite Analytics' efforts to verify and update address information. *Id.* ¶ 12.

In the event that any Settlement Class Members desired further information, Analytics established a Settlement Website at www.FirstGroupERISA.com which included, among other things, various Settlement documents filed with the Court, key dates and deadlines, answers to

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[2] Defendants also caused Analytics to send the required CAFA notices to federal and state authorities on March 8, 2024. *See ECF No. 185-1, Declaration of Jeff Mitchell* ¶ *7 ("First Mitchell Decl.").*

frequently asked questions about the Settlement, and information on how to contact Class Counsel and Analytics. *Id.* at ¶ 13. In addition, Analytics created and maintained a toll-free telephone support line (1-877-336-8922) as a resource for Settlement Class Members seeking information about the Settlement. *Id.* at ¶ 14. This telephone number was referenced in the Notices, and also appears on the Settlement Website. *Id.*

The deadline to file objections to the Settlement was November 21, 2024. *ECF No. 179, Prelim. Approval Order ¶¶ 8-9*. That deadline has now passed, and there have been no objections to the Settlement. *See Fourth Specht Decl. ¶ 6*; *Second Mitchell Decl. ¶ 15*.

IV. REVIEW AND APPROVAL BY INDEPENDENT FIDUCIARY

Pursuant to section 2.2 of the Settlement and applicable guidance from the Department of Labor,[3] the Settlement was reviewed on behalf of the Plan by an Independent Fiduciary (Fiduciary Counselors Inc.) following the Court's preliminary approval order. *See Fourth Specht Decl. ¶¶ 3-4, Ex. 1*. After reviewing the Settlement and other case documents and interviewing counsel for each of the Parties, the Independent Fiduciary concluded that: (1) "The Settlement terms, including the scope of the release of claims, the amount of cash received by the Plan and the amount of any attorneys' fee award or any other sums to be paid from the recovery, are reasonable in light of the Plan's likelihood of full recovery, the risks and costs of litigation, and the value of claims forgone[;]" (2) "The terms and conditions of the transaction are no less favorable to the Plan than comparable arm's-length terms and conditions that would have been agreed to by unrelated parties under similar circumstances[;]" and (3) "The transaction is not part of an agreement, arrangement or understanding designed to benefit a party in interest." *Id.* at ¶¶ 3-4, Ex. 1 at 1-2. Based on its

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[3] *See* Prohibited Transaction Exemption 2003-39, 68 Fed. Reg. 75632, as amended, 75 Fed. Reg. 33830.

determinations about the Settlement, the Independent Fiduciary authorized the Settlement in accordance with PTE 2003-39. *Id.* at ¶ 4, Ex. 1 at 9-12 (describing the determinations made pursuant to PTE 2003-39 and authorizing the Settlement in accordance with PTE 2003-39).

ARGUMENT

I. LEGAL STANDARD

Rule 23(e) of the Federal Rules of Civil Procedure requires judicial approval of any settlement agreement that will bind absent class members. Fed. R. Civ. P. 23(e)(2). In deciding whether to approve the proposed settlement, the Court must consider whether the settlement is "fair, reasonable, and adequate under Rule 23(e) of the Federal Rules of Civil Procedure." *Hawkins v. Cintas Corp.*, No. 1:19-CV-1062, 2024 WL 3982210, at *3 (S.D. Ohio Aug. 27, 2024).

Federal Rule of Civil Procedure 23(e)(2) identifies four factors considered in making such determination: (1) adequacy of representation, (2) existence of arm's-length negotiations, (3) adequacy of relief, and (4) equitableness of treatment of class members. Fed. R. Civ. P. 23(e)(2). "Under a prior version of the Rule, the Sixth Circuit identified additional considerations that guide the inquiry into whether a class settlement is fair, reasonable, and adequate." *Plagens v. Deckard*, No. 1:20-CV-2744, 2024 WL 2080662, at *3 (N.D. Ohio May 9, 2024) (citing *Whitlock v. FSL Mgmt., LLC*, 843 F.3d 1084, 1093 (6th Cir. 2016)). These include:

> (1) the risk of fraud or collusion; (2) the complexity, expense and likely duration of the litigation; (3) the amount of discovery engaged in by the parties; (4) the likelihood of success on the merits; (5) the opinions of class counsel and class representatives; (6) the reaction of absent class members; and (7) the public interest.

Int'l Union, United Auto., Aerospace, & Agr. Implement Workers of Am. ("UAW") v. Gen. Motors Corp., 497 F.3d 615, 631 (6th Cir. 2007). "In 2018, an amendment to the Rule emphasized that the central inquiry remains whether the settlement is fair, reasonable, and adequate." *Plagens*, 2024 WL 2080662, at *4.

As discussed below, both the Rule 23(e)(2) factors and the *UAW* factors overwhelmingly favor approval of the Settlement in this case. Accordingly, Plaintiffs respectfully request that the Court grant final approval of the Settlement.

II. THE SETTLEMENT IS FAIR, REASONABLE, AND ADEQUATE

A. The Recovery Provided by the Settlement Is Fair, Reasonable and Equitable

As the Independent Fiduciary noted in its Report, "[t]he Settlement terms, including the scope of the release of claims, the amount of cash received by the Plan and the amount of any attorneys' fee award or any other sums to be paid from the recovery, are reasonable in light of the Plan's likelihood of full recovery, the risks and costs of litigation, and the value of claims forgone." *Fourth Specht Decl. Ex. 1 at 1.* The $9 million recovery is substantial not only in the aggregate, but also represents a significant portion (14% to 22%) of the total claimed damages. *Id.* at Ex. 1, at 11; *Third Specht Decl. ¶ 27*. This degree of recovery is in line with other class settlements and confers a valuable monetary benefit to the Class. *See Karpik v. Huntington Bancshares Inc.*, No. 2:17-CV-1153, 2021 WL 757123, at *8 (S.D. Ohio Feb. 18, 2021) (collecting cases where settlements representing between 18% and 25% of estimated damages were approved); *see, e.g., High St. Rehab., LLC v. Am. Specialty Health Inc.*, No. 2:12-CV-07243-NIQA, 2019 WL 4140784, at *12, 15 (E.D. Pa. Aug. 29, 2019) (granting final approval of the settlement where, "after deduction of the requested attorneys' fees and expenses and notice and administrative expenses, the $11.75 million fund is large enough to provide Settlement Class Members with checks that[] . . . would represent a recovery of 11% of the amount that Settlement Class Members would have been paid if their claims had not been denied in whole or in part . . . ."); *Mehling v. New York Life Ins. Co.*, 248 F.R.D. 455, 462 (E.D. Pa. 2008) (concluding that the monetary recovery in an ERISA class action settlement, which "represent[ed] approximately 20% of the 'best possible' recovery," was comparable to other approved class settlements); *Griffin v. Flagstar Bancorp, Inc.*, No. 2:10-

CV-10610, 2013 WL 6511860, at *8 (E.D. Mich. Dec. 12, 2013) (recognizing that monetary settlement is particularly valuable in ERISA suits, which are particularly uncertain given the complexity of this area of litigation).

Finally, the recovery will be distributed equitably to Settlement Class Members as it will be disbursed on a pro rata basis based on Settlement Class Members' average quarterly balances in the Aon Hewitt Funds during the Class Period. *See supra* at 4.

B. Continued Litigation Would Have Entailed Significant Risk

If Plaintiffs had continued to litigate the case, they would have faced significant litigation risk. *See Karpik*, 2021 WL 757123, at *5-6. First, there is a risk that Defendants could have prevailed if the litigation continued. *See Griffin*, 2013 WL 6511860, at *8 (recognizing "the uncertainties of the Plaintiffs' chances of ultimately prevailing on the issue of liability in this very uncertain area of ERISA"). In recent breach of fiduciary duty cases involving defined contribution plans, the defendants prevailed. *See, e.g., Lauderdale v. NFP Ret., Inc.,* No. 821CV00301JVSKES, 2024 WL 751005 (C.D. Cal. Feb. 23, 2024); *Wildman v. Am. Century Servs., LLC*, 362 F. Supp. 3d 685 (W.D. Mo. 2019). And "[e]ven if Plaintiffs established a fiduciary breach, it is 'difficult' to measure damages in cases alleging imprudent or otherwise improper investments." *Karpik*, 2021 WL 757123, at *5 (citing Restatement (Third) of Trusts § 100 cmt. b(1)).

"Because an adverse ruling on either liability or damages would significantly impact the Class, the likelihood of success in this case was materially uncertain." *Id.* at *6. While Plaintiffs believe that their case was strong, "the merits of the Class's case are not so overwhelming that continued litigation is a vastly better option than settlement." *In re: Whirlpool Corp. Front-loading Washer Prod. Liab. Litig.*, No. 1:08-WP-65000, 2016 WL 5338012, at *11 (N.D. Ohio Sept. 23, 2016). Thus, the risks of continued litigation further support final approval of the Settlement.

C. ERISA Class Cases Are Complex, Expensive, and Often Lengthy

Regardless of the eventual outcome, continuing the litigation would have resulted in complex and costly additional proceedings. These considerations also support approval of the Settlement.

It is well-known that "ERISA is a complex field that involves difficult and novel legal theories and often leads to lengthy litigation." *Karpik*, 2021 WL 757123, at *4 (quoting *Krueger v. Ameriprise Fin., Inc.*, No. 11-CV-02781 SRN/JSM, 2015 WL 4246879, at *1 (D. Minn. July 13, 2015)); *see also Griffin*, 2013 WL 6511860, at *8 ("The complexity of this ERISA litigation cannot be questioned . . . ."). In fact, it is not unusual for ERISA 401(k) cases to extend for a decade or longer before final resolution. *See, e.g., Tussey v. ABB, Inc.*, 850 F.3d 951, 955, 962 (8th Cir. 2017) (*Tussey II*) (vacating and remanding the case for further proceedings more than ten years after the suit was filed in 2006); *Tibble v. Edison Int'l*, No. CV075359SVWAGRX, 2017 WL 3523737, at *1, 15 (C.D. Cal. Aug. 16, 2017) (outlining remaining issues ten years after suit was filed on August 16, 2007).

This case already has been pending for over six years. Absent a settlement, Plaintiffs would have needed to pursue litigation through trial and potentially a lengthy appeals process. *See, e.g., Tussey v. ABB, Inc.*, 746 F.3d 327, 332, 341 (8th Cir. 2014) (*Tussey I)* (reversing the judgment in part, vacating the judgment in part, and remanding for further proceedings more than four years after the 2010 bench trial); *Tussey II*, 850 F.3d at 962 (vacating the judgment and remanding for further proceedings more than seven years after the 2010 bench trial).

D. The Settlement Is the Product of Arm's-Length Negotiations Conducted After Adequate Discovery and Adversarial Motion Practice

"Absent evidence to the contrary, courts presume the absence of fraud or collusion[]" in this Circuit. *Rudi v. Wexner*, No. 2:20-CV-3068, 2022 WL 1682297, at *3 (S.D. Ohio May 16,

2022) (quoting *In re Wendy's Co. S'holder Derivative Action*, No. 1:16-CV-1153, 2020 WL 13169460, at *7 (S.D. Ohio Jan. 24, 2020), *aff'd*, 44 F.4th 527 (6th Cir. 2022); *see IUE-CWA v. Gen. Motors Corp.*, 238 F.R.D. 583, 598 (E.D. Mich. 2006) ("Courts presume the absence of fraud or collusion unless there is evidence to the contrary.") Accordingly, "[c]ourts consistently approve class action settlements reached through arm[']s-length negotiations after meaningful discovery." *Karpik*, 2021 WL 757123, at *4. That is precisely the situation presented here. At all times, the parties negotiated at arm's length. *See First Specht Decl. ¶ 16*; *Second Specht Decl. ¶ 6.*

Indicia of good faith include that the parties negotiated at arm's length, that negotiations were not rushed once they started, and that negotiations occurred after the case was well advanced. *See Ball v. Kasich*, 2020 WL 1969289, at *6 (S.D. Ohio Apr. 24, 2020). All of these indicia are present here. Again, the parties negotiated at arm's length at all times. *See First Specht Decl., ¶¶ 9-16*: *Second Specht Decl. ¶ 4-6*: *Third Specht Decl.* ¶ *11.* The parties' negotiations were not rushed, but instead took place over an extended period. *First Specht Decl.* ¶ *11*; *Second Specht Decl.* ¶¶ 4-6. The parties also engaged in extensive discovery, including Defendants' production of approximately 350,000 pages of documents, Plaintiffs' production of over 7,000 pages of documents, non-party discovery, and the depositions of numerous fact witnesses and expert witnesses. *Third Specht Decl. ¶ 11.* This gave the parties a clear view of the facts and law, and the strengths and weaknesses of their case. Based on the record that was developed and the stage of the proceedings, there is no question that the parties had sufficient information to evaluate settlement.

E. Class Counsel, Settlement Class Members, and the Independent Fiduciary Support the Settlement

The positive response that the Settlement has received from numerous stakeholders, including Class Counsel, Settlement Class Members, and the Independent Fiduciary further

supports approval the Settlement.

"It is well settled that, in approving a class action settlement, the court 'should defer to the judgment of experienced counsel who has competently evaluated the strength of his proofs.'" *In re Broadwing*, 252 F.R.D. at 375 (quoting *Williams v. Vukovich*, 720 F.2d 909, 922-23 (6th Cir. 1983)). Here, "Class Counsel are skilled in class actions and ERISA litigation, and their recommendation that the Court should approve the Settlement is entitled to some deference." *Karpik*, 2021 WL 757123, at *6.

The reaction of the Settlement Class Members also has been positive. As noted above, there have been no objections to the Settlement from the more than 28,000 Settlement Class Members to whom Settlement Notice was successfully delivered. *See Second Mitchell Decl. ¶¶ 12, 15*; *Fourth Specht Decl. ¶ 6*. The lack of objections "indicates the Class supports the Settlement." *In re Broadwing*, 252 F.R.D. at 376.

Further, after completing the review required by section 2.2 of the Settlement Agreement and applicable guidance from the Department of Labor (*see supra* at 7), the Independent Fiduciary, acting on behalf of the Plan, approved and authorized the Settlement, concluding that "[t]he Settlement terms, including the scope of the release of claims, the amount of cash received by the Plan and the amount of any attorneys' fee award or any other sums to be paid from the recovery, are reasonable in light of the Plan's likelihood of full recovery, the risks and costs of litigation, and the value of claims forgone." *See Fourth Specht Decl. Ex. 1 at 1.* This additionally supports approval of the Settlement.

F. The Settlement Serves the Public Interest

Finally, settlement of a complex class action such as this serves the broader public interest. This is particularly true in the ERISA context, where "[p]rotecting retirement funds of workers is of genuine public interest" and suits such as this "promote private enforcement of and compliance

with important areas of federal law." *In re Broadwing*, 252 F.R.D. at 381.

Consistent with this public interest rationale, the Settlement "confers immediate benefits on the Class Members, avoids the risks and expense of further litigation, and conserves judicial resources." *Karpik*, 2021 WL 757123, at *6. In the absence of a class action such as this, many Settlement Class Members would be unable to bring individual claims due to the complexity and expense of ERISA actions. Indeed, "[i]n filing this case, Plaintiff[s] and Class Counsel 'took on a difficult case that an individual Class Member would almost certainly never file on their own' and 'obtained recovery on a class-wide basis for an alleged injury that, but for this litigation, would almost certainly have gone uncompensated.'" *Barnes v. Winking Lizard, Inc.*, No. 1:18CV952, 2019 WL 1614822, at *4 (N.D. Ohio Mar. 26, 2019) (quoting *Lonardo v. Travelers Indem. Co.*, 706 F. Supp. 2d 766, 782 (N.D. Ohio 2010), *on reconsideration in part* (July 21, 2010)). This Settlement ensures that the Settlement Class Members receive relief for the alleged misconduct, which further promotes approval of the Settlement.

III. The Settlement Notice Was Reasonable

The Settlement Notice program also was reasonable and satisfied the requirements of Rule 23 and Due Process. 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 sent the Court-approved Settlement Notices to each of the Class Members via first-class mail, postage prepaid. *See supra* at 5-6. This type of notice is presumptively reasonable. *See Phillips Petroleum Co. v. Shutts,* 472 U.S. 797, 812 (1985). Further, the record reflects that approximately 96.45% of Settlement Notices were delivered. *See Second Mitchell Decl. ¶ 12*; *Fourth Specht Decl. ¶ 6*. This confirms the effectiveness of the notice program. *See Wright v. Premier Courier, Inc.*, No. 2:16-CV-420, 2018 WL 3966253, at *5, 8 (S.D.

Ohio Aug. 17, 2018) (approving settlement where 653 class members and potential opt-in plaintiffs were mailed notice and 52 of the 75 returned notices were resent, meaning approximately 3.52% of the notices were undeliverable); *Smith v. Grange Mut. Cas. Co.*, No. 208CV00128DLBJGW, 2013 WL 12380460, at *1 (E.D. Ky. Nov. 19, 2013) ("The percentage of notices that were returned without forwarding addresses (approximately 12%) was reasonable.").

The content of the Settlement Notice also was reasonable. The Notice included, among other things: (1) the nature of the claims; (2) the scope of the Settlement Class; (3) the terms of the Settlement; (4) Settlement Class Members' right to object to the Settlement and the deadline for doing so; (5) the Class release; (6) the identity of Class Counsel and the amount of compensation they may seek in connection with the Settlement; (7) the amount of compensation that may be sought for each Class Representative; (8) the date, time, and location of the final approval hearing; and (9) Settlement Class Members' right to appear at the final approval hearing and object. *See Second Mitchell Decl. ¶ 8, Ex. 1-2.* These Notices were previously approved by the Court, *see ECF No. 179, Prelim. Approval Order ¶ 3*, and "'fairly apprise[d] 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 serves their interests." *Graybill v. Petta Enterprises, LLC*, No. 2:17-CV-418, 2018 WL 4573289, at *3 (S.D. Ohio Sept. 25, 2018) (quoting *UAW,* 497 F.3d at 630 (citation omitted)). This is more than sufficient to meet the Rule 23 standard.

Notably, no Settlement Class Member has claimed that the Notices were deficient, and to the extent they had any questions, they could review the Settlement Website, call the toll-free telephone line, or contact the Settlement Administrator or Class Counsel.

IV. THE COURT SHOULD REAFFIRM ITS CERTIFICATION OF THE SETTLEMENT CLASS

In its Order Preliminarily Approving the Class Action Settlement, the Court preliminarily certified 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.

ECF No. 179, Prelim. Approval Order ¶ 2; *ECF No. 92, Order Certifying Class at 4.* This preliminary certification was consistent with the Court's prior Order Certifying Class, in which the Court concluded that: (1) the class is numerous; (2) there are common issues respecting the Class Claims;[4] (3) Plaintiffs are typical of other class members with respect to the Class Claims; (4) Plaintiffs are adequate to represent the class; (5) Class Counsel is competent and experienced; and (6) class certification is appropriate under Fed. R. Civ. P. 23(b)(1)(B) because individual adjudications with respect to common issues would be dispositive of the interests of other persons not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests. *ECF No. 92, Order Certifying Class at 1-3*; *see also Dudenhoeffer v. Fifth Third Bancorp*, 2016 WL 9343955, at *2 (S.D. Ohio July 11, 2016) (finding ERISA 401(k) case a "paradigmatic example" of a 23(b)(1) class). Nothing has changed since the Court preliminarily certified the class for preliminary approval. Accordingly, the Court should reaffirm its approval of Settlement Class.

<u>CONCLUSION</u>

For the reasons set forth above, Plaintiffs respectfully request that the Court grant final approval of the Settlement and enter the accompanying proposed order.

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[4] The definition of the term, "Class Claims" is as set forth in the Order Certifying Class. *ECF No. 92, Order Certifying Class at 2 n.1.*

Dated: November 27, 2024

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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 November 27, 2024.

/s/ Brock J. Specht
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