UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

IN RE NORTEL NETWORKS CORP. "ERISA" LITIGATION	))))))))	**MDL Docket No. 03:03-MD-1537** **Judge John T. Nixon** **Magistrate Judge John S. Bryant** **This Document Relates to: All Cases**

MEMORANDUM IN SUPPORT OF NAMED PLAINTIFFS' MOTION TO PRELIMINARILY APPROVE SETTLEMENT, PRELIMINARILY CERTIFY A SETTLEMENT CLASS, APPROVE CLASS NOTICE, AND SET A FAIRNESS HEARING

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I. INTRODUCTION

Named Plaintiffs James Kauffman, Michael Zafarano, and Carol Felts (hereinafter "Named Plaintiffs"), on behalf of themselves and the Class of participants and beneficiaries of the Nortel Long-Term Investment Plan (as more specifically defined herein), hereby move the Court for an Order granting preliminary approval of the parties' Stipulation of Settlement, conditionally certifying a Settlement Class under Fed. R. Civ. P. 23(b)(1) and (2), approving the form and manner of notice to Class Members, and setting a final Fairness Hearing.

The Stipulation of Settlement reached in this action (attached to motion as Exhibit 4) provides for a Gross Settlement Fund totaling $21,500,000 for the benefit of the Settlement Class. The Settlement was reached after years of intensive motion practice, discovery, and arm's length negotiations. The negotiations included several formal mediation sessions with the Honorable Daniel Weinstein, a former Superior Court Judge of San Francisco, California, interspersed with ongoing informal discussions.

The Settlement provides significant benefits to the Settlement Class, while removing the risk and delay associated with further litigation involving corporations that are now partially or completely insolvent. The results achieved through this Settlement are an excellent result for the Settlement Class, and the Named Plaintiffs are pleased to present it to the Court for preliminary approval.

The Named Plaintiffs respectfully ask that the Court enter the Preliminary Settlement Approval Order submitted herewith, *see* Stip. Settle, Ex. C. In doing so, the Court (1) preliminary approves the Settlement as fair, adequate and reasonable; (2) conditionally certifies the proposed Settlement Class; (3) sets a Fairness Hearing, along with any deadlines for Lead Counsel to file and serve their motion for final approval of the proposed Settlement and their motion for attorneys' fees and expenses and Case Contribution Compensation for the Named Plaintiffs; and (4) directs notice to the Class Members.

II. TERMS OF THE SETTLEMENT

The following are the principle terms of the Stipulation of Settlement:

A. Settling Defendants. The Settling Defendants are Nortel Networks Corporation ("NNC"), Nortel Networks Limited ("NNL") and Nortel Networks Inc. ("NNI" and together with NNC and NNL, "Nortel"), and James J. Blanchard, John Edward Cleghorn, L. Yves Fortier, Robert Alexander Ingram, John Andrew Roth, Guylaine Saucier, Sherwood Hubbard Smith, Jr., Lynton Ronald Wilson, Dr. Manfred Bischoff, Robert Ellis Brown, John P. Manley, Richard David McCormick, William Arthur Owens, Harry Jonathan Pearce, Katharine B. Stevenson, Nicholas DeRoma, William J. Donovan, John M. Doolittle, Mary Cross, and Frank A. Dunn. Stip. Settle. ¶ 1.35.

B. Settlement Amount. The Settlement Amount is $21,500,000 in cash, to be paid from available insurance policies. *Id.* ¶¶ 1.19, 1.38.

C. Settlement Class. The Stipulation of Settlement contemplates that the Court will certify the following Settlement Class under Fed. R. Civ. P. 23(b)(1) and (2):

> All persons who were participants and beneficiaries in the Nortel Long-Term Investment Plan (the "Plan") who held Nortel stock in their 401(k) individual accounts at any time from March 7, 2000 through January 1, 2008; *provided*, however, that the Class shall not include (i) the Settling Defendants; (ii) members of the immediate families of each of the Settling Defendants; and (iii) the legal representatives, heirs, predecessors, successors, or assigns of any such excluded person or entity.

Id. ¶¶ 1.6, 5.2.

D. Released Claims. As part of the Settlement, all parties to the litigation will release each other from all claims of liability. *Id.* ¶ 7.1. Released Claims are all claims, counterclaims, rights, causes of action or liabilities of every nature and description, whether known or unknown, whether arising under federal, state, common or foreign law, that were or could have been asserted in the Nortel ERISA Litigation, or that would be barred by *res judicata* or *collateral estoppel* if the claims asserted in the Nortel ERISA Litigation had been fully litigated on the merits to a final judgment in favor of the party against whom such claims were brought. *Id.* ¶ 1.32.

Released Claims do not include (i) all claims, rights or causes of action or liabilities whatsoever related to the enforcement of the Settlement, including, without limitation, any of the terms of this Stipulation or orders or judgments issued by the courts in connection with the Settlement; (ii) any ERISA Section 502(a)(1)(B) claim for individual vested benefits brought by an individual Plan participant or beneficiary where such claims are unrelated to any claim, matter or cause of action that has been asserted in the Nortel ERISA Action or that could have been asserted in the Nortel ERISA Action arising out of, based upon, or in any way relating to the allegations, transactions, facts, matters or occurrences, representations or omissions involved, set forth, or referred to in the Nortel ERISA Action; or (iii) any and all claims, rights or causes of action or liabilities expressly retained pursuant to the Chubb Stipulation, an agreement between the Nortel entities and an insurer. *Id.*

E. Plan of Allocation. The Plan of Allocation is set forth in paragraph 8 of the Stipulation of Settlement. To highlight portions of the Plan of Allocation, the loss of each Class Member may be calculated based on information on the Plan of each Class Member by use of the following formula: **Loss=(A+B)-C-D.** "A" is the dollar value of interest of the Class Member in Nortel Stock on March 7, 2000 or such later date as the Class Member entered the Class. "B" is the dollar value of any additions of Nortel Stock by the Class Member between March 7, 2008 and January 1, 2008. "C" is the dollar value of any reductions or sales of Nortel Stock by the Class Member between March 7, 2000 and January 1, 2008. "D" is the dollar value of the interest of the Class Member in Nortel Stock on January 1, 2008. In accordance with the Stipulation of Settlement, an Individual Claim Amount that is less that $20.00 is *De Minimis* and that Class Member shall not receive a distribution from the Net Settlement Fund.

F. Notice. With the Court's approval, Lead Counsel will provide two kinds of notice to Class Members. The parties have agreed to the contents of both a summary Publication Notice and a full-length Notice for mailing. *See id.* ¶ 5.2, Ex. C-1, C-2. These documents contain information on the terms of the Settlement, Lead Counsel's intention to request attorney's fees and expenses and Case Contribution Compensation for the Named Plaintiffs, ways to obtain further details, the date and location of the Fairness Hearing (to be set by the Court), and the procedure for making objections.

Within fifteen (15) days of entry of the Preliminary Settlement Approval Order, unless otherwise agreed by the parties, Nortel will facilitate the provision to the Settlement Administrator of the name, last known address and social security number of each Class Member. *Id.* ¶ 3.10. The proposed Preliminary Settlement Approval Order requires Lead Counsel to have the Publication Notice displayed in two different publications and on a website at least forty-five (45) days before the Fairness Hearing. *Id.*, Ex. C ¶ 7(b)-(c). It also requires Lead Counsel to have the Notice mailed to Class Members who can be identified and located by reasonable effort at least forty-five (45) days before the Fairness Hearing. *Id.*, Ex. C ¶ 7(a).

G. Attorney's Fees and Expenses.

Counsel for the Named Plaintiffs have litigated this action on a contingent basis with no payment for their time or out-of-pocket expenses to date. The Stipulation of Settlement provides that Lead Counsel will apply for an award of attorneys' fees and expenses payable from the Gross Settlement Fund. *Id*. ¶ 6.1. The agreement itself does not place any limit on the amounts awarded. However, Lead Counsel intend to seek attorney's fees of no more than one-third (1/3) of the Gross Settlement Fund, or $7,166,667, plus reimbursement of expenses. The Settling Defendants will not take any position on the request for attorney's fees and expenses. *Id*. ¶ 6.2.

H. Named Plaintiffs' Case Contribution Compensation.

The Stipulation of Settlement also provides for Case Contribution Compensation to the Named Plaintiffs for their service in bringing this action and representing the Class Members. Lead Counsel may request up to $10,000 for each of the three Named Plaintiffs. *Id*. ¶ 6.4. Lead Counsel may also request that Named Plaintiff Carol Felts receive an additional $10,852, which equals the amount of severance compensation that she turned down in order to serve as a Named Plaintiff. *Id*. Lead Counsel intend to seek the full Case Contribution Compensation permitted under the Stipulation of Settlement. The Settling Defendants will not take any position on this request, either. *Id*. ¶ 6.2.

I. Coordination with Bankruptcy Proceedings.

Nortel filed bankruptcy relief in the United States and Canada in 2009. *See* Order (Dkt. No. 269). The parties drafted their Stipulation of Settlement to account for Nortel's ongoing bankruptcy proceedings. Nortel will promptly take all necessary actions to have the Stipulation of Settlement approved by the United States Bankruptcy Court for the District of Delaware and the Ontario Superior Court of Justice. Stip. Settle. ¶ 4.1.

In light of the bankruptcy stay currently in place, the Stipulation provides that this Court will not hear the instant motion for preliminary approval until after the entry of Bankruptcy Court Orders approving the Stipulation of Settlement. *Id*. ¶¶ 1.4, 5.1. Lead Counsel will notify the Court of the developments in bankruptcy so that the Court may schedule its own approval process.

III. DISCUSSION

A. The Settlement Meets the Standards for Preliminary Approval.

Fed. R. Civ. P. 23(e) provides that "claims . . . of a certified class may be settled . . . only with the court's approval . . . ." "There are three steps which must be taken by the court in order to approve a settlement: (1) the court must preliminarily approve the proposed settlement, (2) members of the class must be given notice of the proposed settlement, and (3) after holding a hearing, the court must give its final approval of the settlement." *In re Telectronics Pacing Sys., Inc.*, 137 F. Supp. 2d 985, 1026 (S.D. Ohio 2001) (citing *Williams v. Vukovich*,720 F.2d 909, 921 (6th Cir. 1983)).

At the preliminary approval stage, the Court determines whether the proposed settlement is "sufficiently fair, reasonable, and adequate to warrant sending notice" of the action and proposed settlement to class members. *See Manners v. American General Life Insurance Company*, No. 3-98-0266, 1999 U.S. Dist. LEXIS 22880 at *13 (M.D. Tenn. Aug. 11, 1999) (Nixon, J.). "[T]he court first must determine whether the proposed settlement is potentially approvable." *Berry v. Sch. Dist. of Benton Harbor*, 184 F.R.D. 93, 97 (W.D. Mich. 1998). "The purpose of this preliminary review is to "ascertain whether there is any reason to notify the class members of the proposed settlement and to proceed with a fairness hearing." *Id*. (internal quotations omitted).

A district court "bases its preliminary approval of a proposed settlement 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." *Telectronics*, 137 F. Supp. 2d at 1026; *see also Manners*, 1999 U.S. Dist. LEXIS 22880 at **63-64. "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[in] the range of possible approval, then the Court should direct that notice be given to the class members of a formal fairness hearing, at which evidence may be presented in support of and in opposition to the settlement." *Telectronic*s, 137 F. Supp. 2d at 1015 (quoting *Manual for Complex Litig. (Second)* § 30.44 (1985)).

In both form and substance, the Stipulation of Settlement is sufficiently fair, reasonable, and adequate to warrant notice to the class and a fairness hearing. It is the culmination of more than a decade of litigation and negotiation between parties represented by knowledgeable and experienced counsel. The settlement process consisted of numerous and lengthy arm's length negotiations, including a multi-day mediation conducted by the Honorable Daniel Weinstein. The Stipulation of Settlement ensures substantial and prompt payment to the Plan and, ultimately, to Class Members in proportion to the amounts they lost by the investment of their Plan accounts in Nortel stock. This substantial relief is far preferable to the possibility of a smaller recovery or none at all. In short, the proposed Settlement is an excellent result and merits preliminary approval.

B. Consideration of the Final Approval Criteria Supports Preliminary Approval.

The Court need not decide at this stage whether it will ultimately approve the Settlement. However, the standard for final approval is a useful guidepost for deciding whether the Settlement falls within the range of reasonableness for preliminary approval. The relevant factors all support the approval of the Settlement.

"Under Federal Rule of Civil Procedure 23(e), a Court should approve a proposed class action settlement if it determines that the settlement is 'fair, adequate, and reasonable, as well as consistent with the public interest.'" *Manners*, 1999 U.S. Dist. LEXIS 22880 at *53 (quoting *Bailey v. Great Lake Kanning, Inc.*, 908 F.2d 38, 42 (6th Cir. 1990)); *accord Lessard v. City of Allen Park*, 372 F. Supp. 2d 1007, 1009 (E.D. Mich. 2005) (citing *Vukovich*, 720 F.2d at 921-23). This determination requires consideration of "whether the interests of the class as a whole are better served if the litigation is resolved by settlement rather than pursued." *In re Cardizem CD Antitrust Litig.*, 218 F.R.D. 508, 522 (E.D. Mich. 2003) (quoting *Manual for Complex Litigation (Third)* § 30.42 at 238 (1995)).

Courts in the Sixth Circuit have found the following factors relevant in determining whether a settlement is fair, adequate, reasonable, and consistent with the public interest:

(1) the likelihood of success on the merits weighed against the amount and form of the relief offered in the settlement;

(2) the risks, expense, and delay of further litigation;

(3) the judgment of experienced counsel who have competently evaluated the strength of their proofs;

(4) the amount of discovery completed and the character of the evidence uncovered;

(5) whether the settlement is fair to the unnamed class members;

(6) objections raised by class members;

(7) whether the settlement is the product of arm's length negotiations, as opposed to collusive bargaining; and

(8) whether the settlement is consistent with the public interest.

Rankin v. Rots, No. 02-CV-71045, 2006 U.S. Dist. LEXIS 45706 at **9-10 (E.D. Mich. June 28, 2006) (collecting cases); *see also Manners*, 199 U.S. Dist. LEXIS 22880 at *54 citing (*Vukovich*, 720 F.2d at 922-23); *UAW v. General Motors Corp.*, 497 F.3d 615, 631 (6th Cir. 2007).

In evaluating a proposed class settlement, the court does "not decide the merits of the case or resolve unsettled legal questions." *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 88 n.14

(1981); *see also Rankin*, 2006 U.S. Dist. LEXIS 45706 at *9 ("The Court will not substitute its business judgment for that of the parties; the only question . . . is whether the settlement, taken as a whole, is so unfair on its face as to preclude judicial approval.") (internal quotations omitted); *Todd v. Retail Concepts Inc*., No. 3:07-0788, 2008 U.S. Dist. LEXIS 117126 at *13 (M.D. Tenn. Aug. 22, 2008) (Echols, J.).

Courts do not decide the merits in the approval process for two related reasons. First, the object of settlement is to avoid, not confront, the determination of contested issues, and the approval process should not be converted into an abbreviated trial on the merits. *See Van Horn v. Trickey*, 840 F.2d 604, 607 (8th Cir. 1988). The court's intrusion into a private agreement should be limited, "for it is the very uncertainty of outcome in litigation and the avoidance of wasteful and expensive litigation that induce consensual settlement." *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 625 (9th Cir. 1982).

Second, "[b]eing a preferred means of dispute resolution, there is a strong presumption by courts in favor of settlement." *Telectronics*, 137 F. Supp. 2d at 1008-09 (citing *Manual for Complex Litigation (Third)* § 30.42). This is particularly true in the case of class actions, the settlement of which is generally favored. *Manners*, 1999 U.S. Dist. LEXIS 22880 at **54-55 (holding that there is an "overriding public interest in favor of settlement of class action lawsuits" and that courts should consider this in approving settlements pursuant to Rule 23); *Berry*, 184 F.R.D. at 97.

1. The Likelihood of Success on the Merits, Weighed Against the Relief Offered in Settlement, Favors Approval.

The investigation and formal discovery conducted, the extensive briefing on the motions to dismiss and for class certification, and an exhaustive negotiation process have enabled the parties to develop the issues in this case to an appropriate point for settlement. While much remains to be done to prepare the case for trial, the Named Plaintiffs are fully cognizant of the strengths of their claims and the risks that they face, and they believe that the Settlement Agreement is in the best interest of the Plan and the Class. Likewise, Lead Counsel are in a strong position to evaluate the strengths and weaknesses of this case and believe that the Settlement achieved is fair, reasonable, and in the best interest of the Plan and the Class. These opinions should weigh heavily in favor of both preliminary and final approval.

The Named Plaintiffs achieved several notable legal victories in litigating this action, including successfully opposing a motion to dismiss (Dkt. No. 95) and receiving Magistrate John S. Bryant's Report and Recommendation that a class be certified for trial (Dkt. No. 264). As a result of the extensive discovery, the Named Plaintiffs are optimistic they will prevail against any summary judgment motion. They also believe that the evidence will support their theories of liability and damages at trial.

Not surprisingly, though, Defendants have a different view of the case, which they have expressed through various pleadings and motions, and which they will continue to press forcefully through trial and appeal, if necessary. Defendants are represented by highly experienced and competent counsel. Accordingly, the Named Plaintiffs acknowledge the risk that Defendants could prevail with respect to certain legal or factual issues, which could result in the reduction or elimination of the Named Plaintiffs' potential recovery.

Risk is inherent in any litigation, but the level of risk is particularly acute in ERISA class actions, one of the most complex and rapidly developing areas of the law. Trials in such cases have been few and far between. The few decisions on summary judgment or the merits in this area demonstrate the burdens of proof that the Named Plaintiffs may face. *See generally, e.g.*, *Kuper v. Iovenko*, 66 F.3d 1447 (6th Cir. 1995); *Nelson v. IPALCO Enters., Inc.*, 480 F. Supp. 2d

1061 (S.D. Ind. 2007); *DiFelice v. U.S. Airways, Inc.*, 436 F. Supp. 2d 756 (E.D. Va. 2006), *aff'd*, 497 F.3d 410 (4th Cir. 2007); *Landgraff v. Columbia/HCA*, No. 98-0090, 2000 U.S. Dist. LEXIS 21831 (M.D. Tenn. May 24, 2000), *aff'd*, *Landgraff v. Columbia/HCA Healthcare Corp.*, 30 Fed. Appx. 366 (6th Cir. 2002).

Notwithstanding the Named Plaintiffs' belief in the strength of their claims, the certainty of recovery now outweighs the possibility of recovery at trial. The factors described above make it difficult to predict success. The amount of the proposed Settlement is fixed at a substantial amount ($21.5 million), whereas the amount the Named Plaintiffs could recover if successful is not fixed at all.

2. The Risks, Expenses, and Delay of Continued Litigation Favor Approval.

"Settlements should represent 'a compromise which has been reached after the risks, expense and delay of further litigation have been assessed.'" *Cardizem*, 218 F.R.D. at 523 (quoting *Vukovich*, 720 F.2d at 922). "[T]he prospect of a trial necessarily involves the risk that Plaintiffs would obtain little or no recovery." *Id*. This is particularly true for class actions, which are "inherently complex." *Telectronics,* 137 F. Supp. 2d at 1013. "[S]ettlement avoids the costs, delays, and multitude of other problems associated with them." *Id.*; *see also Manners*, 1999 U.S. Dist. LEXIS 22880 *62 (approving settlement agreement in part because "the resulting litigation would be lengthy, complex, and expensive"); *Todd*, 2008 U.S. Dist. LEXIS 117126 at *13 ("It is also pertinent for the Court to consider the risk, expense and delay of further litigation.").

Presenting an ERISA case of this type on the merits is a mammoth undertaking, with extensive risk, expense, and delay. The Named Plaintiffs face risk in having the Court accept their legal theories, in establishing the factual bases to support those theories, in proving damages, and in collecting any amount that is ultimately awarded. Defendants will predictably file a motion for summary judgment directed at one or all of these things. As the Court is well aware, Nortel is in bankruptcy, creating a significant threat to the Named Plaintiffs' ability to collect a judgment. *See* Order (Dkt. No. 269). Though the Named Plaintiffs are confident in the prospects of their claims, they recognize the risks and the possibility that the outcome will not be as expected.

ERISA litigation of this type is a rapidly evolving and demanding area of the law. New precedents emerge on a regular basis, and the demands on counsel and the courts are formidable. This case will continue to demand the devotion of significant resources. As noted above, the Named Plaintiffs expect that Defendants would continue their vigorous defense through trial and a probable appeal. The Settlement obviates that delay and will greatly speed the recovery to the Plan. This factor also speaks strongly in favor of preliminary approval of the proposed Settlement. *Horton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 855 F. Supp. 825, 833 (E.D.N.C. 1994) ("[T]he anticipated duration and expense of additional litigation in this case is considerable. Numerous depositions, . . . responses to pretrial motions and the expenses of trial would all significantly reduce plaintiffs' potential recovery."); *In re MicroStrategy, Inc. Sec. Litig.*, 148 F. Supp. 2d 654, 667 (E.D. Va. 2001) ("[T]here is little doubt that a jury verdict for either side would only have ushered in a new round of litigation in the Fourth Circuit and beyond, thus extending the duration of the case and significantly delaying any relief for plaintiffs.").

In short, a favorable and collectable judgment is not a forgone conclusion. All parties have an incentive to settle. The proposed Settlement ensures substantial and prompt payment to the Plan. This relief is far preferable to the possibility of a smaller recovery or none at all, following a lengthy and expensive trial and appeal.

3. Experienced Trial Counsel Have Competently Evaluated the Strength of the Proof.

In deciding whether a proposed settlement warrants approval, "[t]he Court should also consider the judgment of counsel and the presence of good faith bargaining between the contending parties." *Rankin*, 2006 U.S. Dist. LEXIS 45706 at *8; *see also Manners*, 1999 U.S. Dist. LEXIS 22880 at *81 ("Another factor to be considered in determining whether to approve the Settlement is the experience of class counsel and their views of the Settlement.").

Lead Counsel have extensive experience in handling ERISA class actions and other complex litigation. Lead Counsel Branstetter, Stranch & Jennings is experienced in ERISA litigation. It has served or is serving as lead or co-lead counsel for classes in numerous ERISA class action cases, including *In re:Quest Savings and Investment Plan ERISA Litigation*, No. 02-RB-464 (D. Colo.)(Blackburn); *In re:Xcel Energy, Inc. ERISA Litigation*, Civ. 02-2677 (D. Minn.)(Doty); *In re:Providian Financial Corp. ERISA Litigation*, No. 01-5027 (N.D. Ca)(Breyer); and, *In re:Montana Power ERISA Litigation*, No. 4:02-0099 (D. Mont.)(Haddon).

Lead Counsel Keller Rohrback, LLP is a national leader in the area of ERISA litigation. It has served or is serving as lead or co-lead counsel for the classes in numerous ERISA class action cases, including *In re Enron Corporation ERISA Litigation*; *In re WorldCom ERISA Litigation*; *In re Global Crossing Ltd. ERISA Litigation*; *In re Xerox Corporation ERISA Litigation; In Re Marsh ERISA Litigation; Delphi Corp. ERISA Litigation; and*, and *In re HealthSouth ERISA Litigation*.

Lead Counsel Berger & Montague, P. C. is experienced in ERISA litigation. It has served or is serving as lead or co-lead counsel for classes in numerous ERISA class action cases, including *In re: Lucent Technologies Inc. ERISA Litigation* and *In re: SPX Corporation ERISA Litigation.*

4. The Named Plaintiffs Have Obtained Extensive Discovery.

The parties litigated for almost ten years before entering into the Stipulation of Settlement. During that time, Lead Counsel obtained hundreds of thousands of pages of discovery documents, including governing Plan documents and materials, communications with plan participants, internal Nortel documents regarding the Plan, Nortel's SEC filings, press releases, public statements, news articles, insurance policies, documents and pleadings filed in the Nortel's bankruptcy proceedings in Delaware and Canada, and documents that Nortel and other ERISA and Securities Defendants produced to the SEC regarding Nortel's financial status and alleged fraudulent financial transactions during the Class Period.[1] Lead Counsel conducted a detailed review and analysis of these materials, enabling them to determine key issues regarding the nature of the Plan and the liabilities of the various Defendants. Lead Counsel have also deposed key witnesses. Even where a settlement comes early in a case—which this Settlement clearly did not—a court will not withhold its approval if the plaintiffs "have conducted sufficient informal discovery and investigation to . . . evaluate [fairly] the merits of Defendants' positions during settlement negotiations." *See In re MicroStrategy*, 148 F. Supp. 2d at 664-65 (internal quotations omitted).

5, 6. Few Objections Are Anticipated Because the Stipulation of Settlement Provides for a Fair Allocation of Relief to All Class Members.

The Settlement provides significant Plan-wide monetary relief that will be equitably allocated to Class Members after deduction of Court-approved fees and costs. The Plan of

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[1] Although the amount of discovery completed is a factor to be considered in the settlement approval process, there is no minimum amount of discovery that must be undertaken to satisfy this factor. *In re Jiffy Lube Sec. Litig.*, 927 F.2d 155, 159 (4th Cir. 1991). Indeed, discovery may not be necessary at all for the parties to fully evaluate the merits of the claims. *See id.* (approving settlement after four months of litigation and prior to any formal discovery); *see also Horton*, 855 F. Supp. at 829 (approving settlement in case where discovery consisted of production of 3,800 pages of documents and two "confirmatory" depositions).

Allocation is based upon the amount of the Class Members' losses and the timing of those losses. *See* Stip. Settle. ¶ 8.5. This approach is fair and reasonable because it takes into account "the relative strength and values of different categories of claims." *In re Global Crossing Sec. and ERISA Litig.*, 225 F.R.D. 436, 462 (S.D.N.Y. 2004). As such, Lead Counsel expect few, if any, objections.

The scope of any potential objections by Class Members will remain unknown until a Fairness Hearing has taken place. One can always expect some objections in a class action. *Thacker v. Chesapeake Appalachia, L.L.C.*, 695 F. Supp. 2d 521, 533 (E.D. Ky. 2010), *aff'd*, 636 F.3d 235 (6th Cir. 2011); *Cardizem*, 218 F.R.D. at 527. "Although the Court should consider objections to the settlement, the existence of objections does not mean that the settlement is unfair." *Thacker*, 695 F. Supp. 2d at 533; *Telectronics*, 137 F. Supp. 2d at 1018. "If only a small number of objections are received, that fact can be viewed as indicative of the adequacy of the settlement." *Cardizem*, 218 F.R.D. at 527; *see also Thacker*, 695 F. Supp 2d. at 533-34.

7. The Settlement Agreement Is the Product of Arm's Length Negotiations.

In the absence of evidence to the contrary, a Court should presume that settlement negotiations were conducted in good faith and that the resulting agreement was reached without collusion. *Id.* at 531; *Telectronics*, 137 F. Supp. 2d at 1018 (citing HERBERT NEWBERG & ALBA CONTE, NEWBERG ON CLASS ACTIONS § 11.51 (3d ed. 1992) ("Courts respect the integrity of counsel and presume the absence of fraud or collusion in negotiating the settlement, unless evidence to the contrary is offered.")). The involvement of a skilled mediator reinforces that presumption. *See In re Marsh ERISA Litig.*, 265 F.R.D. 128, 141 (S.D.N.Y. 2010).

The circumstances here indicate good faith, non-collusive negotiations. Lead Counsel have extensive experience in complex litigation, having successfully prosecuted, defended, and settled dozens of class actions in state and federal courts throughout the nation. They bargained over this Settlement for an extended period of time. In doing so, they had the help of the Honorable Daniel Weinstein, who has been described as "a highly regarded mediator with extensive experience in complex ERISA breach of fiduciary duty class actions," *id*.

8. The Settlement Agreement Is Consistent with the Public Interest.

A settlement is, as a matter of public policy, a strongly favored method of dispute resolution, especially in class action cases. *Franks v. Kroger,* 649 F.2d 1216, 1224 (6th Cir. 1981). "The proposed settlement would avoid complex and protracted litigation, provide valuable relief to the Class, and "foster[] the goals of certainty, finality and economy, which lie at the heart of our general preference for settlement of class actions." *Manners,* 1999 U.S. Dist. LEXIS 22880 at *82. "[T]here is a strong public interest in encouraging settlement of complex litigation and class action suits because they are 'notoriously difficult and unpredictable' and settlement conserves judicial resources." *Cardizem,* 218 F.R.D. at 530 (quoting *Granada Invs., Inc. v. DWG Corp.*, 962 F.2d 1203, 1205 (6th Cir. 1992)). ERISA class actions are no exception. Many courts have noted the particular complexity of ERISA class actions. *See, e.g.*, *In re Enron Corp. Sec., Deriv. and "ERISA" Litig.*, 228 F.R.D. 541, 565 (S.D. Tex. 2005); *In re IKON Office Solutions, Inc. Sec. Litig.*, 209 F.R.D. 94, 104-07 (E.D. Pa. 2002).

The public has no interest contravening the strong public interest in settlement of this complex ERISA class action, which provides significant monetary relief to the Class. Thus, this factor as well weighs strongly in favor of approval.

C. Preliminary Certification of the Settlement Class Is Also Appropriate.

On September 2, 2009, Magistrate Bryant filed a Report and Recommendation that Plaintiffs' Motion for Class Certification be granted pursuant to Fed. R. Civ. P. 23(b)(1). Rpt. and Recomm. at 25-29, 34 (Dkt. No. 264). The class definition approved by Magistrate Bryant is virtually identical to the one proposed for settlement purposes,[2] and Magistrate Bryant's reasoning applies just as forcefully here. Class certification is governed by Fed. R. Civ. P. 23, whether certification is sought though a contested motion or, as here, pursuant to a settlement. *See Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 619-29 (1997). The Court may certify the proposed class now upon finding that the action satisfies the four prerequisites of Rule 23(a) and one or more of the three subdivisions of Rule 23(b). *See id.*

This is precisely the type of case that Rule 23 was designed to address. Congress embraced the use of representative actions to enforce ERISA. *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 142 n.9 (1985) (noting Congress' clearly expressed intent that ERISA "actions for breach of fiduciary duty be brought in a representative capacity on behalf of the plan as a whole"). Courts in the Sixth Circuit have frequently found class certification to be appropriate in ERISA company stock cases. *See generally, e.g.*, *Rankin v. Rots*, 220 F.R.D. 511 (E.D. Mich. 2004); *In re CMS Energy ERISA Litig.*, 225 F.R.D. 539 (E.D. Mich. 2004); *see also* Fed. R. Civ. P. 23(b)(1)(B) Advisory Committee's Note (1966 Amendment) (certification under Rule 23(b)(1) is appropriate in cases charging breach of trust by a fiduciary to a large class of beneficiaries).

1. The Proposed Class Satisfies the Requirements of Rule 23(a).

(a) The Settlement Class Meets the Numerosity Requirement.

Rule 23 requires that the class be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). Here, the Settlement Class will include thousands of individuals. *See* Rpt. and Recomm. at 8 (Dkt. No. 264) (finding that litigation class, covering a slightly smaller period, would have roughly 30,000 members). The Settlement Class is

[2] The definition of the Settlement Class now has an end date of January 1, 2008, as compared to the previous end date of October 15, 2007. *See* Stip. Settle. ¶ 1.6.

obviously is too large for joinder to be practicable, and the numerosity requirement is satisfied. *See, e.g., Rankin*, 220 F.R.D. at 517.

(b) Common Questions of Law and Fact Exist.

Fed. R. Civ. P. 23(a)(2) requires that a proposed class action raise "questions of law or fact common to the class." The class members' claims must depend upon a common contention that is capable of class-wide resolution. *Wal-Mart Stores, Inc. v. Dukes*, 180 L. Ed. 2d 374, 389 (2011). Courts have generally treated commonality as "not a high burden." *Henry v. Cash Today, Inc.*, 199 F.R.D. 566, 569 (S.D. Tex. 2000). "[T]here need be only a single issue common to all members of the class," *In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1080 (6th Cir. 1996), if "the resolution of [that common issue] will advance the litigation," *Sprague v. Gen. Motors Corp.*, 133 F.3d 388, 397 (6th Cir. 1998).

In the present case, the Named Plaintiffs have identified a series of common questions of law and fact, including: (a) whether Defendants acted solely in the interest of Plan participants; (b) whether Defendants acted with the requisite skill, care, prudence, and diligence; (c) whether Defendants communicated completely and accurately with Plan participants; and (d) whether Defendants failed to appropriately monitor appointed fiduciaries. Sec. Amend. Compl. ¶ 134 (Dkt. No. 61). Other common questions include the existence of damages to the Plan and Class Members, whether certain individual Defendants knew of alleged accounting improprieties and the degree to which they informed the other Plan fiduciaries about this, and issues of co-fiduciary liability. All of these issues are common to the Class. *See, e.g., Rankin*, 220 F.R.D. at 517-18 (identifying similar common issues and concluding as well that the claim for a breach of the duty of prudence "clearly presents a common issue."). Commonality is easily established in this context, as "the question of defendants' liability for ERISA violations is common to all class members because a breach of a fiduciary duty affects all participants and beneficiaries." *Banyai v. Mazur*, 205 F.R.D. 160, 163 (S.D.N.Y. 2002).

(c) Plaintiffs' Claims Are Typical of Those of the Class.

Rule 23(a)(3) requires that the claims or defenses of the representative parties be typical of the claims or defenses of the class. "The purpose of the typicality requirement is to assure that the named representatives' interests align with those of the class." *Rankin*, 220 F.R.D. at 518. "The typicality requirement is met if the plaintiff's claim 'arises from the same event or practice or course of conduct that gives rise to the claims of the other class members, and her or his claims are based on the same legal theory.'" *Id.* (quoting *Little Caesar Enters., Inc. v. Smith*, 172 F.R.D. 236, 242-43 (E.D. Mich. 1997)). Representatives and class members need not, however, have suffered identical injuries or damages. *United Bhd. of Carpenters & Joiners, Local 899 v. Phoenix Assocs., Inc.*, 152 F.R.D. 518, 522 (S.D. W. Va. 1994).

The Named Plaintiffs' claims arise from the same course of events as the claims of the Class—the Defendants' alleged fiduciary breaches. ERISA company stock cases such as this one are particularly appropriate for class certification, given that "the appropriate focus in a breach of fiduciary duty claim is the conduct of the defendants," *Rankin*, 220 F.R.D. at 519 (quoting *In re IKON Office Solutions, Inc. Sec. Litig.*, 191 F.R.D. 457, 465 (E.D. Pa. 2000)). Each Class Member can make the same arguments in support of the Defendants' liability.

Moreover, ERISA's unique standing and remedial provisions, under which a participant who sues for breach of fiduciary duties is entitled to obtain relief on behalf of the plan, further support a finding of typicality. *See* 29 U.S.C. §§ 1109(a) (liability for breach of fiduciary duty is "to the plan"), 1132(a)(2) (authorizing plan participant to sue for breach of fiduciary duty under § 1109(a)); *Rankin*, 220 F.R.D. at 519 (noting representative nature of action under 29 U.S.C. § 1132(a)(2)). With each Class Member stating the same claim concerning the same conduct and seeking the same relief on behalf of the Plan, there can be no dispute that the claims asserted are typical for purposes of Rule 23(a)(3).

(d) The Named Plaintiffs Will Fairly and Adequately Protect the Interests of All Class Members.

Rule 23(a)(4) requires that the class representatives fairly and adequately protect the interests of the class they seek to represent.

> In *Senter v. General Motors Corp.*, 532 F.2d 511, 525 (6th Cir. [1976]), the Sixth Circuit articulated two criteria for determining adequacy of representation: "1) the representative must have common interests with unnamed members of the class, and 2) it must appear that the representatives will vigorously prosecute the interests of the class through qualified counsel."

Rankin, 220 F.R.D. at 520. Furthermore, "[b]ased on the language in *Senter*, the Sixth Circuit appears to focus on the adequacy of plaintiff's counsel and whether plaintiff has a conflicting interest, not the personal qualifications of the named plaintiff." *Id.*

These requirements are easily met here. The Named Plaintiffs' interests are the same as those of the absent class members; all seek to increase the value of the Fund. There can be no question that the Named Plaintiffs' interests are aligned with those of the Class, and they have retained qualified counsel with extensive experience in representing plaintiffs in class litigation, including ERISA cases.

2. The Proposed Class Satisfies the Requirements of Rule 23(b)(1) and (b)(2).

(a) Individual Actions Would Establish Incompatible Standards of Conduct or Would Be Dispositive of the Interests of Absent Members.

A class may be certified under Rule 23(b)(1) if, in addition to meeting the requirements of Rule 23(a), the prosecution of separate actions by individual class members would create the risk of inconsistent adjudications, which would create incompatible standards of conduct for the defendant, or would as a practical matter be dispositive of the interests of absent members. Fed R. Civ. P. 23(b)(1)(A) and (B). Other courts have certified classes under Rule 23(b)(1) in

ERISA cases for those very reasons. *See, e.g.*, *Rankin*, 220 F.R.D. at 522-23; *CMS*, 225 F.R.D. at 546; *IKON*, 191 F.R.D. at 466.

Moreover, the Advisory Committee on Rule 23 specifically noted that actions that "charge[] a breach of trust by an indenture trustee or other fiduciary similarly affecting the members of a large class of . . . beneficiaries"—*i.e.*, an action such as this one—"should ordinarily be conducted as class actions" under Rule 23(b)(1)(B). *See* Fed. R. Civ. P. 23(b)(1)(B) Advisory Committee's Note (1966 Amendment). As a result, certification of the proposed class under Rule 23(b)(1) is appropriate.

(b) The Defendants Have Acted or Refused to Act on Grounds Generally Applicable to the Class, and Injunctive Relief for the Class as a Whole Is Appropriate.

A class may be certified under Rule 23(b)(2) if, in addition to meeting the requirements of Rule 23(a), "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Fed. R. Civ. P. 23(b)(2). Here, Plaintiffs allege that Defendants breached their fiduciary duties by (among other things) failing to ensure that Nortel stock was a prudent investment for the Plan and failing to properly monitor fiduciary appointees.

The available remedies include restoration of the Plan's losses, as well as such other equitable actions the Court finds appropriate. 29 U.S.C. §§ 1109(a), 1132(a)(2)-(3). Indeed, remedies under § 1132(a)(2) are by definition plan-wide, a classic example of equitable relief. *See, e.g., Smith v. Provident Bank*, 170 F.3d 609, 616 (6th Cir. 1999) ("ERISA authorizes participants to sue on behalf of a plan for breach of fiduciary duty, *see* 29 U.S.C.S. § 1132(a)(2). . . . Permitting such suits by participants is the mechanism which Congress established to enforce the plan's right to recover for a breach of fiduciary duty."); *Specialty Cabinets &*

Fixtures, Inc. v. Am. Equitable Life Ins. Co., 140 F.R.D. 474, 479 (S.D. Ga. 1991) (noting that "[t]he right to recovery, after all, belongs to the plan").

Once the Plan recovers through the relief available under ERISA, any consequential financial benefit to individual participants and beneficiaries "would flow directly and incidentally" from the Plans' equitable relief. *Bublitz v. E.I. du Pont de Nemours & Co.*, 202 F.R.D. 251, 259 (S.D. Iowa 2001); *see also Berger v. Xerox Corp. Ret. Income Guarantee Plan*, 338 F.3d 755, 763-4 (7th Cir. 2003) (certifying 23(b)(2) class where ERISA plaintiffs sought declaratory relief, and monetary follow-on relief would be the direct, anticipated consequence of the declaration). Accordingly, the Named Plaintiffs' claims are also properly certified under Rule 23(b)(2).

3. Lead Counsel Merit Appointment as Class Counsel.

A court must appoint class counsel when it certifies a class. Fed. R. Civ. P. 23(g)(1). In doing so, the Court must examine the capabilities and resources of class counsel to determine whether they will provide adequate representation to the class. *See id*.(g)(1)(A).

The Court is aware of the claims brought in this action and the extraordinary time and effort already expended by Lead Counsel. Moreover, Lead Counsel are some of the leading firms nationwide in the prosecution of ERISA class actions, particularly for the types of claims in this lawsuit. There can be no doubt that Lead Counsel satisfy the requirements of Rule 23(g). *See* Lead Counsels' Firm Resumes (attached to motion as Exhibits 1-3); *see also* Rpt. and Recomm. at 33-34 (Dkt. No. 264) (recommending the appointment of Branstetter Stranch & Jennings, PLLC; Berger &Montague, P.C.; and, Keller Rohrbach, L.L.P. as Lead Counsel for litigation class).

D. The Proposed Notice to the Class Satisfies Rule 23 and Due Process Requirements.

Once a court grants preliminary approval to a proposed settlement, "[n]otice of the proposed settlement and the fairness hearing must be provided to class members." *Reed v. Rhodes,* 869 F. Supp. 1274, 1278 (N.D. Ohio 1994). Procedurally, Rule 23 requires the court to "direct notice in a reasonable manner to all class members who would be bound by the proposal." Fed. R. Civ. P. 23(e)(1). Class members should get the "best notice practical under the circumstances, including individual notice to all members who can be identified through reasonable effort." *Vukovich*, 720 F.2d at 921.

Substantively, the notice should provide a "very general description[] of the proposed settlement." *Weinberger v. Kendrick*, 698 F.2d 61, 70 (2d Cir. 1982), *superseded by statute on other grounds,* 1983 Amendment to Fed. R. Civ. P. 11, *as recognized in Glasser v. Cincinnati Milacron, Inc.,* 808 F.2d 285 (3d Cir. 1986). This description should nevertheless allow class members "a full and fair opportunity to consider the proposed decree and develop a response." *Reed*, 869 F. Supp. at 1279. To satisfy due process, notice to a class must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *UAW*, 497 F.3d at 629 (quoting *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)).

The proposed notice program meets all of the procedural requirements. Where, as here, the names and last known addresses of all Class Members are available from the Defendants' records, *see* Stip. Settle. ¶ 3.10, mailing the notice to the Class Members at those addresses is the best notice practicable under the circumstances, *Thompson, v. Midwest Found. Indep. Physicians Ass'n*, 124 F.R.D. 154, 157 (S.D. Ohio 1988) (citing *Mullane*, 339 U.S. at 315). Lead Counsel will cause the long-form Notice to be mailed by first-class mail, postage prepaid, to all Class

Members whose identity and location can be determined with reasonable effort. Stip. Settle., Ex. C ¶ 7(a). In case the mailed Notice does not reach a Class Member, Lead Counsel will also cause the Publication Notice to be displayed in two different publications and on a website. *Id*., Ex. C ¶ 7(b)-(c).

Class Members will have adequate time to consider the proposed Settlement and whether to object. While individual circumstances dictate the length of time needed between the notice and the fairness hearing, no less than two weeks should be provided. *Vukovich,* 720 F.2d at 921. Lead Counsel will issue both the Notice and Publication Notice at least forty-five (45) days before the Fairness Hearing. Stip. Settle., Ex. C ¶ 7(a)-(c). Class Members have until fourteen (14) days before the Fairness Hearing to make objections or to indicate their intention to appear at the Fairness Hearing. *Id*., Ex. C ¶¶ 9-10. This gives Class Members approximately a month to consider the matter. The form and manner of notice will, therefore, fairly apprise Class Members of the Settlement and their options.

With regard to substance, the proposed Class Notice describes in plain English the terms and operation of the Stipulation of Settlement, the considerations that caused the Named Plaintiffs and Lead Counsel to accept the Settlement as fair and adequate, the maximum attorney's fees and expenses and Case Contribution Compensation that will be sought, the procedure for objecting, and the date and place of the Fairness Hearing. *See generally* Stip. Settle. ¶ 5.2, Ex. C-1, C-2. Neither due process nor Rule 23 requires more. *See* HERBERT NEWBERG & ALBA CONTE, NEWBERG ON CLASS ACTIONS § 8.34 (4th ed. 2002).

IV. CONCLUSION

The Settlement is an excellent result for the Class in this complex and hard-fought ERISA class action. The named Plaintiffs respectfully request that the Court grant their motion and enter the Preliminary Settlement Approval Order.

Dated: August 10, 2011

Respectfully submitted,

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The undersigned hereby certifies that a true and correct copy of the foregoing document was forwarded via the Court's electronic filing system to the following on August 10, 2011:

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ANN M. LANDGRAFF, et al. v. COLUMBIA/HCA HEALTHCARE CORPORATION OF AMERICA, et al.

No. 3-98-0090

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION

2000 U.S. Dist. LEXIS 21831

May 24, 2000, Decided
May 24, 2000, Entered

SUBSEQUENT HISTORY: aff'd, *Landgraff v. Columbia/HCA Healthcare Corp., 2002 U.S. App. LEXIS 2334 (6th Cir. Tenn. Feb. 7, 2002)*

DISPOSITION: [*1] . Plaintiffs' action dismissed with prejudice. Defendant's counterclaims for attorneys' fees and costs withdrawn and dismissed.

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JUDGES: Thomas A. Higgins, United States District Judge.

OPINION BY: Thomas A. Higgins

OPINION

MEMORANDUM

The plaintiffs, Ann M. Landgraff and Gina Magarian, were employees of Columbia/HCA in 1997, [1] and participated in the company's Stock Bonus Plan. They filed this action for breach of fiduciary duty under the Employment Retirement Securities Act of 1974, Title *29 U.S.C. § 1001, et seq.* on behalf of the SBP. As "participants" in the SBP, the plaintiffs have standing to file this action on behalf of the SBP under *29 U.S.C. § 1132(a)(2)*.

1 Ms. Landgraff worked for West Paces Ferry Hospital in Atlanta, Georgia, from 1983 to 1997, as a registered nurse. HCA and later Columbia/HCA owned West Paces Ferry Hospital. Ms. Magarian worked for Gulf Coast Community Hospital, now Columbia Gulf Coast Community Hospital, from 1977 to 1997, as a registration coordinator. The hospital was owned by HCA and later Columbia/HCA throughout her tenure there.

[*4] The defendant, Columbia/HCA, is a healthcare management company which, at the time in question, owned and operated approximately 300 hospitals throughout the United States and employed nearly 300,000 individuals.

During the time in question, the individual defendants, Stephen T. Braun, David Anderson, Neil D. Hemphill, Bruce A. Moore and James D. Shelton, were executives of Columbia/HCA and served as members of Columbia's retirement committee. [2] Mr. Braun was a senior vice-president and general counsel of Columbia/HCA. Mr. Anderson was the treasurer and vice-president of finance. Mr. Hemphill was senior vice-president of human resources and served on the retirement committee from 1995, to November, 1998. Mr. Moore, at the time in question, was vice-president of benefits and is now vice-president of operations administration. He became a member of the retirement committee in 1996. Since that time, he has been the committee chairman. Finally, Mr. Shelton, the president of the Central Group of Columbia/HCA, served on the retirement committee from May, 1996, to August, 1997.

2 In 1997, and 1998, Richard Bracken, president of the Columbia/HCA's western group division, and John M. Franck, II, the corporate secretary, also served on the retirement committee. Both were originally named as defendants in this action. See, second amended complaint (filed April 27, 1998; Docket Entry No. 38). The plaintiffs filed a notice of voluntary dismissal

without prejudice with respect to these defendants on July 8, 1998 (Docket Entry No. 70) and on July 9, 1998, the Court entered an order (Docket Entry No. 72) dismissing these defendants without prejudice.

[*5] As members of the retirement committee, the individual defendants were charged by the company with administering the SBP. They exercised discretionary authority with respect to the management and disposition of the SBP's assets and were therefore fiduciaries with respect to the SBP within the meaning of ERISA. *29 U.S.C. § 1002(21)(A)(i)*. [3]

3 Under *29 U.S.C. § 1002(21)(A)* "a person is a fiduciary with respect to a plan to the extent that (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of assets, . . . or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan."

The SBP, is a retirement fund sponsored by Columbia/HCA and is an "employee pension benefit plan" under ERISA, Title *29 U.S.C. § 1002(2)(A)(i)*. [4] Specifically, the SBP was an "eligible individual account [*6] plan," or EIAP, as defined under *29 U.S.C. § 1107(d)(3)(A)*. [5] Accordingly, the SBP was exempt from ERISA's general requirements that retirement plans hold no more than 10% of their assets in employer's securities and that plan assets be diversified. [6] At all times relevant to this action, the SBP held nearly 100% of its assets in the stock of Columbia/HCA. [7] In January, 1997, the SBP was valued at approximately $ 1.4 billion.

4 Title *29 U.S.C. § 1002(2)(A)* defines an "employee pension benefit plan" as

> any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund or program - (i) provides retirement income to employees . . . regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan.

5 Title *29 U.S.C. § 1107(d)(3)* states that "(A) The term 'eligible individual account plan' means an individual account plan which is (i) a . . . stock bonus . . . plan . . ; (ii) an employee stock ownership plan; . . . which was in existence on September 2, 1974, and which on such date invested primarily in qualifying employer securities" and "(B) Notwithstanding subparagraph (A), a plan shall be treated as an eligible individual account plan with respect to the acquisition or holding of qualifying employer . . . securities only if such plan explicitly provides for acquisition and holding of qualifying employer securities."

[*7]

6 See, *29 U.S.C. §§ 1107(b)* and *1104(a)(2)*.

7 Once an employee's SBP vests, the employee may choose whether to take his or her share in stock or in cash. The record reflects that a portion of the SBP's assets were not invested in Columbia securities so that SBP could pay employees who were eligible to receive their benefits as they requested them.

In 1997, or earlier, the federal government began an investigation of Columbia/HCA for alleged illegal billing and coding practices. The investigation became public knowledge in March, 1997, and the price of Columbia/HCA stock fell significantly. The plaintiffs contend that the individual defendants subsequently breached their fiduciary duty to the SBP as set forth under ERISA, *29 U.S.C. § 1104*, by failing to investigate and consider whether the assets of the SBP should be diversified as the result of the government's investigation of Columbia/HCA and by maintaining and increasing the amount of company stock owned by the SBP. The individual defendants dispute that they acted imprudently (1) in [*8] their consideration of the effects of the investigation, (2) in deciding not to diversify the assets of the SBP and (3) in the purchase of additional company stock. The defendants also argue that even if their procedure for administering the assets of the SBP was deficient under ERISA, the plaintiffs should not prevail because they have not established that "a prudent fiduciary acting under similar circumstances would have made a different investment decision." *Kuper v. Iovenko, 66 F.3d 1447, 1459 (6th Cir. 1995)*.

Next, the plaintiffs claim that Columbia/HCA is a co-fiduciary to the SBP and breached its fiduciary duty in two respects. First, the plaintiffs contend that Columbia/HCA breached its duty by authorizing two purchases on behalf of the SBP of approximately $ 25 million each in Columbia/HCA stock. Second, the plaintiffs assert that the company breached its duty by failing to monitor the decisions of the retirement committee and remove any member not meeting his fiduciary duty to the SBP.

Columbia/HCA disputes that it had discretionary authority with respect to the management of the SBP or the disposition of its assets and asserts it was not involved in the [*9] decision to buy or sell stock. Therefore, the company contends that it was not a fiduciary of the SBP under *29 U.S.C. § 1002(21)(A)* with respect to the investment of the SBP assets. Columbia/HCA admits that it was a fiduciary only for the limited purpose of appointing, removing and monitoring the performance of the retirement committee members. It further insists that because the members of the retirement committee did not breach their fiduciary duty with respect to the SBP assets, it did not breach its fiduciary duty with respect to its duty to appoint, remove and monitor the retirement committee members.

The Court has subject matter jurisdiction over this matter under *29 U.S.C. § 1132(f)* and venue is proper in this district under *29 U.S.C. § 1132(e)*.

A trial without the intervention of a jury was held before the Court on June 8-10, 14, 16-18, 29-30, and July 1, 1999. The Court heard oral argument on March 23, 2000. For the reasons set forth below, the Court finds in favor of the defendants with respect to the plaintiffs' claims of breach of fiduciary duty. At oral argument, the counterclaims of the defendants [*10] were withdrawn and will be dismissed.

I.

At the time in question, Columbia/HCA sponsored three employee pension benefit plans governed by ERISA: a money purchase pension plan, [8] a salary deferral plan, called the HealthTrust 401(k) [9] and the SBP. The SBP was entirely funded by Columbia/HCA. The company contributed .5% of each employee's salary to the SBP through cash contributions to the SBP and the SBP purchased Columbia/HCA stock accordingly.

8 Columbia/HCA made contributions to the money purchase pension plan based on the salary of the employee. The plan was diversified and it did not hold any company stock.

9 The HealthTrust 401(k) is funded primarily by the employee, with some company matching. It came into existence in 1991, when the HealthTrust ESOP, was terminated and the funds transferred into the 401(k) plan. In 1995, HealthTrust and Columbia/HCA merged and the HealthTrust 401(k) plan was frozen. No new contributions were made to the plan after that date and the assets of the former HealthTrust ESOP were converted from HealthTrust stock to Columbia/HCA stock.

[*11] In accordance with the SBP document, which states that Columbia/HCA, through its board of directors, "shall appoint a committee to perform the duties of the Plan Administrator in connection with administration of this Plan and such committee shall give instructions to the Trustee," the Columbia/HCA board of directors appointed the members of the retirement committee to administer the SBP. Defendants' Exhibit 6 at 62. The members of the retirement committee also made up the HealthTrust 401(k) committee and administered the 401(k).

The SBP document states that:

> For purposes of Part 4 of Title I of ERISA, the Plan Sponsor, the Trustee, and the committee shall each be Fiduciaries and shall each discharge their respective duties hereunder with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.

Id. at 69.

The plan document section titled "Purpose" states that:

> This plan is adopted voluntarily by Columbia/HCA Healthcare Corporation and is intended to qualify under *Section 401(a) of the Internal Revenue Code* [*12] as a stock bonus plan. All assets acquired under this Plan . . . are to be held and administered for the exclusive purpose of providing benefits to participants and their beneficiaries and defraying the reasonable expenses of administering the plan.

Id. at 11. *Section 401(a) of the Internal Revenue Code* states that a stock bonus plan is one that is "established and maintained by an employer. . . [whose] benefits are distributable in stock of the employer company." *26 C.F.R. § 1.401-1(b)(1)(iii)*.

The plan also states that the assets of the SBP shall be primarily or exclusively invested in company stock but that it may also invest in other securities, as follows:

> All Employer contributions in cash and any other cash received by the Trust . . . *shall be utilized primarily or exclusively to purchase Company Stock from holders of outstanding stock or stock issued by the Company*. . . . The Trustee may invest Trust Funds which are in excess of current outstanding obligations in Company Stock, savings accounts, and if the Trustee is a bank, savings accounts in the Trustee's banking department, bank certificates of [*13] deposit, including those issued by the Trustee's banking department, short-term securities, stock, bonds, futures, options, foreign securities (to the extent that such securities satisfy the requirements of ERISA), the participation in any common trust fund or commingled fund for the investment of qualified retirement plan assets which may be established from time to time by the Trustee's banking department, or other investments deemed by the Trustee to be desirable for the Trust, or such funds may be held temporarily in cash, including a demand account in the Trustee's banking department. The Plan Administrator [10] may direct the Trustee to invest up to one hundred percent (100%) of the Trust Assets in Company Stock. *It is the intent of the Plan Sponsor that Trust assets be invested primarily or exclusively in Company Stock.*

Defendants' Exhibit 6 at 48-49 (emphasis added). [11]

10 According to the SBP plan document, the plan sponsor is Columbia/HCA and the plan administrator is also the plan sponsor. Defendants' Exhibit 6 at 25-26.

11 As of September 29, 1998, the SBP plan document was amended to permit plan participants to decide how to allocate the assets in their SBP account among ten investment options, including company stock.

[*14] In addition to the SBP plan document, on July 24, 1994, the retirement committee approved and adopted the Columbia/HCA Investment Policy and Guidelines pertaining to the investment of the assets of the SBP.

The investment policy guidelines state that "the overall objective of the Plan's assets is to achieve a minimum real rate of return (in excess of inflation) of 7% annualized. The Committee believes that a 10 year period is appropriate in measuring its progress toward achieving this objective." Plaintiffs' Exhibit 117 at 23. The guidelines also provide for the committee's ability to diversify the assets in the SBP, as follows:

> The Committee believes that at certain times additional assets may be added to the portfolio to dampen the volatility of Employer Common Stock without severely damaging the Employee's ability to participate in the growth of the Employer Common Stock.
>
> III. Stock Bonus Plan Portfolio Structure and Overall Fund Guidelines
>
> The Committee is charged with the responsibility of determining the structure of the Plan's portfolio that offers the highest probability of achieving its investment objectives. Moreover, it may update and revise this [*15] structure as the financial needs of the Plan and/or the outlook for the capital markets change.

A. The ranges for the asset allocation of the Plan are designed to allow flexibility of the fund over a time horizon. The ranges are given so the Committee can adjust for any of the following:

1. The Committee's assessment of the intermediate term outlook for different types of securities.

2. Recent divergences in the performance of different classes of securities.

. . . .

4. The allocation of cash flows.

The Committee has established maximum exposures on the asset classes being employed by the Stock Bonus Plan. They are:

Columbia/HCA Common Stock Maximum 100%

Minimum 50%

Domestic Equities Maximum 50%

Minimum 0%

International Equities Maximum 20%

Minimum 0%

Other Investments Maximum 25%

Minimum 0%

Domestic Fixed Maximum 25%

Minimum 0%

International Fixed Maximum 25%

Minimum 0%

Short Term Investments Maximum 30%

Minimum 3%

B. The target asset allocation mix recommended and approved by the Committee to achieve the long term financial objectives of the Stock Bonus Plan is as follows:

Equities

Columbia/HCA [*16] Common Stock 95%

Domestic 0%

International 0%

95%

Other Investments 0%

Fixed Income

Domestic 0%

International 0%

0%

Cash and Short Term Investments 5%

Total Plan 100%

Id. at 23-24.

II.

A. Fiduciary Duty Under ERISA

ERISA sets forth the following standard of fiduciary duty:

> a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and-
>
> (A) for the exclusive purpose of:
>
> (i) providing benefits to participants and their beneficiaries; and
>
> (ii) defraying reasonable expenses of administering the plan,
>
> (B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

29 U.S.C. § 1104(a)(1).

The United States Court of Appeals for the Sixth Circuit has interpreted the general duty of an ERISA fiduciary as threefold. *Kuper, 66 F.3d at 1458*. First, ERISA fiduciaries have a duty of loyalty requiring [*17] that the fiduciary make any decisions regarding an ERISA plan "'with an eye single to the interests of the participants and beneficiaries.'" Id. (quoting *Berlin v. Michigan Bell Tel. Co., 858 F.2d 1154, 1162 (6th Cir. 1988)* and *Donovan v. Bierwirth, 680 F.2d 263, 271* (2nd Cir.), cert. denied, *459 U.S. 1069, 103 S. Ct. 488, 74 L. Ed. 2d 631 (1982))*. Second, ERISA requires that plan fiduciaries carry out their fiduciary duties with the standard of care of a prudent man. Id. Third, the Sixth Circuit states that "an ERISA fiduciary must 'act for the exclusive purpose' of providing benefits to plan beneficiaries." Id.

In Kuper, the Sixth Circuit considered the standard by which the actions of fiduciaries of an employee stock ownership plan should be measured. The Court finds the Kuper Court's reasoning instructive because both ESOPs 12 and SPBs are eligible individual account plans subject to the same ERISA requirements. The Sixth Circuit noted that Congress created two exceptions for ESOP fiduciaries from the general duties of ERISA fiduciaries. First, ESOP fiduciaries are not required to diversify the holdings [*18] of ESOPs. Second, ESOP fiduciaries are not prohibited from self-dealing, as is the general rule for ERISA fiduciaries. They can therefore invest more than 10% of ESOP assets in company stock. These exceptions were made for ESOPs to encourage employee ownership in company stock. Id. However, the Court also stated that ESOP fiduciaries are not relieved from their duty to act in accordance with the prudent man standard, the duty to act solely in the interests of, and for the exclusive benefit of, the plan participants and beneficiaries. Id. (citing *Martin v. Feilen, 965 F.2d 660, 664 (8th Cir. 1992)*, cert. denied, *506 U.S. 1054, 113 S. Ct. 979, 122 L. Ed. 2d 133 (1993))*.

> 12 An ESOP is an employee retirement account that invests primarily in employer securities. It serves two roles: one as a retirement fund and another as a "'technique of corporate finance' that would encourage employee ownership." *Kuper, 66 F.3d at 1457* (quoting *Martin, 965 F.2d at 664*). Accordingly, "ESOPs are not designed to guarantee retirement benefits, and they place employee retirement assets at a much greater risk than the typical diversified ERISA plan." Id. (citing *Moench v. Robertson, 62 F.3d 553, 568* (3rd Cir.), cert. denied, *516 U.S. 1115, 116 S. Ct. 917, 133 L. Ed. 2d 847 (1996)*(quoting *Martin, 965 F.2d at 664*)).

[*19] In Kuper, the Court found that because ESOPs differ from most ERISA plans in that they are exempt from the diversification requirement and prohibition against self dealing, they are at more risk than most ERISA plans. The Court noted that, fiduciaries of such plans are placed in a precarious position because they must "'administer the ESOP investment consistent with the provisions of both a specific employee benefits plan and with ERISA['s duty of prudence].'" *66 F.3d at 1458* (quoting *Moench, 62 F.3d at 569* and *Kuper v. Quantum Chems. Corp., 852 F. Supp. 1389, 1395 (S.D. Ohio 1994))*. The Court noted that this "conflict becomes particularly evident when an employee claims that a fiduciary breached his ERISA duties by failing to diversify an ESOP." Id. It relied on the reasoning of the United States Court of Appeals for the Third Circuit that subjecting ESOP fiduciaries to a strict standard of review:

> "would render meaningless the ERISA

> provision excepting ESOPs from the duty to diversify." This, in turn would risk transforming ESOPs into ordinary pension plans, thus frustrating Congress's desire to encourage employee ownership and contravening [*20] the intention of the parties.
>
> The Third Circuit found that the better balance between these concerns was achieved by measuring a fiduciary's decision to continue investing in employer securities for an abuse of discretion. Thus, it held that "keeping in mind the purpose of ERISA and the nature of ESOPs themselves, . . . an ESOP fiduciary who invests the assets in employer stock is entitled to a presumption that it acted consistently with ERISA by virtue of that decision. However, the plaintiff may overcome that presumption by establishing that the fiduciary abused its discretion . . . ."

66 F.3d at 1458-59 (quoting *Moench, 62 F.3d at 570-71*). The Sixth Circuit adopted the Third Circuit's holding and established a presumption that an ESOP "fiduciary's decision to remain invested in employer's securities was reasonable." *66 F.3d at 1459*. The presumption of reasonableness in an ESOP fiduciary's decision to remain invested in employer stock may be rebutted by a plaintiff only "by showing that a prudent fiduciary acting under similar circumstances would have made a different investment decision." Id.

As all EIAPs are exempt from the diversification [*21] requirement, the competing Congressional interest in employee ownership of company stock and the fiduciary's duty of prudence must be balanced with respect to all EIAPs. This includes the SBP under consideration. Therefore, the reasoning upon which the Sixth and Third Circuits applied the presumption of prudence to the investment decisions of ESOP fiduciaries not to diversify may equally be applied to the SBP fiduciaries.

The plaintiffs argue that the presumption is not applicable to the defendants' decision because it has not been extended to all EIAPs and there is no authority for such a presumption with respect to a SBP. They also insist that the Court should not extend the presumption of prudence for ESOP fiduciaries to the defendants' actions with respect to the SBP because it is not an ESOP and was created only as a retirement fund and not as a means of corporate finance. However, after reviewing the reasoning of the Sixth Circuit in its decision to apply a presumption of prudence to the fiduciary duty of ESOP fiduciaries, the Court finds that the same reasoning may be applied to the SBP. Accordingly, the Court finds that the presumption of prudence applies to the decisions [*22] of the defendants to invest the SBP assets in company stock.

In order to rebut the presumption of prudence, the plaintiff must show that "a prudent fiduciary acting under similar circumstances would have made a different investment decision." *Kuper, 66 F.3d at 1459*. A plaintiff must meet this burden by showing that a fiduciary "fail[ed] to investigate and evaluate the merits of his investment decisions" and that "there is a causal link between the failure to investigate and the harm suffered by the plan." Id. (citing *Diduck v. Kaszycki & Sons Contractors, Inc., 974 F.2d 270, 279 (2nd Cir. 1992))*. A causal link can be established by demonstrating "an adequate investigation would have revealed to a reasonable fiduciary that the investment at issue was improvident." Id. (citing *Fink v. National Sav. & Trust Co., 249 U.S. App. D.C. 33, 772 F.2d 951, 955 (D.C. Cir. 1985)* (Scalia, J., concurring in part and dissenting in part [13])).

13 As Justice Scalia explained in Fink:

> Breach of fiduciary duty to investigate and evaluate would sustain an action to enjoin or remove the trustee, see, e.g., *Donovan v. Bierwirth, 538 F. Supp. 463, 471 (E.D.N.Y. 1981)*, or perhaps even to recover trustee fees paid for the investigative and evaluative services that went unperformed. But it does not sustain an action for the damages arising from losing investments. I know of no case in which a trustee who has happened-through prayer, astrology or just blind luck-to

> make (or hold) objectively prudent investments (e.g., an investment in a highly-regarded blue chip stock) has been held liable for losses from those investments because of his failure to investigate and evaluate beforehand. Similarly, I know of no case in which a trustee who has made (or held) patently unsound investments has been excused from liability because his objectively imprudent action was preceded by careful investigation and evaluation. In short, there are two related but distinct duties imposed upon a trustee: to investigate and evaluate investments, and to invest prudently. Neither does the faithful discharge of the first satisfy the second, not does breach of the first constitute breach of the second. To be sure, the extent of the trustee's investigation and evaluation is often the focus of inquiry in imprudent-investment suits. But that is because the determination of whether an investment was objectively imprudent is made on the basis of what the trustee *knew or should have known*; and the latter necessarily involves consideration of what facts would have come to his attention if he had fully complied with his duty to investigate and evaluate. It is the imprudent investment rather than the failure to investigate and evaluate that is the basis of suit; breach of the latter duty is merely evidence bearing upon breach of the former, tending to show that the trustee *should have known* more than he knew.

Fink, 772 F.2d at 962 (emphasis in the original).

[*23] B. The Government's Investigation and the Committee's Response

The government's investigation of Columbia/HCA's business practices became apparent when the Federal Bureau of Investigation, the Internal Revenue Service and the Department of Health and Human Services made unannounced raids on Columbia/HCA's healthcare facilities located in El Paso, Texas, on March 19, 1997. The individual defendants contend that when these raids occurred, they were not aware that Columbia/HCA had been under a government investigation. The first notable subsequent drop in the price of Columbia/HCA stock occurred on March 21, 1997. The stock closed at $ 41.25 per share on March 20, 1997, and closed on March 21, 1997, at $ 38.50 per share.

After the raids, there were numerous newspapers that covered the events and alleged that investigations of Columbia/HCA were being conducted in other locations. Most notably, on March 28, 1997, the New York Times reported that the investigation was also being conducted in Florida, Texas, Illinois and Nevada for Medicare fraud. [14]

> 14 The next day, March 29, 1997, the Columbia/HCA board of directors held a special meeting to discuss the investigation, the article and its potential ramifications. At that meeting, the board decided to call meetings as needed to discuss issues related to the investigation. A second meeting of the board of directors was held on April 14, 1997. During this meeting, the board discussed additional media coverage of the investigation and issues raised by the media. The minutes reflect that, as of this meeting, Columbia/HCA had been informed that it was "the target of an investigation by the United States Attorney's office." Plaintiffs' Exhibit 150. The board created a special committee consisting exclusively of outside directors "for the purpose of reviewing, evaluating, and making recommendations to the Board of Directors regarding supervision of the Company's responses to the Investigation and any other inquiries by governmental agencies." Id. The minutes of the meeting of April 14, 1997, do not reflect that the board discussed the effect of the investigation on the assets in the SBP. Id.

[*24] The retirement committee met a total of seven times in 1997; six times after the El Paso raids. [15] Mr. Anderson, Ms. Sharp, the administrative assistant for the retirement committee, and others testified that it was the

practice of the committee to meet first as the HealthTrust 401(k) committee, to theoretically adjourn, and to reconvene as the retirement committee. As part of this practice, there were occasions on which the retirement committee would adopt the HealthTrust committee's earlier determination that the company stock was a prudent investment.

15 The retirement committee met before the raids on March 3, 1997. The minutes to this meeting do not reflect that the committee discussed whether Columbia/HCA stock was a prudent investment for the SBP or any other retirement plan, nor that the retirement committee adopted any determination regarding prudence from an earlier meeting of the HealthTrust 401(k) committee. Plaintiffs' Exhibit 15. Columbia/HCA's stock closed on March 3, 1997, at $ 43 per share. The retirement committee did not meet again during April of 1997.

[*25] The first meeting of the HealthTrust 401(k) committee after the raids occurred on April 16, 1997. The retirement committee did not meet that day to discuss the SBP. At this time, Columbia/HCA's stock had not closed above $ 40 per share since the investigation became public, and it closed at $ 34.25 per share on April 16, 1997. The purpose of the April 16th meeting was to discuss the response to a motion for mandatory injunction seeking the appointment of an investment advisor in HealthTrust, Inc., The Hospital Co., et. al. v. Usher. [16] The minutes of the meeting do not reflect that the HealthTrust 401(k) committee discussed the merits of the government investigation. Plaintiffs' Exhibit 29. However, the pleadings the committee reviewed and discussed concerned the actual and potential effect of the investigation on the stock price which, as Ms. Sharp testified, was the subject discussed. Transcript (Docket Entry No. 213), vol. II at 323. The investigation was considered by the committee in the overall context of deciding how to respond to the motion. The minutes state that "it was the consensus of the Committee that Columbia/HCA Healthcare Corporation stock remained a prudent [*26] investment. The Committee agreed to review the issue of stock prudency at the next meeting." Id.

16 HealthTrust, Inc. et. al. v. Usher, No. 3-96-0486, is a class action suit filed in this Court in May, 1996, regarding the assets of the former HealthTrust employee stock ownership plan which terminated in December of 1991. HealthTrust is an affiliate of Columbia/HCA. The plaintiffs in Usher seek to interplead the funds and to have the Court declare whether former HealthTrust employees who had participated in the SBP were entitled to certain assets or whether the assets should go to present employees of the company. See transcript (Docket Entry No. 218), vol. VII at 1518. At the time the complaint was filed, the assets from the ESOP had been moved into the HealthTrust 401(k) and were invested in Columbia/HCA stock.

On April 9, 1997, two classes of defendants in the HealthTrust litigation filed a joint motion seeking to have the Court issue a mandatory injunction appointing an investment manager to determine if the assets of the HealthTrust 401(k) should be held in the stock of Columbia/HCA or diversified as a result of the government investigation. They argued that the Court should issue the injunction because of the risk that the HealthTrust 401(k) committee would not be able to meet its fiduciary duty under ERISA to act solely in the interest of the SBP participants and beneficiaries in light of the government's investigation.

[*27] The evidence reflects that at that time, the committee sought legal advice from three attorneys who attended the April meeting by telephone. These were Mr. Allen Buckley, the retirement committee's ERISA counsel, Mr. Alan Lubel, counsel for HealthTrust in the Usher litigation and Mr. Ken Russell, who was then head of the employee benefits and pension practice group at the law office of Troutman Sanders. Mr. Buckley testified that he did not think the HealthTrust 401(k) committee discussed whether prudence would require a consideration of diversifying the assets of the SBP. He stated that the committee discussed generally whether Columbia/HCA stock was a prudent investment and voted that it was. Likewise, James Glasscock [17] testified that the committee did not discuss the investigation at this meeting.

17 Mr. Glasscock worked in the Columbia/HCA Treasury Department under David Anderson and handled the mechanics of the SBP's purchases and sales of company stock and was responsible for

> maintaining adequate liquidity in the plan so that participants seeking cash distributions on a given day could receive their vested amounts.

[*28] Mr. Lubel testified that the investigation and recent drop in stock price was the basis for the motion and that these events were discussed at the meeting. He testified that the ERISA lawyers, Messrs. Buckley and Russell, made a presentation to the committee regarding their fiduciary duty with respect to the HealthTrust 401(k) plan. Specifically, the attorneys talked about whether the committee or the company was bound by the terms of the 401(k) that all assets be invested in Columbia/HCA stock and discussed the prudence of the investment. The committee was told that they would need to consider amending the plan or diversifying the assets of the 401(k) if they determined that the investment in Columbia/HCA stock was not prudent, despite the plan language requiring that the assets be invested in Columbia/HCA stock. Mr. Lubel further recalled that:

> there was a very strong feeling of the members of the committee that the company- that investment in company stock remained a very good, and I guess in ERISA terms, a prudent investment, that it was reasonable to remain invested in it. They seemed to feel that very strongly.
>
> . . . .
>
> The strongest impression I had from that [*29] and my strongest memory of it was the committee getting its backbone up, saying, if the question is, is investment in Columbia stock, whether that's a good investment, we think it is a good investment. If that's the question we have to decide here and if that's what guides our decision on this motion, then we think it is a good investment. We're a strong company and we do not want to consent to this motion to diversify.
>
> . . . .
>
> They just seemed to feel the basics of the company were very strong, that this investigation that was going on was a temporary thing, that there was no indication that it was going to be any bigger than it was, and that you need to look at the stock in the long-term basis.
>
> One consideration was how well the stock had done over the preceding years. It was their feeling that the company was still the same company and that it remained a good investment, both because of its history, the history of the increase in the stock price and the ongoing strength of the company.

Transcript (Docket Entry No. 218), vol. VII at 1530-1532. He explained that "I don't recall there being detailed discussion of, you know, how many boxes got taken out in El [*30] Paso or who are the people involved. But that, again, wasn't the purpose of our meeting. Our purpose was something that was an offshoot of that." Transcript (Docket Entry No. 218) at 1565. Mr. Lubel also testified that the SBP was not discussed at this meeting.

On May 14, 1997, the committee members met both as the HealthTrust 401(k) committee and as the retirement committee. Columbia/HCA stock closed at $ 36.50 per share on this date. The minutes of the HeathTrust committee meeting state only that the committee "addressed the issue of whether the investment in Columbia/HCA stock continued to be prudent." Plaintiffs' Exhibit 30. The minutes do not indicate the committee's conclusion. Ms. Sharp testified that every time the committee members discussed whether the investment was prudent, they determined that it was. Transcript (Docket Entry No. 213) at 290.

The minutes of the retirement committee meeting do not reflect that the committee discussed whether Columbia/HCA stock was a prudent investment for the SBP in light of the government's investigation. Plaintiffs' Exhibit 16.

Between July and September of 1997, there were three significant developments in relation to the investigation. [*31] First, the government executed additional search warrants on facilities of Columbia/HCA affiliates in six states, including Florida, Tennessee, Utah, Oklahoma, North Carolina and Texas. Three mid-level employees of one hospital owned by a Columbia/HCA affiliate were indicted on charges related to a Medicare cost report.

Second, the Columbia/HCA board of directors requested that Richard Scott, the Company's CEO, and David Vanderwater, its President, resign. They did so; and Dr. Thomas Frist, Jr., the former CEO of HCA who was then acting as vice-chairman of Columbia/HCA, became the new president and CEO. Shortly thereafter, Dr. Frist put in place a 12-point action plan which caused 12 of 14 executives of the company to be replaced.

Third, on August 1, 1997, the United States Congress passed the Balanced Budget Act. The law significantly reduced the amount of reimbursements Medicare would make for certain medical expenses, including home healthcare.

On August 14, 1997, Columbia/HCA filed a form 10Q with the SEC which stated that:

> Management believes the ongoing investigation and related media coverage are having a negative effect on the Company's results of operations. It [*32] is too early to predict the outcome or effect that the ongoing investigations, the initiation of additional investigations, if any, and the related media coverage will have on the Company's financial condition or results of operations in future periods. Were the Company to be found in violation of federal or state laws relating to Medicare, Medicaid or similar programs, the Company could be subject to substantial monetary fines, civil and criminal penalties and exclusion from participation in the Medicare and Medicaid programs. Any such sanctions could have a material adverse effect on the Company's financial position and results of operations.

Plaintiffs' Exhibit 117 at 5. Dr. Thomas Frist, Jr., testified that if the government were to exclude Columbia/HCA from Medicare and Medicaid, it would be disastrous for Columbia.

The retirement committee's ERISA counsel, Mr. Buckley, sent a memo to Ms. Sharp from which he planned to read at a retirement committee meeting on August 27, 1997. See Plaintiffs' Exhibit 56. The memo indicated that Mr. Buckley was planning to advise the retirement committee of their fiduciary duty. It stated that "the recent problems of Columbia/HCA in [*33] terms of the Federal and State Medicare and Medicaid investigations need to be analyzed in terms of potential implications to the retirement plans of Columbia/HCA" and that "the only two plans which are substantially invested in Columbia/HCA stock at the direction of the employer are the Stock Bonus Plan and the HealthTrust 401(k) Plan." Id. at TS 0018. Mr. Buckley further stated that "any decision must be made with the exclusive interest of participants in mind- can't not divest an EIAP if company stock [is] no longer a prudent investment because you feel it might hurt the company." Id.

The committee met on August 27, 1997, as both the HealthTrust 401(k) committee and as the retirement committee. This was the first time the committee formally discussed prudence and reviewed analyst recommendations for Columbia/HCA stock. The HealthTrust 401(k) committee determined that Columbia/HCA stock was a prudent investment. Their discussion was reflected in the minutes of the meeting as follows:

> The Committee then discussed the prudence of the continued investment in Columbia stock. David Anderson made several comments to the Committee. He state [sic] that the employees [*34] at HealthTrust all knew that this was a plan composed of company stock, and that this plan was originally intended to only own company stock. He stated that he did not believe that it would be prudent to sell Columbia stock in the current environment due to the low level of the stock price. He pointed out that of the ten major investment houses, seven have a buy or out-perform recommendation currently on Columbia stock. David Anderson and Jim Glasscock agreed to continue to monitor the ten major investment houses and how they rated Columbia stock. They will report back to the Committee at each Committee meeting with regard to how these investment houses are addressing Columbia stock. After further discussion on the issue, the Committee agreed that Columbia continued to be a prudent investment. The Committee agreed to

> continue to monitor the prudence of an investment in Columbia stock.

Plaintiffs' Exhibit 32.

The retirement committee meeting minutes indicate that, for the first time, prudence was discussed with respect to the SBP specifically. Ms. Sharp testified that it was the first retirement committee meeting that included such a discussion. Transcript (Docket Entry No. [*35] 213) at 281. The minutes show that the retirement committee adopted its earlier determination as the HealthTrust 401(k) committee that Columbia/HCA was a prudent investment with respect to the investment of the SBP assets. Plaintiffs' Exhibit 17. The minutes state: "the prudence of Columbia/HCA stock as an investment had been discussed at the immediately preceding HealthTrust, Inc. 401(k) Committee meeting; at which meeting it was resolved by the Committee that Columbia/HCA stock continued to be a prudent investment for an EIAP. The same conclusion is applicable in this meeting." Id. On the last trading day in August, Columbia/HCA stock closed at $ 31 and 9/16 per share.

The next meeting of the HealthTrust 401(k) committee was held on September 19, 1997. By this time, the price of Columbia/HCA stock had dropped into the $ 20 range and on the previous day had closed at $ 28 and 11/16 per share. Mr. Glasscock reported to the committee that of the 23 analysts that rated the company, 14 rated it a buy and 9 gave a neutral recommendation. Defendants' Exhibit 49D. Mr. Buckley attended this meeting and testified that the committee voted unanimously that Columbia/HCA stock was a prudent [*36] investment for the 401(k) plan but he does not recall any specific discussion of the investigation.

In mid-October of 1997, the committee received reports from Marine Midland Bank and Hewitt Associates [18] regarding whether the assets of the 401(k) should be diversified. [19] The committee met as the HeathTrust 401(k) committee on October 7, 1997. Mr. Glasscock again reported to the committee that analyst reports were favorable with respect to Columbia/HCA stock.

18 Hewitt Associates is a human resources consulting group.

19 These reports were ordered by the Court in the Usher litigation. As a result of the motion for mandatory injunction, the parties reached an agreement whereby independent investment advisors would answer questions to aid the Court in determining how the disputed assets should be invested. Defendants' Exhibit 90. The Court's order states that:

> the plaintiffs shall, within thirty (30) days of the entry of this order on the docket, retain one or more independent investment consultants or investment advisors to advise and render a report(s) to the plaintiffs on: (1) the investments of the assets of the 401(k) plans maintained by other companies which plans are similar to the plans at issue in this case; (2) whether an investment in Columbia/HCA Healthcare Corporation stock is a prudent investment under the applicable ERISA standards for plans of this type; (3) whether the investment of all the disputed assets, as defined in the complaint in Columbia/HCA Healthcare Corporation stock is a prudent investment under the applicable ERISA standards; (4) whether, if the advisor(s) or consultant(s) had a fund of approximately $ 200 million, it would recommend diversifying that fund.

Id. Hewitt Associates was retained to answer the first question, and Marine Midland Bank was retained to answer questions two through four.

[*37] During the month of October, 1997, the price of Columbia/HCA stock remained in the twenties. It was not until November 11, 1997, that the stock went back up to $ 30 per share. Between November, 1997, and July 28, 1998, the lowest closing price of the stock was $ 24 and 3/8 per share on February 6, 1998, and the highest closing price was $ 34 and 3/16 on April 20, 1998.

On November 25, 1997, January 6, 1998, and February 3, 1998, the committee met and received reports of investment analysts and discussed the prudence of continuing to invest in Columbia/HCA stock. On each date, the committee members concluded that the stock remained a prudent investment. In March, 1998, the Company made its annual cash contribution on behalf of the SBP and the plan purchased approximately $ 25 million in Columbia/HCA stock.

In a March 10, 1998, memo to Ms. Sharp, Mr. Scallet gave "a summary of the recommendations we made in our prior call concerning additional actions that plan fiduciaries might take in connection with Columbia/HCA stock." Defendants' Exhibit 57. Mr. Scallet's listed the following:

> 1. Draft an investment policy statement for the plans and the specific accounts . . . .
>
> 2. [*38] Retain an investment advisor.
>
> 3. Undertake a valuation of the company using traditional valuation techniques.
>
> 4. Do an analysis of whether fiduciaries should be looking long-term or more short-term. The analysis would include patterns of employee termination and volatility of the stock price. The idea is that, if stock price is volatile and people are leaving all of the time, there is a greater potential for treating people unfairly because of the happenstance of when they are eligible to get their benefits. Conversely, if the actuarial trend is that people will be there a long time before they actually get paid, the fiduciaries might be less concerned about short-term fluctuation of the stock.
>
> 5. Look at comparable companies in sector and size to see whether they have stock funds (almost all do) and whether they sell when stock goes down (almost never). In other words, there is some comfort in doing just what others are doing.
>
> 6. Expand the analysts' survey to portfolio managers of pension plans. The people on there now are all Wall Street houses. Portfolio managers perspective is closer to what we have here.
>
> 7. Consider insider activity. If we do something [*39] different from what insiders are doing with their own stock, then we have problems.

Id.

The retirement committee never determined that the SBP's investment in Columbia/HCA stock was imprudent and never diversified the assets of the SBP. On September 29, 1998, the board of directors amended the SBP to allow plan participants to choose whether to diversify their assets from among ten options, including company stock.

C. Procedural Prudence

The plaintiffs assert that after conducting a reasonable investigation, a prudent fiduciary would have determined that it was not prudent to invest the assets of the SBP in company stock and would have diversified the assets in accordance with the direction from the investment policy guidelines. They insist that to reach this conclusion a prudent fiduciary would have made a more through inquiry into the merits of the government's investigation, including the steps outlined by Columbia/HCA's outside ERISA counsel, Mr. Scallet. The defendants argue that their process for determining whether Columbia/HCA stock was prudent complied with the requirements of ERISA.

In support of their position that their investigation was adequate, the [*40] defendants assert that the Court should take into account the discussions of the HealthTrust 401(k) committee on the issue of prudence and the knowledge each member had of the value of Columbia/HCA stock by virtue of his position in the company. The plaintiffs argue that the prudence standard for the HealthTrust 401(k) plan is not the same as the prudence standard for the SBP because the HealthTrust plan strictly limited investments to company stock and the committee could only recommend diversification to the board, whereas the SBP allowed the committee to diversify the assets of the SBP.

The Court agrees that the measures the 401(k) committee would be required to take if it determined the company stock was an imprudent investment were different than the steps the committee would have to take with regard to the SBP. The HealthTrust 401(k) committee was not free to diversify the assets of the HealthTrust 401(k), and could only suggest diversification to the board. The retirement committee, on the other hand, could diversify the assets of the SBP of its own accord. Nevertheless, as both the retirement committee and the HealthTrust 401(k) committee, they were under a continuing obligation [*41] to evaluate the prudence of investing the assets of the 401(k) in company stock. See *Kuper, 66 F.3d at 1458* (finding that a plan fiduciary who is not given discretion to diversify must nevertheless act prudently). As both committees were subject to this requirement and both were made up of the same people, it was unnecessary for them to make the prudence analysis when discussing each plan. Accordingly, the Court finds that the HealthTrust 401(k) committee's determination of prudence with respect to the 401(k) may be considered in determining whether the retirement committee adequately investigated the prudence of investing in Columbia/HCA stock.

The retirement committee members, as senior executives, received periodic updates on the government investigation, and each committee member had access to general information regarding the ongoing developments. The retirement committee members did not seek independent assistance to help them determine whether it was prudent to hold almost all of the assets of the SBP in Columbia/HCA stock. Nor did the committee independently conduct its own inquiry into the merits of the government investigation regarding Columbia/HCA's billing [*42] practices. Transcript (Docket Entry No. 213) at 379. Moreover, the committee did not meet as either the HealthTrust committee or the retirement committee until almost one month after the first raid. The committee did not formally discuss prudence in relation specifically to the SBP until August, 1997. Although the committee hired an attorney to explain steps it could take to determine prudence, the retirement committee did not engage in most of these steps and only began to review analyst reports with respect to prudence in August, 1997.

The evidence also reflects that the defendants failed to review the diversification language in the investment policy guidelines. According to Mr. Shelton, the retirement committee discussed the movement of the stock price and its prudence in relation to the long-term investment objective of the SBP as reflected in the guidelines and concluded that the underpinnings of the company were good, but that the committee did not discuss the section of the guidelines permitting diversification with respect to the SBP. Mr. Moore, the committee chairman, and Mr. Braun, both testified that they were not familiar with the guidelines. Transcript (filed June 21, 1999; [*43] Docket Entry Nos. 214 and 223), vol. III at 582 and vol. X at 2084. The plaintiffs contend that the failure to know of the investment policy guidelines and the failure to consider them each constitute a breach of fiduciary duty.

The defendants argue that it was not necessary for the committee to consider the investment policy guidelines because the diversification provision of the guidelines was mistakenly included in them. [20] David Anderson, who was responsible for the drafting of the investment policy guidelines, testified that the diversification provision was mistakenly included in relation to the SBP and that the plan document should be considered the ultimate source of guidance. The defendants further argue that the diversification provision is void because it conflicts with the directive in the plan document that the assets of the SBP shall be invested "primarily or exclusively in company stock." Defendants' Exhibit 6 at 48-49. Mr. Anderson further testified that, in conjunction with the plan language, the guidelines do not make sense and that he is not certain when the diversification provision would apply to the SBP. [21]

20 Mr. Longfellow testified in his deposition that he did not look at the SBP document when drafting the investment policy guidelines for the SBP but used the first restatement of the HCA profit sharing plan to draft the guidelines. Transcript (Docket Entry No. 214) at 754-755.

[*44]

21 The Court notes that while the defendants contend that the investment policy guidelines are irrelevant to the determination of whether the defendants breached their fiduciary duty to the SBP, the defendants nevertheless cite the language in the guidelines which states that "the Committee believes that a 10 year period is appropriate in measuring its progress toward achieving [the objective of the plan]" in support of their decision to invest in company stock. Plaintiffs' Exhibit 117.

The Court finds that the SBP investment policy guidelines are valid. Even if they were mistakenly based on the wrong authority, the guidelines were adopted by the committee. Also, the guidelines do not squarely conflict with the directive of the plan that the assets of the SBP be invested primarily or exclusively in company stock. First, the plan does not completely forbid diversification. The investment policy guidelines do not require a fiduciary to diversify the assets of the SBP at any particular time, including times when company stock is particularly volatile, in order to meet its fiduciary duty. The [*45] guidelines merely underline the committee's ability to diversify the assets and suggest the manner in which diversification should occur.

Although the SBP directive that the assets be invested "primarily or exclusively" in company stock is a binding directive to the fiduciaries, in light of the fact that ERISA states that "a fiduciary shall discharge his duties . . . in accordance with the documents and instruments governing the plan," the committee should have considered the diversification provision in the guidelines. Accordingly, the Court finds that the failure to do so constituted a procedural deficiency.

Next, the record does not reflect that the retirement committee discussed the demographics of the participants in the SBP. Mr. Anderson testified that he does not recall any discussion of the retirement committee regarding the demographics of the SBP, the number of participants approaching retirement or whether the volatility of the company stock would have an adverse effect on these employees with respect to the SBP. Ms. Yarosh, of Hewitt Associates, was responsible for keeping data on plan participants for the retirement committee. She testified that the retirement committee [*46] did not ask her to provide it with information regarding the demographics of SBP participants. Transcript (filed June 21, 1999; Docket Entry No. 219), vol. VIII at 1702.

A prudent consideration of the possibility of diversification also would have included consideration of whether high ranking Columbia/HCA executives, including committee members, were selling their personal holdings of stock shortly after the investigation became public knowledge. There is no evidence that the defendants considered this information.

In summary, the Court concludes that the procedure followed by the retirement committee to review the prudence of investing the assets of the SBP in Columbia/HCA stock was deficient.

D. Substantive Prudence

In addition to proving that the inquiry of the committee was procedurally deficient, the plaintiffs "must show a causal link between the failure to investigate and the harm suffered by the plan." *Kuper, 66 F.3d at 1459* (citation omitted). Accordingly, the Court will also consider whether additional considerations would "have revealed to a reasonable fiduciary that the investment at issue was improvident." Id. (citations omitted).

In Kuper [*47] , the Court reached the conclusion that a reasonable fiduciary would have taken the same actions as the defendant and held the stock based only on the facts that the "stock fluctuated during this period and that several investment advisors recommended holding [company] stock." *Id., 66 F.3d at 1460*. The defendants in this case have presented a great deal more evidence to support their contention that a reasonable fiduciary would have continued to hold Columbia/HCA stock.

First, a reasonable fiduciary who retained an investment advisor to perform a valuation of Columbia/HCA would have determined that the investment was prudent. Columbia/HCA's summary annual reports show that on January 1, 1997, the value of the SBP's assets after liabilities was $ 1,406,757,882.00. This amount decreased by $ 531,346,715.00 to $ 875,411,167.00 as of December 31, 1997. Nevertheless, the company maintained revenues of approximately $ 18.8 billion for the years 1996, 1997, and 1998, and earned a positive net income for each year, increasing its annual income from $ 182 million in 1997 to $ 532 million in 1998. Moreover, Columbia/HCA maintained total assets of approximately $ 20 billion [*48] for each of the three years. In 1997 and 1998, Columbia/HCA generated cash from operations of approximately $ 3 billion each year and increased its net worth over $ 300 million, from $ 7.25 billion in 1997, to $ 7.58 billion by December 31, 1998.

The defendants' expert witness, Mr. Gougis, testified that at the time the plaintiffs assert that the committee should have begun diversification, the fundamentals of the company were sound. Mr. Gougis stated that even though the investigation had a more serious impact than expected and Columbia/HCA's earnings in 1997 were significantly lower than in the previous year,

> the Company still generated more dollar

> profits and operating cash flow (earnings before interest, taxes, depreciation and amortization) than any other hospital management company. Columbia/HCA's operating cash flow in 1998 was greater than the next three largest companies' combined results. The Company's strong cash flow, along with its noncore assets, represented sources of funds that could easily meet the $ 1.0 billion to $ 1.5 billion government fine that I believe the market had already factored into the Company's stock price.

Statement of direct testimony [*49] of Chester A. Gougis (Docket Entry No. 190) at 4.

The strength of Columbia/HCA's fundamentals at this time were also reflected in an independent evaluation of the company by Goldman Sachs on July 31, 1997, prepared in connection with Columbia/HCA's spin-off of some of its affiliates. In its analysis, Goldman Sachs concluded that Columbia/HCA had sound fundamentals and that even if the company were required to break-up it was worth more than the stock was trading at that time.

Columbia/HCA's sound fiscal state is further evidenced by the fact that it implemented and completed $ 1 billion stock buy-backs in both 1997 and 1998. These buy-backs were financed through two $ 1 billion term loans. Mr. Anderson testified that the banks were aware of the government's investigation when they approved the loans.

Late in 1997, Columbia's S&P credit rating was downgraded to BBB. However, this was still an investment grade rating. Mr. Gougis testified that the company's diminished credit rating was partly the result of the investigation and partly the company's increased debt from the stock buy-backs. The company's strong financial condition in 1997, and 1998, was also indicated by its ability [*50] to issue commercial paper, "an important source of short-term financing to which only the strongest companies have access." Id. at 7. Mr. Gougis further testified that the decline in stock price was also caused by negative events in the hospital management industry. These included the promulgation of the Balanced Budget Act by Congress, which called for a reduction in Medicare spending, and the increased power of managed care companies. The plaintiffs do not contest that these factors contributed to the drop in the stock price.

In its report, Marine Midland addressed "whether an investment in Columbia/HCA Healthcare Corporation stock is a prudent investment under the applicable ERISA standards for plans of this type." Defendants' Exhibit 90; Plaintiffs' Exhibit 159 at 1. The Marine Midland report states that "Marine has assumed that the Court's reference to 'plan of this type' is a reference to eligible individual account plans." Plaintiffs' Exhibit 159 at 2. Accordingly, the Marine Midland report would include whether Columbia/HCA stock is a prudent investment for the SBP.

Marine Midland reported that a large number of institutional investors [22] held Columbia/HCA stock and [*51] that "the majority of analysts are positive in their outlook for the stock, and even those that are not positive nevertheless rate Columbia as a stock that they expect to do as well as the market in general." Id. at 3. However, Marine Midland also stated that the lack of sale recommendations is "not unusual, since securities firms are generally reluctant to publish sale recommendations." Id. Marine Midland further noted that the Columbia's net worth grew from $ .3 billion in 1992, to $ 8.6 billion in 1996, and that:

> In summary, Columbia has a strong balance sheet and a proven track record of profitability, is very liquid, has ample capacity to service its debt and otherwise discharge its obligations, and is able to employ the stockholders' assets profitably. The declining efficiency in asset employment is a modest danger sign, but in the overall context, it is merely an indication of an area for continued monitoring and not a significant problem in and of itself.
>
> . . . .
>
> Finally, Marine evaluated the risks to Columbia in the government investigation of its billing practices in its home health care division, as well as its coding of patients' diagnoses for [*52] Medicare reimbursement. Clearly, this is the most significant negative factor for Columbia at present. If not for this development, it

> seems very likely that Columbia Stock would still be outperforming the general market indices.
>
> . . . .
>
> Marine concludes that Columbia is dealing effectively with the government investigations, and will emerge scathed but not seriously wounded. It is likely that the cost of remediation will not be significantly damaging to so profitable a company. It is not unreasonable to anticipate that Columbia is likely to be an even more successful industry leader after it has gotten beyond the current difficulties. Therefore, Marine believes that Columbia is a prudent investment in spite of the government investigations.

Id. at 6.

> 22 Specifically, Marine Midland reported that 1,245 institutional investors held Columbia/HCA stock totaling 69% of outstanding shares. These institutional investors included 739 mutual funds, 345 money managers, 102 banks, and 57 insurance companies. Plaintiffs' Exhibit 159 at 3.

[*53] Based on these facts, the Court finds that an inquiry into the fundamentals of the company would not "have revealed to a reasonable fiduciary that the investment at issue was improvident." *Kuper, 66 F.3d at 1459*.

During the trial, the defendants presented evidence of the demographics of the SBP participants in 1997, showing that the workforce was relatively young. The average employee was 40 years old. Of the 200,000 plan participants in 1997, only 24,000 were over age 54. Defendants' Exhibit 122. Accordingly, even if the retirement committee had reviewed the demographics of the SBP, because most of the participants were not near retirement age, they would have concluded that the investment objective should be long-term and that short-term volatility caused by the investigation would not have an adverse effect on most SBP participants. Short-term volatility was also of diminished importance to SBP participants because they could choose whether to take their benefits in the SBP in company stock, rather than sell the stock and take their benefits in cash. Participants could thereby potentially avoid selling their stock at a time when the share price is low. Therefore, [*54] if the retirement committee had reviewed the demographics of the SBP or retained an investment advisor to do an analysis of whether fiduciaries should be looking long-term or short-term, they would have determined that plan assets should be invested for long-term. Accordingly, the Court finds that such an analysis would not "have revealed to a reasonable fiduciary that the investment at issue was improvident." *Kuper, 66 F.3d at 1459*.

The plaintiffs did not retain an investment advisor to look at actions of comparable companies in sector and size. However, Hewitt Associates' report of September of 1997, addressed to "what extent are 401(k) and defined contribution plans of large employers invested in the employer's own securities?" Defendants' Exhibit 92. Hewitt Associates concluded that "approximately 40 percent of the total assets of large plans are invested in company stock" and that large defined contribution plans "invest a majority of the defined contribution plan assets in employer stock." Id.

Mr. David Pogue was the author of Hewitt's report. He testified that Hewitt Associates was "not addressing the stock bonus plan at that time" and that "the materials [*55] that we provided to the company and any consulting was limited simply to ESOP accounts within the HealthTrust plan." Transcript (filed June 21, 1999; Docket Entry No. 216), vol V at 987. Nevertheless, the Court finds the report to indicate that a prudent fiduciary would have allowed the SBP assets to remain invested in Columbia/HCA stock.

Further, Mr. Gougis testified that the comparable decline in the stock price of Tenet Healthcare, the company most directly comparable to Columbia/HCA, from September, 1997, indicates that the decline was the result of industry-wide problems rather than the investigation alone. Statement of direct testimony of Chester A. Gougis (Docket Entry No. 190) at 12.

Accordingly, the Court finds that an inquiry into actions of comparable companies in sector and size would not "have revealed to a reasonable fiduciary that the investment at issue was improvident." *Kuper, 66 F.3d at 1459*.

The retirement committee did not retain an investment advisor to analyze the portfolios of pension plan managers as suggested by Mr. Scallet. The plaintiffs' expert, Ms. Elkind, reported that 17 of 24 pension plans she reviewed decreased their ownership of [*56] Columbia/HCA stock during the period in question. Mr. Gougis pointed out that this statistic is not entirely negative and shows that "several sophisticated pension plan and endowment funds actually chose to maintain and increase their ownership during this period." Id. at 13. The Court agrees that, although a significant number of pension fund managers decreased their holdings in Columbia/HCA, seven of the pension plans studied held their investment in the stock, indicating that some other fiduciaries determined that maintaining their investment was a sound decision. This is of additional importance considering that the retirement committee was operating under the plan language that the assets of the SBP should be held "primarily or exclusively" in Columbia/HCA stock. The other pension fund managers who held their investment in the stock were, presumably, not working within the confines of such plan language. Accordingly, the Court finds that an inquiry into the investments of portfolio managers of pension plans would not "have revealed to a reasonable fiduciary that the investment at issue was improvident." *Kuper, 66 F.3d at 1459*.

With respect to insider trading [*57] of company stock during this time, the evidence reflects that Mr. Anderson, who maintains more than 50% of his net worth in company stock, engaged in a cashless exercise of stock options in July, 1998. In this exercise, he sold one quantity of stock to purchase another larger quantity through stock options that were about to expire.

In August, 1996, Mr. Braun exercised an option for Columbia/HCA stock which he sold and used the proceeds to acquire company stock through the exercise of another option in the same month. Mr. Braun testified that in May, 1997, he held 28,000 shares of Columbia/HCA stock plus options, and that the stock made up 80% of his personal wealth. One of his stock options was going to expire in July, 1997, and to exercise the option, he would have had to borrow roughly $ 460,000.00. Mr. Braun stated that he choose to sell the stock because he was not in a financial position to borrow that much money. Transcript (Docket Entry No. 214) at 627-28.

Mr. Hemphill exercised stock options for 18,000 shares and received cash for his shares instead of receiving the shares. He testified that he sold these shares because he was going through a divorce and had certain housing [*58] needs. Mr. Hemphill has not sold any stock since 1996, and testified that he continued to acquire stock until he changed organizations.

Mr. Moore exercised two options for cash: one on December 24, 1996, and one on June 30, 1997. He testified that he exercised these options to help pay for a home he purchased and remodeled. He further testified that he intended to sell more shares to finance these expenses but that after the price went down, he did not want to sell more shares and, instead, took on extra debt on his house. Transcript (Docket Entry No. 214) at 689.

Mr. Shelton testified that he made purchases of Columbia/HCA stock from the time of the September, 1997, raids to the second purchase of Columbia/HCA stock by the retirement committee in February, 1998.

Dr. Thomas Frist, Jr., and his family, who owned 24.4 million shares of Columbia/HCA stock in March of 1997, did not sell any shares of Columbia/HCA stock during 1997, 1998 or 1999, and acquired 2.7 million shares in 1999. Richard Scott, the former CEO of Columbia/HCA, sold 90,000 shares of company stock in February, 1997. As he held over 9 million shares in Columbia/HCA stock, this sale constituted less than one percent [*59] of his shareholdings.

The Court finds that these transactions do not indicate that the members of the retirement committee and other executives were substantially reducing their investments in company stock. As for the minimal sales that took place during this time, there is no indication that the sales were made because the executives thought the stock was an imprudent investment. Moreover, several retirement committee members purchased company stock during this time and all were participants in the SBP and held shares of company stock in their retirement account. Accordingly, the Court finds that such an investigation would not "have revealed to a reasonable fiduciary that the investment at issue was improvident." *Kuper, 66 F.3d at 1459*.

Finally, the plaintiffs have argued that the committee was required to take into consideration the SBP investment policy guidelines. The plaintiffs contend that the defendants failed to consider the directive of the guidelines they allege required the defendants to diversify the assets of the SBP if the stock was volatile. Although not directly contrary to the investment policy guidelines, which allow for diversification, the plan [*60] language directed that the assets of the SBP "shall be utilized primarily or exclusively to purchase Company stock." Defendants' Exhibit 6 at 48. Therefore, even though the committee could have diversified the assets, there was a strong directive from the plan to maintain the assets in company stock and no directive to diversify. Accordingly, the Court finds that even if the defendants had considered the investment policy guidelines, the plaintiffs have not established that consideration of the investment policy guidelines would "have revealed to a reasonable fiduciary that the investment at issue was improvident." Id.

III.

In summary, the Court finds that the plaintiffs have not established that a reasonable fiduciary would have determined that the investment of the SBP assets in Columbia/HCA stock was imprudent, thereby rebutting the presumption of reasonableness afforded to the defendants' actions. *Kuper, 66 F.3d at 1460*. Accordingly, the plaintiffs have not established that the defendants breached their fiduciary duty to the SBP, and their claims against the individual defendants must fail. Id.

In light of the fact that the Court has found that the individual [*61] defendants did not breach their fiduciary duty to the SBP, the Court need not address whether the company was a co-fiduciary with respect to the investment of SBP assets. The Court finds that Columbia/HCA is not liable for breach of fiduciary duty based on its alleged failure to monitor and remove retirement committee members or the investment of the SBP assets.

At oral argument, the counterclaims (Docket Entry Nos. 64 and 69) of the defendants for attorneys' fees and costs under *29 U.S.C. § 1132(g)* were withdrawn and will be dismissed.

An appropriate order shall be entered.

Thomas A. Higgins

United States District Judge

5-24-00

ORDER

In accordance with the memorandum contemporaneously entered, the Court finds in favor of the defendants and against the plaintiffs. Accordingly, the plaintiffs' action is dismissed with prejudice.

The counterclaims, having been withdrawn at oral argument on March 23, 2000, are likewise dismissed with prejudice.

The entry of this order and the orders (entered July 9, 1998 and March 21, 2000; Docket Entry Nos. 72 and 234), shall constitute the judgment in this action.

It is so ORDERED

Thomas A. Higgins

United States [*62] District Judge

5-24-00

Caution
As of: Aug 01, 2011

HARRY J. MANNERS, JR., and PHILIP A. LEVIN, on behalf of themselves and all others similarly situated, Plaintiffs, v. AMERICAN GENERAL LIFE INSURANCE COMPANY, Defendant.

Civil Action No. 3-98-0266

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION

1999 U.S. Dist. LEXIS 22880

August 10, 1999, Decided
August 11, 1999, Entered

DISPOSITION: [*1] Defendant's Motion for Expedited Discovery, (Doc. No. 197), the Brix's Motion to Permit Attorney Eva Geist to Participate in Hearing Telephonically, (Doc. No. 199), and their Ex Parte Application to Deemed Excluded from the Manners Class Action all DISMISSED without prejudice.

COUNSEL: For HARRY J. MANNERS, JR., plaintiff: David N. Garst, Lewis, King, Krieg, Waldrop & Catron, P.C., Nashville, TN.

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For BILL BURDOCK, plaintiff: Bill Burdock, Fort Worth, TX.

For ROBERT W. BENNETT, plaintiff: Wallace R. Bennett, David D. Bennett, Salt Lake City, UT.

For FRANKLIN JONES, JR., plaintiff: David L. Kleinfelter, Dale, [*2] Rosenberg and Kleinfelter, Nashville, TN.

For FRANKLIN JONES, JR., plaintiff: T. John Ward, Jr., Holmes Law Office, Longview, TX.

For AMERICAN GENERAL LIFE INSURANCE COMPANY, AGC LIFE INSURANCE COMPANY, defendants: Robert E. Cooper, Jr., E. Steele Clayton, IV, Bass, Berry & Sims, Nashville, TN.

For AMERICAN GENERAL LIFE INSURANCE COMPANY, defendant: Thomas M. Zurek, American General Life Insurance Company, Houston, TX.

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For AMERICAN GENERAL LIFE INSURANCE COMPANY, defendant: Ralph C. Ferrara, Debevoise & Plimpton, Washington, DC.

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HARRY G. BRIX, MARIANN BRIX, trustees: Eva I. Geist, James E. Toothman & Associates, Los Gatos, CA.

For MARSHA SMOLEN, MATTHEW WEISS, intevenor plaintiffs: Martin Stephen Sir, Cross & Sir, Nashville, TN.

JUDGES: JOHN T. NIXON, SENIOR JUDGE, UNITED STATES DISTRICT COURT.

OPINION BY: JOHN T. NIXON

OPINION

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Plaintiffs and defendant have submitted for approval [*3] a proposed settlement of this class action that is memorialized in a Stipulation of Settlement and a *First Amendment* to the Stipulation of Settlement, filed with the Court on December 16, 1998 and May 28, 1999, respectively (referred to collectively as the "Settlement Agreement" or "Settlement"). For the reasons set out below, the Court has determined that the Settlement is fair, reasonable and adequate and should therefore be approved. The Court makes the following findings of fact and conclusions of law and issues. It has previously issued an Order Approving Class Action Settlement and Final Judgment approving the Settlement and dismissing the complaint in this action with prejudice.

I. BACKGROUND

A. Materials Considered by the Court

1. In reaching its decision in this case, this Court has considered the written memoranda of the parties. As discussed below, both sides have fully briefed the request for approval, and they have supported the request with numerous declarations and affidavits of fact and expert witnesses. Both plaintiffs' counsel and defendant's counsel also made oral presentations at the June 3, 1999 Fairness Hearing.

2. As discussed in more detail below, [*4] the Court also considered the written objections submitted by Class Members and the oral presentation made on behalf of objector Franklin T. Jones, Jr., by his counsel, T. John Ward, at the June 3 Fairness Hearing.

B. History of the Litigation

3. On February 24, 1998, plaintiff Henry J. Manners, Jr. filed *Manners v. American General Life Insurance Co., et al.*, Case No. 98-C-496, in the Circuit Court of Davidson County, Tennessee. Weiss/Stoia Decl. P 48. [1] On March 25, 1998, defendants American General Life Insurance Company ("AGL") and AGC Life Insurance Company (AGL's immediate parent) removed the case to this Court. *Id.* P 49. Defendants answered the complaint on April 8, 1998.

1 Declarations and Affidavits submitted by the parties are cited, respectively, as "[Witness] Decl. P " and "[Witness] Aff. P ."

4. On April 27, 1998, defendant AGC Life Insurance Company moved for summary judgment arguing that it could not be sued as the alter ego of AGL. *Id.* P 50.

[*5] 5. An Initial Case Management Conference was held before Magistrate Judge Haynes on May 5, 1998. *Id.* P 51. Judge Haynes stayed all proceedings in the case pending the parties' negotiation of document production by defendants. *Id.* Thereafter, plaintiff engaged in extensive discovery with AGL relating to plaintiff's allegations. *Id.*

6. While this action was proceeding, a second putative class action also was proceeding against AGL in Texas. That case, *Levin v. American General Life Insurance Company, et al.*, Case No. 97-25626 (80th Jud. Dist. Tex.), was filed on May 13, 1997. *Id.* P 33. Defendants answered that complaint on June 11, 1997. They removed the case to the United States District Court for the Southern District of Texas on June 12, 1997. *Id.* P

34.

7. Plaintiff moved to remand the action on August 14, 1997. *Id.* P 35. The remand motion went through several rounds of briefing. *Id.* During this period, the parties engaged in discovery related to remand issues and the merits. *Id.* P 36.

8. On March 27, 1998, the federal court adopted the Magistrate Judge's recommendation that the case be remanded to state court. *Id.* P 35.

9. Plaintiff Levin [*6] subsequently engaged in merits discovery jointly with plaintiff Manners. *Id.* P 46.

10. On December 10, 1998, plaintiffs Levin and Manners jointly requested leave of this Court to file a first amended class action complaint in this action. *Id.* P 53. This complaint makes claims similar to those raised in Manners' original complaint filed in this case, as well as in Levin's original complaint filed in his Texas action. The amended complaint did not name AGC Life Insurance Company as a defendant.

11. On February 11, 1999, the parties filed a joint motion to stay all proceedings in the Texas action based on execution of the Settlement in this case.

C. Plaintiffs' Allegations

12. The first amended complaint is brought on behalf of a class of persons or entities (the "Class" or "Class Members") who, at any time from January 1, 1982 through December 31, 1997 (the "Class Period"), had an ownership interest in one or more AGL whole life or universal life insurance policies issued in the United States during the Class Period. The Class description (including identification of the individuals and entities who are specifically excluded from the Class) is set out in the Court's [*7] Order Approving Class Action Settlement and in the Final Judgment.

13. The complaint [2] asserts twelve different causes of action, including federal claims based upon *18 U.S.C. § 1962* and common law claims based on fraud, breach of contract and negligent misrepresentation. The complaint seeks declaratory and injunctive relief, reformation and restitution, and compensatory and punitive damages.

2 All further references to plaintiffs' complaint are to the first amended complaint filed on December 10, 1998.

14. Plaintiffs allege that AGL engaged in misleading practices in selling its whole life and universal life insurance policies. They allege that AGL developed a scheme involving uniformly fraudulent, misleading and deceptive sales practices in order to increase its own revenues and profitability. [Comp. P 20]

15. The specific practices alleged in the complaint include, among other things, that

a. AGL sold "vanishing premium" insurance policies through the use of false and misleading [*8] illustrations that "were cast in a format that was intended to deceive policyowners to believe that premium payments could be terminated without causing the Policy to terminate until the guaranteed termination date" [Comp. P 57];

b. AGL provided its agents with monetary incentives to engage in wholesale replacement of [its] existing book of business [Comp. P 32];

c. AGL deceived policyowners into believing that they were purchasing investment, retirement, pension, estate or savings plans rather than life insurance policies [Comp. P 38];

d. AGL misrepresented to policyowners that its policies would provide a certain amount of cash and/or account values [Comp. P 44]; and

e. AGL engaged in abuses and other misconduct with respect to the administration and servicing of insurance policies [Comp. P 20].

16. AGL has denied all allegations of wrongdoing.

D. The Parties and Their Counsel

17. **The Class Representatives** -- Plaintiff Harry J. Manners, Jr., is a citizen of Tennessee. [Comp. P 12] Plaintiff Philip A. Levin is a citizen of Maryland. [Comp. P 11]

18. The Class representatives allege a wide variety of fraudulent conduct on behalf of AGL in its marketing, [*9] sale, servicing and administration of their policies.

19. **Class Counsel** -- The plaintiffs and the Class are represented by the law firms of Milberg Weiss Bershad Hynes & Lerach LLP ("Lead Counsel"); Abbey, Gardy & Squitieri, LLP; Arnzen, Parry & Wentz, P.S.C.; Bonnett, Fairbourn, Friedman & Balint, P.C.; Hubbard &

Biederman, L.L.P.; James, Hoyer, Newcomer, Forizs & Smiljanich, P.A.; Claxton & Hill, PPLC; Law Offices of Charles J. Piven, P.A.; and Schiffrin & Barroway, LLP. All are experienced plaintiffs' counsel with expertise in insurance, consumer and class action litigation. *See* Weiss/Stoia Decl. P 173.

20. **Defendant** -- AGL is a stock life insurance company incorporated in Texas, with its principal place of business in Houston, Texas. In its current form, AGL is the product of the consolidation and subsequent statutory merger of several life insurance companies. AGL is licensed to issue life insurance throughout the United States, except the state of New York. An AGL subsidiary, American General Life Insurance Company of New York, is licensed to issue life insurance in New York.

21. AGL is a wholly owned subsidiary of AGC Life Insurance Company, which in turn [*10] is a wholly owned subsidiary of American General Corporation.

22. **Defendant's Counsel** -- Defendant is represented by the firms of Bass, Berry & Sims PLC and Debevoise & Plimpton. Both of these firms have extensive experience in the defense of complex and class action litigation.

E. The Settlement

23. Both this action and plaintiff Levin's Texas action were vigorously contested from the time they were filed.

24. AGL initiated settlement discussions with plaintiffs in February 1998. Weiss/Stoia Decl. P 69; Santillo Decl. P 12. Initial settlement discussions focused on, among other things, the factual basis for plaintiffs' allegations. *Id.* However, plaintiffs insisted that a settlement could not be achieved until all remaining discovery, including document production and depositions, had been completed. *Id.* P 16; *see* Weiss/Stoia Decl. P 70.

25. AGL continued to produce, on an expedited basis, a substantial volume of additional documents soon after settlement discussions began. *Id.* AGL produced over 695,000 pages of documents, numerous audio tapes, and illustration software. Santillo Decl. P 16; Weiss/Stoia Decl. P 56. The materials were gathered from sources [*11] throughout AGL's home office and included, among other things, policy forms, product advertising, field communications, board of directors minutes, regulatory reviews, illustration software and related policy files for the named plaintiffs.

26. Plaintiffs' counsel also deposed seven former or current senior executives, managers and members of AGL's field force. The deponents included the Executive Vice President of Insurance Services, the current Chief Marketing Officer, current and former Regional Vice Presidents, and the Chief Actuary. Santillo Decl. P 16; Weiss/Stoia Decl. P 57.

27. While discovery proceeded, the parties continued their settlement negotiations. There were many meetings, both by telephone and face-to-face, throughout 1998. These meetings were very contentious, and the discussions were often heated. *Id.* PP 71-79; Santillo Decl. PP 17-28. Negotiations broke down on more than one occasion. Weiss/Stoia Decl. P 71; Santillo Decl. P 28.

28. The parties focused on a settlement framework similar to that adopted in other cases involving life insurance sales practice class actions -- *i.e.*, a framework that would include an alternative dispute resolution process, [*12] as well as relief for Class Members who did not elect to participate in that process. Weiss/Stoia Decl. P 72; Santillo Decl. P 13. However, plaintiffs' counsel insisted that, among other things, the alternative dispute resolution process be significantly streamlined and the general relief be available to Class Members automatically if they do not elect the alternative dispute resolution process. Weiss/Stoia Decl. P 72; Santillo Decl. P 15. As a consequence, the dispute resolution process included in the Settlement was dramatically restructured over the course of the settlement negotiations. Weiss/Stoia Decl. P 75; Santillo Decl. P 24.

29. The final terms of the settlement continued to be negotiated up to the second week of December 1998. Weiss/Stoia Decl. P 79; Santillo Decl. P 27. With the settlement terms set, an agreement on plaintiffs' attorneys' fees was concluded on December 15, 1998, and a Stipulation of Settlement was executed. Weiss/Stoia Decl. P 79; Santillo Decl. P 27.

F. The December 17, 1998 Hearing and Preliminary Approval Order

30. On December 17, 1998, the Court held a hearing

at which it preliminary approved the Stipulation of Settlement and directed the parties [*13] to send notice to the Class.

31. The Court entered its Findings and Order, ruling, among other things, that the Settlement was "sufficiently fair, reasonable and adequate to warrant sending notice of the Action and proposed settlement" to Class Members.

32. Consistent with the Court's Order, the parties provided notice of the proposed Settlement to Class Members. AGL, with Lead Counsel's approval, selected a settlement administrator, Rust Consulting, Inc. ("Rust"), that arranged for mailing of individual notices and publication of the summary notice and, in addition, established a Class Action Information Center, including a toll-free telephone bank, to receive and respond to Class Member inquiries regarding the class action and proposed Settlement. Dahl Decl. PP 16-18, 30-31.

G. *First Amendment* to the Stipulation of Settlement

33. In response to objections raised by two Class Members, the parties executed a *First Amendment* to the Stipulation of Settlement on May 21, 1999. It was filed with the Court on May 28, 1999. The Class Members' objections were subsequently withdrawn. [3]

3 The objectors, Matthew Weiss and Marsha Smolen, also filed a motion to intervene and a complaint in intervention. Subsequent to the execution of the *First Amendment* to the Stipulation of Settlement, Mr. Weiss and Ms. Smolen withdrew their motion and their complaint, as well as their objections to the settlement.

[*14] 34. The *First Amendment* to the Stipulation of Settlement enhanced the relief available to Class Members by making four changes to the Settlement Agreement. These changes are discussed below.

H. The Fairness Hearing

35. The parties filed extensive memoranda, declarations, affidavits and reports with the Court prior to the Fairness Hearing. These submissions, which were filed with the Court on May 21, 1999, included numerous declarations and affidavits from fact and expert witnesses.

a. Plaintiffs presented declarations from: Timothy G. Blood (associate at Milberg Weiss Bershad Hynes & Lerach LLP); Hal D. Hardin (practicing attorney, Nashville, Tennessee); Samuel Issacharoff (Professor, Joseph D. Jamail Centennial Chair, at the University of Texas School of Law, and Professor, Columbia University); Terry M. Long (Vice President and Principal of Lewis & Ellis, Inc.); John E. Sexton (Dean of the New York University School of Law); John J. Stoia, Jr. (partner at Milberg Weiss Bershad Hynes & Lerach LLP); and Melvyn I. Weiss and John J. Stoia, Jr. (senior partner/partner at Milberg Weiss Bershad Hynes & Lerach LLP). [4]

4 Declarations also were submitted by plaintiffs' counsel listed in paragraph 19 above in support of plaintiffs' application for attorneys' fees and expenses.

[*15] b. Defendant submitted affidavits and declarations from Karen Champion (Director of Information Technology at AGL); James P. Corcoran (former New York Superintendent of Insurance); Patricia K. Crouch (Associate Director for Client Systems at The Franklin Life Insurance Company); Jeffrey D. Dahl (Senior Vice President and National Director of Claims Administration at Rust); Robert D. Harrison (Lecturer in Legal Method, Yale Law School); Susan Howard (Vice President of Communications, American General Life Division); Anne Milio (Vice President of Policy Administration at AGL); Andrew Novak (Vice President, Kinsella Communications, Ltd.); Randall M. O'Connor (Principal, Tillinghast-Towers Perrin), attached to whose declaration was a report prepared by Tillinghast-Towers Perrin; George L. Priest (John M. Olin Professor of Law and Economics at Yale Law School); Carl Santillo (Executive Vice President, VALIC, an American General Corporation company); Kent D. Syverud (Dean and Garner Anthony Professor of Law at Vanderbilt University Law School) and Leigh Whelan (Senior Attorney, American General Corporation).

36. The parties' submissions also responded to the 24 objections submitted by [*16] Class Members regarding the Settlement.

37. The Court held a hearing regarding the fairness, adequacy and reasonableness of the Settlement Agreement on June 3, 1999.

38. Both plaintiffs' counsel and defendant's counsel made presentations in support of the Settlement at the

June 3 hearing. In addition, Class Member Franklin T. Jones, Jr., represented by counsel T. John Ward, Jr., presented certain objections to the Settlement. These objections are discussed below. Mr. Jones also sought to intervene in this proceeding. The Court denied that motion and has issued a separate opinion regarding that denial.

II. THE TERMS OF THE SETTLEMENT

39. The Settlement provides the Class with a substantial and innovative package of relief responsive to the allegations raised in the complaint. Though this Settlement has some similarities to court-approved settlements reached in class actions involving other large insurance companies. [5] the Settlement is unique in many respects, including the Claim Evaluation Process, which is specifically tailored to meet the needs of the Class in this case.

5 *E.g., Willson v. New York Life Ins. Co., 1995 N.Y. Misc. LEXIS 652* (N.Y. Sup. Ct. Feb. 1, 1996), *aff'd, 228 A.D.2d 368, 644 N.Y.S.2d 617 (App. Div. 1996), appeal denied, 677 N.E.2d 289 (N.Y. 1997), cert. dismissed, 521 U.S. 1112 (1997)*; *Michels v. Phoenix Home Life Mut. Ins. Co., 1997 N.Y. Misc. LEXIS 171* (N.Y. Sup. Ct. Jan. 3, 1997); *Natal v. Transamerica Occidental Life Ins. Co.*, No. 694829 (Cal. Super. Ct., San Diego County, July 28, 1997); *In re Prudential Ins. Co. of Am. Sales Practices Litig., 962 F. Supp. 450 (D.N.J. 1997), aff'd in part, vacated and remanded in part, 148 F.3d 283 (3d Cir. 1998), cert. denied, 119 S. Ct. 890 (1999)*; *Duhaime v. John Hancock Mut. Life Ins. Co., 177 F.R.D. 54 (D. Mass. 1997), aff'd*, No. 98-1901 (1st Cir. Dec. 1, 1998), *cert. denied, 527 U.S. 1040, 67 U.S.L.W. 3784, 144 L. Ed. 2d 802, 119 S. Ct. 2404* (U.S. June 24, 1999); *Elkins v. Equitable Life Ins. Co. of Iowa, 1998 U.S. Dist. LEXIS 1557, 1998 WL 133741* (M.D. Fla. Jan. 27, 1998); *Ace Seat Cover Co. v. Pacific Life Ins. Co.*, No. 97-Cl-00648 (Ky. Cir. Ct., Kenton County, Nov. 19, 1998); *In re Manufacturers Life Ins. Co. Premium Litig.*, No. 96-CV-230 BTM (AJB) (S.D. Cal. Dec. 21, 1998).

[*17] 40. The Settlement provides two alternative types of relief: General Policy Relief and the Claim Evaluation Process ("CEP"), including the Part VIII Alternative Dispute Resolution ("ADR") Process.

A. General Policy Relief

41. As described in detail in the Settlement Agreement, the Settlement provides three forms of General Policy Relief to each Class Member who chooses not to submit a claim to CEP: (*i*) the General Benefit, (*ii*) Settlement Scrip and (*iii*) the Prospective Commitment. Class members will receive this relief automatically and without any evidence of wrongdoing or damages.

42. The General Benefit -- The General Benefit will provide two benefits: (*i*) the Settlement Death Benefit, which provides a new death benefit for 12 to 59 months of up to 10% of the original face amount of the policy making the Class Member eligible for relief; and (*ii*) the Accidental Death Benefit, which will begin automatically after the end of the Settlement Death Benefit and will provide from 12 to 59 months, and up to 10% of the original face amount, of an accidental death benefit. The General Benefit will be provided automatically and without cost to all Class [*18] Members who do not elect CEP.

43. **Settlement Scrip** -- In addition to receiving the General Benefit, Class Members who do not choose CEP will automatically be able to use Settlement Scrip to buy a new life insurance policy from AGL to which AGL will contribute 100% of the first year premium over the first two years of the policy. Settlement Scrip will be freely transferable and, as specifically set out in the *First Amendment* to the Stipulation of Settlement, AGL will set up a website at which Class Members and others will be able to post messages or other information regarding transferring or obtaining Scrip. Lead Counsel also will provide a hyperlink to the Scrip website on Lead Counsel's website.

44. With respect to the transfer of Settlement Scrip and the right to designate another person as eligible to receive the General Benefit, the Court finds that, to the extent the opportunity (*i*) to transfer Settlement Scrip or (*ii*) to designate another person as eligible to receive the General Benefit under the Settlement constitutes the offer or sale of a security under the Securities Act of 1933, *15 U.S.C. §§ 77a et. seq.*, the Court's approval of [*19] the terms and conditions of the Settlement will exempt the transfer or designation (or opportunity to transfer or designate) from registration under the 1933 Act pursuant to section 3(a)(10) of that Act, which exempts securities "issued in exchange for one or more bona fide . . . claims." *15 U.S.C. § 77c(a)(10)*.

45. **Prospective Commitment** -- Pursuant to this commitment (which was added to the Settlement as a result of the May 21, 1999 *First Amendment* to the Stipulation of Settlement), AGL has agreed that, for one year following July 1, 1999, it will refund to all Class Members receiving General Policy Relief any increase over scheduled cost-of-insurance charges or any decrease in dividends due to mortality experience. As with the General Benefit, this relief will be provided automatically and without cost to all Class Members who receive General Policy Relief.

B. Individual Relief

46. As described in more detail in the Settlement Agreement, the Settlement also allows any Class Member who believes he or she was misled by a misstatement or omission of material information, or was otherwise harmed in connection with his or her policy, to seek an award [*20] through an individualized alternative dispute resolution process. Depending on its nature, a Class Member's claim will be reviewed through one of two processes: CEP or the Part VIII ADR Process.

47. **The Claim Evaluation Process** -- CEP will be used to evaluate claims relating to the key sales practice allegations contained in the complaint -- Limited Premium Payment Claims (including "Fully Paid-Up" claims), Performance Claims, Replacement Claims and Retirement Claims. The claims will be evaluated by a Claim Evaluator, who will be selected by Lead Counsel. AGL will pay $ 1.25 million to cover the administrative costs of CEP, including the Claim Evaluator's fees and expenses.

48. The Claim Evaluator will designate claims as level three, level two, level one or level zero claims based on the nature and strength of the claim, with level three claims receiving the highest level of relief and level zero claims receiving no relief. [6] Successful CEP claimants will receive cash awards tailored to the harms suffered and damages incurred. *See* Priest Aff. P 32 ("the restitutionary relief provided by [CEP] mirrors the substantive allegations of the class"); Syverud Decl. P 25 ("the [*21] settlement will permit individualized treatment of each class member's claim"). These cash awards will have no restrictions limiting, or requirements regarding, how Class Members may use the cash awards.

6 As originally set out in the Stipulation of Settlement, a claim would be designated a level zero claim if there was documentary evidence contradicting the Class Member's claim. As part of the *First Amendment* to the Stipulation of Settlement, this provision was eliminated. Thus, contradictory documentary evidence alone will no longer cause a claim to be designated as a level zero claim. Only claims based on blank or otherwise deficient claim forms will be designated as level zero claims.

49. CEP features a number of substantive and procedural protections for claimants, including that (*i*) the Claim Evaluator will review claims using detailed, objective criteria approved by the Court, (*ii*) AGL will assemble a Claim File that includes information from its files on the policy(ies) at issue, (*iii* [*22]) AGL will not be able to raise defenses (*e.g.*, statutes of limitations, the parol evidence rule and the statute of frauds) or evidentiary objections it could have asserted against claimants in litigation and (*iv*) the Claim Evaluator may utilize the evidence uncovered as part of plaintiffs' discovery in evaluating any particular claim. In addition, the Claim Evaluator will have discretion to adjust the scoring and/or awards of relief for claims to reflect the circumstances or injuries suffered by a particular claimant(s). The Claim Evaluator may also in his or her discretion consider a range of factors unique to AGL's alleged misconduct. As noted by AGL's expert, James Corcoran, a former New York Superintendent of Insurance: "The CEP Guidelines are designed to provide for a fair resolution of the four primary sales practice claims made in this case." Corcoran Aff. P 25. Similarly, plaintiffs' expert, John E. Sexton, Dean of the New York University School of Law, has concluded that CEP "will be fast and efficient while ensuring that all interests are represented." Sexton Decl. P 25. Finally, defendant's expert, Kent Syverud, the Dean and Garner Anthony Professor of Law at the [*23] Vanderbilt University Law School, has concluded that "the proposed settlement might give an individual claimant a *better* chance of obtaining cash relief than would traditional ADR proceedings, because AGL will waive many defenses that would be available to it in such other proceedings (or in litigation)." Syverud Decl. P 27 (emphasis in original).

50. The Claim Evaluator's decisions will be final, binding and not subject to review or appeal.

51. **The Part VIII ADR Process** -- The Part VIII ADR Process provides a forum for resolving claims that

were submitted by the Election Date (as defined in the Settlement Agreement) but do not fall within one of the four categories of claims identified above (*see* P 47; Ex. A to the Settlement Agreement). In addition, a Class Member may require AGL to resolve in the Part VIII ADR Process any policy servicing or administration claim that arose during the Class Period, even if the claim was not submitted by the CEP deadline, as long as the Class Member can demonstrate that, despite exercising reasonable care, he or she did not know and could not have known of the claim by the Election Date. The Settlement also allows AGL to require Class [*24] Members to resolve certain other policy-related claims, including pending litigation and regulatory proceedings, through the Part VIII ADR Process if they did not elect to exclude themselves from the Settlement.

52. Claims submitted by the Election Date that do not fall within the claim categories identified above (*see* P 47 above), but that otherwise relate to Sales Practices (as defined in Exhibit A to the Stipulation of Settlement), will be reviewed by the Claim Evaluator pursuant to the CEP procedures. For all other claims, the Part VIII ADR Process provides a two-tiered resolution system: (*i*) review by a team of three company representatives in accordance with objective scoring and relief criteria set out in the Settlement and approved by the Court [7] and (*ii*) an appeal at the discretion of the Class Member (but *not* AGL) to a panel of independent arbitrators (chosen by Lead Counsel), who will review the claim de novo using the same objective, Court-approved scoring and relief criteria. AGL will pay all of the costs associated with the Part VIII ADR Process, including the arbitrators' fees and expenses.

7 As part of the *First Amendment* to the Stipulation of Settlement, the Settlement Agreement was amended to provide an enhanced opportunity to receive the highest level of relief under the Part VIII ADR Process without documentation. *See First Amend* to Stipulation of Settlement at 8.

[*25] 53. As with CEP, the relief in the Part VIII ADR Process has been designed to correspond to the nature of each claim and the information gathered in support of it. In addition, the Part VIII ADR Process provides Class Members with numerous procedural and substantive protections, including AGL's waiver of defenses otherwise available in litigation.

54. The arbitrators' decisions will be final, binding and not subject to review or appeal (except to the limited extent specified in the Settlement Agreement).

C. The Release

55. In exchange for the benefits provided by the Settlement, the Settlement Agreement contains a release that bars Class Members from asserting in any other lawsuit or proceeding any of the claims that have been or could have been asserted in this action. The release was set out in full in the Stipulation of Settlement (pp. 53-59), was reprinted in Appendix A to the individual notice mailed to Class Members), and is included in the Court's Final Order.

D. Value of the Relief

56. The parties' expert actuaries have valued the General Benefit portion of the General Policy Relief that will be provided to Class Members at $ 130.3 million. Tillinghast-Towers [*26] Perrin ("Tillinghast") Report (attached as Ex. A to Randall M. O'Connor Decl.) at 77; Long Decl. P 12(b). The actuaries also have concluded that for every 1% of Class Members who use Settlement Scrip, an additional $ 17 million in economic value will be provided to the Class. Tillinghast Report at 34; *see* Long Decl. P 12(d). Thus, if 5% of the Class utilize Scrip, the Class will receive an additional $ 84.9 million in economic value; if 100% of the Class utilize Scrip, the Class will receive an additional $ 1.697 billion. *Id.*

57. Under the Settlement Agreement, AGL has agreed to provide up to $ 38.7 million (plus interest) to be disbursed through CEP. [8] Once all CEP claims have been finally resolved, the total amount of relief awarded to the Class will be calculated. If that total is less than $ 38.7 million, the difference between $ 38.7 million (plus accrued interest) and the amount paid to claimants will be distributed to the Class through increases to the Settlement Death Benefit and to CEP awards. If that total is more than $ 38.7 million (plus interest), CEP awards will be proportionately reduced. The parties' expert actuaries have concluded that, based on, among other [*27] things, the number of Class Members who have elected CEP and the demographics of those Class Members electing CEP, the total CEP relief awarded in this case should not exceed $ 38.7 million. Tillinghast Report at 77; *see* Long Decl. PP 34-35. The actuaries also have concluded that, based on their review of reasonable alternative scenarios regarding CEP elections, there

should be no downward adjustment in CEP awards. Tillinghast Report at 78. In any event, the Court finds that, even if CEP benefits have to be adjusted downward, individual CEP claimants will still receive relief that is substantial and reasonably related to their perceived damages.

8 Under the settlement agreement, a portion of the $ 38.7 million also may be used to pay any CEP administration costs not covered by the additional $ 1.25 million that AGL will pay specifically to cover such costs.

58. The Court finds that the Settlement will provide a minimum of $ 169 million in economic value to the Class. This sum does not include the additional [*28] economic value that the class will receive from Settlement Scrip, the Prospective Commitment and the Part VIII ADR Process.

59. Pursuant to a March 31, 1999 Escrow Agreement between the company and Bankers Trust Company, AGL established an escrow fund for the purpose of satisfying a portion of its obligations under the Settlement Agreement. The Court approves this escrow fund as a "qualified settlement fund" under I.R.C. Reg. § 1.468B-1. Nothing in the Escrow Agreement shall alter any of AGL's obligations under the Settlement Agreement, including its obligations to (*i*) the Class or (*ii*) Lead Counsel.

III. JURISDICTION

A. Subject Matter Jurisdiction

60. This Court possesses federal question jurisdiction, *18 U.S.C. § 1964(c)* and *28 U.S.C. § 1331*, over the subject matter of this action pursuant to the plaintiffs' claims based on conduct in violation of federal law, *18 U.S.C. § 1962(c)*.

61. The existence of federal question jurisdiction over the *section 1962(c)* claims authorizes the Court to exercise supplemental jurisdiction under *28 U.S.C. § 1367(a)* over the remaining [*29] state law claims. *Section 1367* codifies "principles of pendent and ancillary jurisdiction by which the federal courts' original jurisdiction over federal questions carries with it jurisdiction over state law claims that 'derive from a common nucleus of operative fact,' such that 'the relationship between [the federal] claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional case.'" *City of Chicago v. International College of Surgeons, 522 U.S. 156, 164-65, 118 S. Ct. 523, 529, 139 L. Ed. 2d 525, 535 (1997)* (quoting *United Mine Workers v. Gibbs, 383 U.S. 715, 725, 86 S. Ct. 1130, 1138, 16 L. Ed. 2d 218, 227-28 (1966))*; *see also Soliday v. Miami County, 55 F.3d 1158, 1165 (6th Cir. 1995)*.

62. The Court additionally possesses diversity jurisdiction under *28 U.S.C. § 1332*. Complete diversity exists between each named plaintiff and the defendant, and each plaintiff and Class Member has pleaded an amount in controversy of more than $ 75,000. [Comp. P 3] In any event, the Court would have diversity jurisdiction even if only one named plaintiff satisfied [*30] the amount in controversy. *See Stromberg Metal Works, Inc. v. Press Mechanical, Inc., 77 F.3d 928, 930-33 (7th Cir. 1996)*; *In re Abbott Lab., 51 F.3d 524, 527-29 (5th Cir. 1995)*.

B. Personal Jurisdiction

63. The Court has personal jurisdiction over the plaintiffs and Class Members from Tennessee because those persons have minimum contacts with this forum. The Court also has personal jurisdiction over out-of-state Class Members because, as discussed in more detail below, proper notice has been provided to them and they have been given a chance to opt out or to be heard. *See, e.g., Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 811-12, 105 S. Ct. 2965, 2974, 86 L. Ed. 2d 628, 641-42 (1985)*; *In re Prudential Ins. Co. of Am. Sales Practice Litig., 148 F.3d 283, 306 (3d Cir. 1998), cert. denied, 119 S. Ct. 890 (1999)*.

64. The Court therefore finds that all Class Members who did not request exclusion from the Class by the April 29, 1999 deadline are subject to this Court's personal jurisdiction. *See Phillips Petroleum Co. v. Shutts, 472 U.S. at 812-13, 105 S. Ct. at 2974-75, 86 L. Ed. 2d at 642-43*. [*31]

IV. NOTICE TO CLASS MEMBERS

65. In its December 17, 1998 Order, the Court found that the individual notice to be provided to Class Members, the procedures for mailing and remailing the individual notice, and the summary publication notice constituted "the best practicable notice" and were "reasonably calculated, under the circumstances, to . . .

meet the requirements of the Federal Rules of Civil Procedure (including *Fed. R. Civ. P. 23(c)* and *(e)*), the United States Constitution (including the Due Process Clause), the Rules of this Court, and any other applicable law." Based on the findings set forth below, the Court affirms these conclusions.

66. Approximately 849,851 individual notices were mailed by first-class mail to current and former policyowners at their last-known addresses between January 29 and March 3, 1999. Dahl Decl. PP 16-18. In addition, copies of individual notices were mailed to 15 attorneys known to represent Class Members in litigation against defendant. *Id.* P 19; Whelan Decl. P 4. The notice was accompanied by, among other things, a cover letter summarizing the notice, a question-and-answer brochure responding to anticipated questions about the [*32] case and the proposed Settlement, two "fact sheets" describing in greater detail the various forms of settlement relief and individualized forms regarding the settlement benefits available to the Class Member (collectively, the "notice package"). Dahl Decl. P 8 & Ex. A. Through May 4, 1999, Rust remailed notice packages returned with a forwarding address, as well as notice packages for which either of the two search firms retained by Rust was able to provide updated address information. *Id.* PP 21-24.

67. The notice package included, among other things, (*i*) the case caption; (*ii*) a description of the litigation; (*iii*) a description of the settlement Class; (*iv*) identification of counsel for the Class; (*v*) a description of the proposed Settlement, including the relief available; (*vi*) the full text of the release to be given AGL; (*vii*) the date and time of the Fairness Hearing; (*viii*) information about entering an appearance at the Fairness Hearing individually or through counsel; (*ix*) the procedure and deadline for filing objections; (*x*) the manner in which Class Members could obtain access to discovery materials produced in the lawsuit; ([*33] *xi*) the procedure and deadline for filing requests for exclusion; (*xii*) the consequences of requesting exclusion; (*xiii*) the consequences of remaining in the settlement Class; (*xiv*) a description of AGL's responsibility for plaintiffs' attorneys' fees and expenses; (*xv*) a description of the preliminary injunction issued by the Court; and (*xvi*) the procedure for obtaining additional information, including the toll-free telephone number established to respond to Class Member inquiries.

68. The notice package provided to Class Members contains clear and comprehensive documents that present, in a reader-friendly format, detailed and accurate information about the lawsuit, the proposed Settlement and the options available to Class Members. Harrison Aff. P 11; p. 35; Priest Aff. P 24; Corcoran Aff. P 18; Sexton Decl. P 9. The notice package in this case is quite similar to the notice package considered by the United States Court of Appeals for the Third Circuit in *In re Prudential Ins. Co. of Am. Sales Practices Litig.* That court found that "the provision of individual notice to each class member is by no means typical of the notice provided in most class actions, [*34] and certainly qualifies as unprecedented." *In re Prudential Ins. Co. of Am. Sales Practices Litig., 148 F.3d at 306*.

69. In addition to providing the individual notice described above, the parties published a summary notice on March 9, 10 or 11, 1999 in *The Wall Street Journal* (national edition), *The New York Times* (national edition), *USA Today, The Houston Chronicle, The Tennessean* (Nashville, Tennessee), and the newspapers with the highest circulation in each of the remaining 48 states and the District of Columbia. Novak Decl. P 4 & Ex. A. The summary notice also was published on AGL's internet website and Lead Counsel's website. Howard Decl. P 3; Weiss/Stoia Decl. P 134.

70. The summary notice included, among other things, (*i*) the case caption; (*ii*) a description of the settlement Class; (*iii*) a brief description of the proposed Settlement; (*iv*) identification of counsel for the Class; (*v*) the date and time of the Fairness Hearing; (*vi*) information about appearing at the Fairness Hearing; (*vii*) information about and the deadline for filing objections to the Settlement; (*viii*) information about and the deadline for filing [*35] requests for exclusion; (*ix*) the consequences of requesting exclusion; (*x*) the consequences of remaining in the settlement Class; (*xi*) a description of AGL's responsibility for plaintiffs' attorneys' fees and expenses; (*xii*) a description of the preliminary injunction issued by the Court; and (*xiii*) the procedure for obtaining additional information, including the toll-free telephone number established to respond to Class Members inquiries regarding how they could obtain an individual notice package.

71. The Court finds that the publication notice provided to Class Members is a clear and comprehensive summary of the proposed Settlement that presents detailed and accurate information about the lawsuit, the

terms of the Settlement and the options available to Class Members.

72. At the parties' direction, Rust also established the American General Life Class Action Information Center, including, among other things, a toll-free telephone bank to respond to Class Member inquiries. Dahl Decl. P 31. The toll-free number was included both in the individual class notice and in the published summary notice, and both notices informed Class Members that, if they had any questions [*36] about the Settlement, they should call the toll-free telephone number. The Class Action Information Center was staffed with individuals who were trained by the parties to answer Class Member questions. *Id.* P 35. As of May 5, 1999, the telephone bank had responded to over 57,000 policyowner inquiries. *Id.* P 47. Plaintiffs' counsel was on site at the Class Action Information Center since its opening to participate in the day-to-day operation of the center, to monitor Class Members' conversations with the operators and to speak directly with Class Members. Weiss/Stoia Decl. P 137. As of May 7, 1999, plaintiffs' counsel had spoken directly with over 8,456 Class Members and monitored over 9,012 additional calls between the operators and Class Members. *Id. P 138*.

73. Based upon its review of the individual and publication notice materials and expert testimony concerning those materials, the Court concludes that the best practicable notice was given to the Class in this case and that the notice was reasonably calculated (*i*) to describe the action and the plaintiffs' rights in it and (*ii*) to apprise interested parties of the pendency of the action and of their right either [*37] to exclude themselves from the Class or to appear and object to the Settlement. *See Phillips Petroleum Co. v. Shutts, 472 U.S. at 812, 105 S. Ct. at 2974, 86 L. Ed. 2d at 642*; *accord In re Cement & Concrete Antitrust Litig., 817 F.2d 1435, 1439 (9th Cir. 1987), rev'd on other grounds, 490 U.S. 93, 109 S. Ct. 1661, 104 L. Ed. 2d 86 (1989)*. In determining that the best practicable notice was provided to Class Members, the Court has considered that amendments were made to the Stipulation of Settlement after notice was mailed and published. Because these amendments enhance the relief provided to Class Members, the Court finds that additional notice was not and is not necessary. The notice previously sent to Class Members remains the best practicable notice that could have been given to Class Members and is consistent with constitutional standards.

74. The Court thus affirms its finding and conclusion in the December 17, 1998 Order that the notice in this case meets the requirements of the Federal Rules of Civil Procedure (including *Fed. R. Civ. P. 23(c)(2)* and *(e)*), the United States Constitution (including the Due Process [*38] Clause), the Rules of this Court, and any other applicable law.

V. CLASS CERTIFICATION

75. In its December 17, 1998 Order, the Court preliminarily certified the Class for settlement purposes. Plaintiffs argue that final certification of this action is both appropriate and warranted. Weiss/Stoia Decl. PP 168-75. Defendant has taken no position on the certification of a class action as part of this Settlement. The Court makes the following findings in support of its decision to grant final certification of the Class for settlement purposes, which are intended to supplement and finalize the certification findings made by this Court in its December 17, 1998 Order.

76. In order to certify this settlement class, the Court must find that the proposed class meets the four threshold requirements of *Federal Rule of Civil Procedure 23(a)* -- numerosity, commonality, typicality and adequacy of representation -- and, in addition, is maintainable under *Rule 23(b)(3)*. The *Rule 23(b)(3)* requirements are that common questions "predominate over any questions affecting only individual members" and that class resolution be "superior to other available methods for the fair and efficient adjudication [*39] of the controversy."

77. In *Amchem Products, Inc. v. Windsor, 521 U.S. 591, 618, 117 S. Ct. 2231, 2247, 138 L. Ed. 2d 689, 706-10 (1997)*, the Supreme Court expressly acknowledged that cases may be certified for settlement purposes only. In doing so, the Supreme Court stated that the "dominant concern" on which a court should focus in deciding whether to certify a class is "whether a proposed class has sufficient unity so that absent members can fairly be bound by decisions of class representatives." *Id. at 621*. The Court further held that, when the question of certification is raised in connection with a class action settlement, "settlement is relevant to a class certification," *id. at 619*, and "must be considered as a factor in the calculus," *id. at 622*.

78. **Numerosity** -- There is no question that the class proposed in this case -- which has approximately 700,000 Class Members living across the nation -- meets the

numerosity requirement. *E.g., Senter v. General Motors Corp., 532 F.2d 511, 523 (6th Cir. 1976)*; *see also Coburn v. 4-R Corp., 77 F.R.D. 43, 44 (E.D. Ky. 1977)*. [*40]

79. **Commonality** -- The commonality requirement is satisfied when the members of a proposed class share at least one common factual or legal issue. *Bittinger v. Tecumseh Prods. Co., 123 F.3d 877, 884* (6th Cir.), *cert. denied, 429 U.S. 870 (1976)*; H. Newberg & A. Conte, 1 *Newberg on Class Actions* § 3.10, at 3-51 to -52 (3d ed. 1992); 5 James Wm. Moore et al., *Moore's Federal Practice § 23.23[2]* (3d ed. 1999). This requirement thus is satisfied "as long as the members of the class have allegedly been affected by a *general* policy of the defendant, and the general policy is the focus of the litigation." *Day v. NLO, Inc., 144 F.R.D. 330, 333 (S.D. Ohio 1992)* (quoting *Sweet v. General Tire & Rubber Co., 74 F.R.D. 333, 335 (N.D. Ohio 1976))* (emphasis in original)); *see also In re Prudential Ins. Co. of Am. Sales Practices Litig., 962 F. Supp. at 511* (collecting cases). "The mere fact that questions peculiar to each individual member of the class remain after the common questions of the defendant's liability have been resolved does not dictate the conclusion that a class is impermissible. [*41] " *Sterling v. Velsicol Chem. Corp., 855 F.2d 1188, 1197 (6th Cir. 1988)*.

80. In this case, the complaint (P 104) alleges over 30 factual and legal issues common to the Class, including whether AGL routinely engaged in fraudulent and deceptive acts, practices and courses of conduct in the design and sale of its insurance policies, and whether AGL failed to disclose to plaintiffs and other Class Members material information relating to its internal projections of future dividend scales or interest crediting rates. The commonality requirement is thus satisfied.

81. **Typicality** -- Typicality is satisfied when the named plaintiff's injuries "arise[] from the same event or practice or course of conduct that gives rise to the claims of other class members and his or her claims are based on the same legal theory." *Craft v. Vanderbilt Univ., 174 F.R.D. 396, 404 (M.D. Tenn. 1996)*; *accord Senter v. General Motors Corp., 532 F.2d at 525 n.31* (citation omitted); Slight factual differences that may exist between the class representatives and other Class Members will not defeat typicality. *See Senter v. General Motors Corp., 532 F.2d at 525 n.1*; [*42] *Craft v. Vanderbilt Univ., 174 F.R.D. at 404*; *see also Tucker v. Union Underwear Co., 144 F.R.D. 325, 329 (W.D. Ky. 1992)* ("absolute homogeneity" not required).

82. The typicality requirement is satisfied in this case because the named plaintiffs allege claims that arise from the same alleged course of conduct that purportedly harmed all Class Members and are based on the same legal theories. *See In re Prudential Ins. Co. of Am. Sales Practices Litig., 962 F. Supp. at 518* (typicality requirement met in case alleging replacement, vanishing premium and investment plan claims, because defendant's alleged scheme to defraud was "prominent guiding thread through all of the plaintiffs' claims"); *Duhaime v. John Hancock Mut. Life Ins. Co., 177 F.R.D. at 63* (typicality requirement met where "named plaintiffs were subjected to the same deceptive sales techniques allegedly used by [defendant] against other class members").

83. **Adequacy of Representation** -- *Rule 23(a)*'s adequacy of representation requirement "serves to uncover conflicts of interest between named parties and the class they seek to represent." *Amchem Prods., Inc. v. Windsor, 521 U.S. at 625, 117 S. Ct. at 2250, 138 L. Ed. 2d at 714* [*43] (citations omitted). This requirement is met when (*i*) the named representatives have common interests with unnamed members of the class and (*ii*) the representatives have retained qualified counsel. *Senter v. General Motors Corp., 532 F.2d at 525*; *see also Cross v. National Trust Life Ins. Co., 553 F.2d 1026, 1031 (6th Cir. 1977)* (the requirement tests "the experience and ability of counsel for plaintiffs and whether there is any antagonism between the interests of the plaintiffs and other members of the class they seek to represent"). In this case, both of these requirements are easily met.

84. There are no conflicts of interest or other antagonisms between plaintiffs and other Class Members that would impair the representative plaintiffs' incentive to prosecute vigorously all aspects of the claims against AGL. *See* Issacharoff Decl. PP 34-37. The named representatives have the same incentive as other Class Members who believe they were deceived: to establish the alleged fraud and to maximize the overall recovery. *See In re Corrugated Container Antitrust Litig., 643 F.2d 195, 208 (5th Cir. 1981)* ("so long as all class members [*44] are united in asserting a common right, such as achieving the maximum possible recovery for the class, the class interests are not antagonistic for representation purposes") (internal citation omitted). In addition, it is clear that the settlement -- which is relevant to

determining whether there is adequate representation of absent Class Members, *see Amchem Prods., Inc. v. Windsor 521 U.S. at 621, 117 S. Ct. at 2248, 138 L. Ed. 2d at 711* -- benefits the Class and does not involve any sacrifice of the interests of some Class Members for those of others. Issacharoff Decl. PP 34-37. Finally, the extremely low number of requests for exclusion (less than 0.25% of Class policies) and objections (24 objections submitted on behalf of 25 Class Members) confirms that the interests of the named plaintiffs and of Class Members are closely aligned and that the vast majority of Class Members believe that their interests have been well served.

85. The named class representatives have engaged competent counsel. Lead Counsel in this case, Milberg Weiss Bershad Hynes & Lerach LLP, is a firm of national stature, experienced in the litigation and settlement of large, nationwide class [*45] actions. Lead Counsel and the other firms representing the Class in this case are clearly qualified to conduct this action. *See generally* Weiss/Stoia Decl. P 173. In addition, plaintiffs' counsel have vigorously conducted this litigation from the outset. The settlement negotiations in this case were long and protracted. Only after plaintiffs' counsel had finished their discovery and satisfied themselves that they had procured the best possible settlement for the Class was an agreement reached. The Class thus had more than adequate legal representation. *See* Priest Aff. P 22.

86. **Predominance of Common Questions** -- The predominance requirement in *Rule 23(b)(3)* focuses "on the legal or factual questions that qualify each class member's case as a genuine controversy, questions that preexist any settlement." *Amchem Prods., Inc. v. Windsor, 521 U.S. at 623, 117 S. Ct. at 2249, 138 L. Ed. 2d at 712*. This requirement "requires a *predominance* of common questions, not a *unanimity* of them." *Hanrahan v. Britt, 174 F.R.D. 356, 365 (E.D. Pa. 1997)* (emphasis added; citation omitted). This requirement is thus "not defeated by slight differences [*46] in class members' positions." *Blackie v. Barrack, 524 F.2d 891, 902 (9th Cir. 1975), cert. denied, 429 U.S. 816, 50 L. Ed. 2d 75, 97 S. Ct. 57 (1976)*; *accord Kirkpatrick v. J.C. Bradford & Co., 827 F.2d 718, 725 (11th Cir. 1987)*; *In re Prudential Ins. Co. of Am. Sales Practices Litig., 962 F. Supp. at 510-11*; *Elkins v. Equitable Life Ins. Co. of Iowa, 1998 U.S. Dist. LEXIS 1557, 1998 WL 133741*, at *15.

87. The predominance requirement is satisfied when "the litigation will concern 'similar or standardized oral representations containing significant legal and factual questions which are common to the class.'" *Hanrahan v. Britt, 174 F.R.D. at 365* (quotation omitted); *see also In re School Asbestos Litig., 789 F.2d 996, 1010* (3d Cir.) (even a few common issues may satisfy the predominance requirement if resolution of those issues "will so advance the litigation that they may fairly be said to predominate"), *cert. denied, 479 U.S. 852 (1986)*. When confronted with a class of purchasers allegedly defrauded over a period of time by a similar common thread or scheme to which all alleged [*47] non-disclosures or misrepresentations relate, "courts have taken the common sense approach that the class is united by a common interest in determining whether a defendant's course of conduct is in its broad outlines actionable, which is not defeated by slight differences in class members' positions, and that the issue may profitably be tried in one suit." *Blackie v. Barrack, 524 F.2d at 892*; *accord Kirkpatrick v. J.C. Bradford & Co., 827 F.2d at 725*. A claim will meet the predominance requirement when there exists generalized evidence that proves or disproves an element on a simultaneous, classwide bases, because such proof obviates the need to re-examine each class member's individual position. *In re Potash Antitrust Litig., 159 F.R.D. 682, 693 (D. Minn. 1995)*; *see also* Issacharoff Decl. P 12.

88. As noted above, in their complaint (P 104), plaintiffs allege over 30 factual and legal issues common to the Class. These allegations relate to whether AGL uniformly failed to disclose material information relating to policy dividends, interest credits and values, whether AGL developed a common scheme for fraudulently inducing Class [*48] Members to purchase insurance, and whether AGL implemented any such scheme by training agents to use uniformly deceptive sales techniques and by providing agents with uniformly deceptive sales materials and policy illustrations to be used with prospective purchasers. Resolution of these issues will clearly "so advance the litigation that they may fairly be said to predominate." *In re School Asbestos Litig., 789 F.2d at 1010*; *accord Sterling v. Velsicol Chem Corp., 855 F.2d at 1197*.

89. In this case, plaintiffs' allegations of a common scheme of deception are sufficient to demonstrate that common questions predominate. *See Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 178, 94 S. Ct. 2140, 2153, 40 L. Ed. 2d 732, 749 (1974)* ("in determining the propriety of

a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of *Rule 23* are met") (quoting *Miller v. Mackey Int'l, 452 F.2d 424, 427 (5th Cir. 1971))*; *see also Amchem Prods., Inc. v. Windsor, 521 U.S. at 625, 117 S. Ct. at 2250, 138 L. Ed. 2d at 713* [*49] ("predominance is a test readily met in certain cases alleging consumer . . . fraud"); *In re Prudential Ins. Co. of Am. Sales Practices Litig., 148 F.3d at 314* (case "involving a common scheme to defraud millions of life insurance policy holders" falls within the category of cases that satisfy the predominance requirement).

90. The Court recognizes that differing state laws might have applied to certain of plaintiffs' claims had this case been tried. Of course, plaintiffs' claims under federal law involve a common body of law. Even as to state law claims, however, the possible existence of such variations does not defeat a finding of predominance. In a nationwide insurance sales practice class action involving the same types of claims and legal questions as those at issue here, the United States Court of Appeals for the Third Circuit held that any variations in state law did not defeat the district court's finding that common issues predominated over individual ones because the potential variations "could be overcome at trial by grouping similar state laws together and applying them as a unit." *In re Prudential Ins. Co. of Am. Sales Practices Litig., 148 F.3d at 315*; [*50] *see also* Issacharoff Decl. PP 30-32

91. Finally, the Court notes that, to the extent any variations in state law would suggest that the case might not be readily manageable as a class action, that is an issue that the Supreme Court has specifically stated a court need *not* consider in determining whether a class should be certified for settlement purposes. *Amchem Prods., Inc. v. Windsor, 521 U.S. at 620, 117 S. Ct. at 2248, 138 L. Ed. 2d at 710*.

92. The Court therefore finds that common issues of law and fact predominate.

93. **Superiority** -- Matters pertinent to a finding of superiority include:

> (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

Fed. R. Civ. P. 23(b)(3).

a. Interests of Individual Members -- The interest of class members in conducting [*51] separate lawsuits does not require denial of class certification when a large number of class members' claims would be so small that class members would be deterred from bringing actions on their own. *See, e.g., Duhaime v. John Hancock Mut. Life Ins. Co., 177 F.R.D. at 64*; *In re Prudential Ins. Co. of Am. Sales Practices Litig., 962 F. Supp. at 523*. As the Supreme Court recently emphasized:

> The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor.

Amchem Prods., Inc. v. Windsor, 521 U.S. at 617, 117 S. Ct. at 2246, 138 L. Ed. 2d at 709 (quoting *Mace v. Van Ru Credit Corp., 109 F.3d 338, 344 (7th Cir. 1997))*. In addition, because Class Members who wished to pursue their own lawsuit could have requested exclusion, no Class Member was precluded from conducting a separate lawsuit if he or she so desired. [*52] Moreover, the interest of Class Members in pursuing their individual claims is actually advanced by the settlement class proposed in this case, because the Settlement itself provides an efficient and cost-free means for Class Members to present individual claims and obtain individualized determinations whether their claims merit relief and, if so, at what level.

b. **Pending Proceedings** -- There are only seven individual lawsuits pending against AGL relating to the sales practices at issue in this case. Weiss/Stoia Decl. P 175. This number is very small in comparison to the large number of Class Members who will benefit from this Settlement. Those seven actions will not, separately or collectively, result in an adjudication of the controversy that underlies this class action.

c. **Concentration of Litigation in One Forum** -- Because this case will be settled (not tried), the desirability of concentrating the litigation in a particular forum is consistent with certification. Moreover, it clearly is more efficient to have these claims resolved in one forum.

d. **Manageability** -- Given the Supreme Court's holding that a court certifying a settlement class need not decide [*53] whether or not a class action would be manageable at trial, *Amchem Prods., Inc. v. Windsor, 521 U.S. at 620, 117 S. Ct. at 2248, 138 L. Ed. 2d at 710*, this Court need not consider the issue of manageability. It is nevertheless worth noting that the proposed Settlement resolves any manageability problems that would have been present by creating a mechanism for reviewing the individual claims of Class Members. The Settlement Agreement thus permits what may be a sizable number of Class Members to achieve individual relief without burdening the judicial system and thus "result[s] in a large saving of judicial resources." *See Margaret Hall Found., Inc. v. Atlantic Fin. Management, Inc., 1987 U.S. Dist. LEXIS 7528*, at *15 (D. Mass. July 30, 1987).

94. Based on the above, the Court grants final certification of the settlement class in this case under *Fed. R. Civ. P. 23(b)(3)*.

VI. FAIRNESS OF THE SETTLEMENT

95. Under *Federal Rule of Civil Procedure 23(e)*, a court should approve a proposed class action settlement if it determines that the settlement is "fair, adequate, and reasonable, as well as consistent with the public interest." *Bailey v. Great Lakes Canning, Inc., 908 F.2d 38, 42 (6th Cir. 1990)*. [*54] In making this determination, a court should consider the following factors: (*i*) plaintiff's likelihood of success on the merits, weighed against the amount and form of relief offered in the settlement; (*ii*) the complexity, expense and likely duration of the litigation; (*iii*) the stage of proceedings and the amount of discovery completed; (*iv*) the nature of the settlement negotiations; (*v*) the objections raised by members of the class and (*vi*) the judgment of experienced counsel. *See, e.g., Williams v. Vukovich, 720 F.2d 909, 922-23 (6th Cir. 1983)*; *Berry v. School Dist. of City of Benton Harbor, 184 F.R.D. 93, 98 (W.D. Mich. 1998)*; *Whitford v. First Nationwide Bank, 147 F.R.D. 135, 140 (W.D. Ky. 1992)*; *In re Dun & Bradstreet Credit Servs. Customer Litig., 130 F.R.D. 366, 371 (S.D. Ohio 1990)*.

96. In addition, a court should consider the "overriding public interest in favor of settlement of class action lawsuits," *Whitford v. First Nationwide Bank, 147 F.R.D. at 143*, bearing in mind that compromise is the essence of settlement, *see Williams v. Vukovich, 720 F.2d at 922* [*55] ("[a] court may not withhold approval simply because the benefits accrued from the decree are not what a successful plaintiff would have received in a fully litigated case"). The proposed settlement here more than satisfies these various considerations.

97. **Plaintiffs' Likelihood of Success at Trial** -- "One of the most important factors in assessing the fairness of a settlement agreement is the strength of the plaintiffs' case on the merits balanced against the relief offered in the settlement." *Berry v. School Dist. of City of Benton Harbor, 184 F.R.D. at 98*. In assessing plaintiffs' likelihood of success at trial for purposes of determining whether the Settlement is fair, reasonable and adequate, the Court should make only a "limited inquiry into whether the possible rewards of continued litigation with its risks and costs are outweighed by the benefits of the settlement." *Ressler v. Jacobson, 822 F. Supp. 1551, 1553 (M.D. Fla. 1992)*; *accord Williams v. Vukovich, 720 F.2d at 921* (in determining fairness of consent decree, "the Court has no occasion to determine the merits of the controversy or the factual underpinning of [*56] the legal authorities advanced by the parties").

98. Furthermore, although the Court has considered the effect of possible variations in state law in certifying the Class, it has neither made, nor is required to make, any choice of law determination in assessing the obstacles plaintiff's might face at trial. *See Bowling v. Pfizer, Inc., 143 F.R.D. 141, 167-68 (S.D. Ohio 1992)*; *Michels v. Phoenix Home Mut. Life Ins. Co., 1997 N.Y. Misc. LEXIS 171*, at *51-52, *Willson v. New York Life Ins. Co., 1995 N.Y. Misc. LEXIS 652*, at *41.

99. The Court notes that defendant's submission [at 33-36] raises a number of potential legal and factual obstacles that plaintiff's would have faced if this litigation had proceeded to the merits, including, among others, that (*i*) plaintiffs' claims of misrepresentations would be contradicted by the language of the policies themselves; (*ii*) alleged promises of future conduct or expressions of opinion cannot support misrepresentation claims; (*iii*) the economic loss doctrine bars plaintiffs' tort claims; and (*iv*

) plaintiffs' claims would have to overcome statutes of limitations, parol evidence [*57] and statute of frauds defenses. Plaintiffs acknowledge in their submission [at 28] that these defenses are "potentially formidable."

100. The existence of these (and other) potential obstacles to plaintiffs' success on the merits argues in favor of approving the settlement.

101. **Amount and Form of Relief Offered in the Settlement** -- When plaintiffs' likely success on the merits is weighed against the amount and form of relief offered in the settlement, the balance tips decisively in favor of approving the settlement.

102. There is no fixed point above or below which a settlement is or is not fair. Indeed, "the fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is inadequate; there is no reason why a satisfactory settlement could not amount to a hundredth or even a thousandth part of a single percent of the potential recovery." *TBK Partners, Ltd. v. Western Union Corp., 675 F.2d 456, 463-64 (2d Cir. 1982)* (internal quotation marks omitted).

103. The parties' actuarial experts have opined that the Settlement's benefit package will provide at least $ 169 million [*58] in economic value to the class. *See* Tillinghast Report at 77-78; Long Decl. P 12. This valuable relief falls well within the "range of reasonableness" required for settlement approval. *See, e.g., In re Domestic Air Transp. Antitrust Litig., 148 F.R.D. 297, 319 (N.D. Ga. 1993)* ("in assessing the settlement, the Court must determine whether it falls within the range of reasonableness, not whether it is the most favorable possible result in the litigation") (internal citations omitted).

104. Class Members who elect General Policy Relief automatically will receive an aggregate economic value of $ 130.3 million in death benefits and also will have the opportunity to use or transfer Settlement Scrip. These Class Members also will automatically receive the benefits of the Prospective Commitment if AGL increases its cost-of-insurance charges or decreases it dividends due to its mortality experience for one year following July 1, 1999.

105. Class Members who elect CEP will have an opportunity to present their individual claims to a Claim Evaluator chosen by Lead Counsel. If they are successful, they will receive cash awards. AGL will make up to $ 38.7 million (plus interest) [*59] available for distribution through CEP. A CEP claimant who receives the highest level designation for his or her claim may receive an award that approximates the economic loss suffered. *See* Weiss/Stoia Decl. P 77; Santillo Decl. P 25; *see also* Priest Aff. P 32 ("these various forms of [CEP] relief represent substantial restitution of meritorious claims and, in fact, appear not fully adjusted to reflect the defenses that would be available to the Defendant if affected class members were required to prosecute active litigation"). As noted above, the Court finds that, even if the total amount of awards made under CEP require a pro rata reduction of all awards (an outcome the actuarial experts do not expect), CEP still will provide substantial compensation to individual CEP claimants.

106. The Court notes that the Settlement makes additional value available, including that derived from the very existence of CEP and the Part VIII ADR Process (both of which will provide fair, simple and essentially cost-free mechanisms to resolve Class Members' individual claims). *See Spitz v. Connecticut General Life Ins. Co.*, MDL No. 1136, No. CV95-8484, slip op. at 3 (C.D. Cal. Jan. 13, 1997).

[*60] 107. Additionally, the Court notes that the finality provisions for CEP and Part VIII ADR determinations represent an appropriate and efficient means of providing expeditious relief to the class and minimizing the burden on the Court and the parties. *See, e.g., In re Prudential Ins. Co. of Am. Sales Practices Litig., 148 F.3d at 325*; *Elkins v. Equitable Life Ins. Co. of Iowa, 1998 U.S. Dist. LEXIS 1557, 1998 WL 133741*, at *7-8; *Stewart v. Rubin, 948 F. Supp. 1077, 1082 (D.D.C. 1996), aff'd, 326 U.S. App. D.C. 337, 124 F.3d 1309 (D.C. Cir. 1997)*; *Haynes v. Shoney's, Inc., 1993 U.S. Dist. LEXIS 749, 1993 WL 19915*, at *18, *42 (N.D. Fla. Jan. 25, 1993). The potential for appeals could create an ongoing administrative burden for the Court and the parties, thereby undermining one of the purposes of settling this case, *see, e.g., Bachman v. Miller, 559 F. Supp. 150, 152 n.7 (D.D.C. 1982)*, and could also delay the provision of relief to the Class as a whole. Class Members who elected CEP did so after having been specifically informed through the notice package that claim decisions would not be reviewed, and Class Members are properly bound by their elections. *See,* [*61] *e.g., Bachman v. Miller, 559 F. Supp. at 151-52*;

Gramling v. Food Mach. & Chem. Corp., 151 F. Supp. 853, 855-56 (D.S.C. 1957). Moreover, the very structure of the claim procedure (including, among other things, the use of objective scoring criteria that are part of the approved Settlement) should ensure that claims will be processed in a procedurally and substantively fair manner. The Court retains jurisdiction over this case to consider issues regarding whether the Settlement has been implemented consistent with the terms of the Settlement Agreement. *See Security Pac. Fin. Servs. v. Jefferson, 259 Ill. App. 3d 914, 921, 632 N.E.2d 299, 304, 198 Ill. Dec. 240, 245 (1994)*.

108. For all of these reasons, there is no question that the proposed Settlement provides relief that is fair and adequate and within the "range of reasonableness." *In re Domestic Air Transp. Antitrust Litig., 148 F.R.D. 297, 319 (N.D. Ga. 1993)*.

109. **Length, Complexity and Cost of Further Litigation** -- The Court finds that this factor also supports approval of the Settlement. The complaint's allegations concern the sale and performance [*62] of approximately 850,000 life insurance policies. If this case were to proceed without settlement, the resulting litigation would be lengthy, complex and expensive. *See, e.g., In re Prudential Ins. Co. of Am. Sales Practices Litig., 148 F.3d at 318*; *In re Manufacturers Life Ins. Co. Premium Litig., 1998 U.S. Dist. LEXIS 23217*, No. 96-CV-230 BTM (AJB), slip op. at 10 (S.D. Cal. Dec. 21, 1998); *Elkins v. Equitable Life Ins. Co. of Iowa, 1998 U.S. Dist. LEXIS 1557, 1998 WL 133741*, at *27. The proposed Settlement grants Class Members timely relief without their having to endure the risk, complexity, duration and expense inherent in continuing this litigation. *See Michels v. Phoenix Home Life Mut. Ins. Co., 1997 N.Y. Misc. LEXIS 171*, at *88.

110. **Stage of Proceedings at Which Settlement Was Achieved** -- In assessing this factor, the relevant inquiry is whether the parties have conducted sufficient discovery to assess the strengths and weaknesses of their claims and defenses. *See, e.g., Woodward v. NOR-AM Chem. Co., 1996 U.S. Dist. LEXIS 7372, 1996 WL 1063670*, at *21 (S.D. Ala. May 23, 1996). Comprehensive discovery is not necessary, *id.*, "only some reasonable amount of discovery" is required, [*63] *Elkins v. Equitable Life Ins. Co. of Iowa, 1998 U.S. Dist. LEXIS 1557*, *92, 1998 WL 133741, at *31 (internal quotation marks omitted). In this case, extensive document discovery and numerous depositions were completed. The discovery enabled plaintiffs' counsel not only to assess the legal and factual merits of their clients' claims, but also to negotiate a settlement that provides relief specifically tailored to Class Members' needs. Discovery has therefore afforded the Court and the parties a clear view of "the facts and legal issues involved, as well as the strengths and weaknesses of [the parties'] positions." *In re Dun & Bradstreet Servs. Customer Litig., 130 F.R.D. at 371*; *accord, e.g., Elkins v. Equitable Life Ins. Co. of Iowa, 1998 U.S. Dist. LEXIS 1557*, *91, 1998 WL 133741, at *31; *Duhaime v. John Hancock Mut. Life Ins. Co., 177 F.R.D. at 67*. Thus, this factor also favors approval of the Settlement.

111. **The Nature of the Negotiations** -- This settlement was the product of extensive, contentious, arm's length negotiations that lasted for close to a year. *See generally* Santillo Decl. PP 11-28; Weiss/Stoia Decl. PP 67-79. The Settlement was not finalized until after [*64] plaintiffs had conducted extensive document and witness discovery. The history of the settlement negotiations thus clearly counsels in favor of approving the Settlement. *See, e.g., In re Dun & Bradstreet Credit Servs. Customer Litig., 130 F.R.D. at 372* (approving settlement negotiated at arms' length, with no evidence of collusion and no indication that any party or subgroup of class members benefited at class's expense).

112. **Substance and Amount of Opposition to the Settlement** -- There has been very little opposition to this Settlement. Only 1,976 policies (representing only 0.24% of the Class policies) have been excluded from the Class. Second Supplemental Dahl Decl. P 5. Only 24 objections were submitted on behalf of 25 Class Members. [9] This small amount of opposition strongly supports approving the Settlement.

9 The Court notes that one objector (Carl Schmuck) withdrew his objection. In addition, one objector (Douglas Marpe) filed a late objection. That objection is overruled. Finally, one objector (Bill Burdock) filed a timely request for exclusion after filing his objection. Because Mr. Burdock is no longer a Class Member, he lacks standing to object, and his objection is invalid. *See, e.g., In re Beef Indus. Antitrust Litig., 607 F.2d 167, 172 (5th Cir. 1979), cert. denied, 452 U.S. 905 (1981)*. In any event, none of these objections would justify disapproval of this

settlement.

In addition, as noted above, two objectors (Matthew Weiss and Marsha Smolen) withdrew their objection in light of the amendment that was made to the Settlement on May 21, 1999. As discussed above, this amendment enhanced the relief available to Class Members.

[*65] 113. After due consideration, for the reasons set out below, the Court finds that none of these objections prevents the Court from approving the Settlement.

114. As noted above, one Class Member, Franklin T. Jones, Jr., moved (two days before the Fairness Hearing) to intervene in this action. That motion has been denied. The Court's denial of Mr. Jones' intervention motion is discussed in a separate Order filed in this action. Mr. Jones also appeared, through his counsel, T. John Ward, at the June 3, 1999 Fairness Hearing and was heard.

115. It appears that Mr. Jones' objection to the Settlement has changed since he filed his first objection, which was the only timely objection he filed, on April 28, 1999 (one day before the deadline for filing objections). In that submission, Mr. Jones' only objection was that he was unable to obtain a copy of the CEP Guidelines. [10] This objection became moot when he received a copy of the Guidelines from plaintiffs' counsel in late April or early May, immediately after plaintiffs' counsel became aware of Mr. Jones' desire to obtain a copy.

10 Mr. Jones' objection regarding his inability to obtain a copy of the CEP Guidelines ignores the fact that he could have obtained a copy from the Court Clerk. The Guidelines (which are part of the Stipulation of Settlement) have been on file with the Court since December 1998. The notice sent to Class Members explicitly notified them that the Stipulation of Settlement was on file with the Court. *See* Dahl Decl. Ex. A, Notice at 18.

[*66] 116. Mr. Jones next complained (in a submission entitled "Motion to Intervene" filed two days before the June 3 hearing and well after the April 29, 1999 deadline for objections) that the relief available to him under CEP would be inadequate to address his economic loss. This objection is untimely. In any event, at the hearing, Mr. Jones' counsel acknowledged that this objection was based on his own erroneous calculations.

117. Mr. Jones' counsel then focused his presentation on an entirely different objection: that the CEP process is some how procedurally flawed because the Claim Evaluator's decision is final and binding and not subject to review. This objection, which received only passing reference (one sentence to be exact) in Mr. Jones' June 1, 1999 submission, is again untimely, and the Court overrules it for that reason. Mr. Jones has no excuse for not raising that issue much earlier. The Court nevertheless has considered the objection and finds it is without merit.

118. Mr. Jones received notices for the multiple Class policies he owns. These notices clearly informed him in two places that the Claim Evaluator's decision would be final and unreviewable. The notices states [*67] that "the Claim Evaluator's decision will be final." *See* Dahl Decl. Ex. A, Notice at 12. In addition, the Fact Sheet on CEP that was included in each notice package stated that

> the Claim Evaluator's decision about the relief for a claim will be final and binding on [AGL] and on you. *It will not be subject to any appeal by anyone or on any basis.*

Id. Ex. A, CEP Fact Sheet at 15 (emphasis added). [11] If Mr. Jones found this provision objectionable, he should have raised it in his earlier objection, or he could have requested exclusion from the Class and pursued any claims he had in the courts. Instead, Mr. Jones affirmatively chose to participate in CEP by returning election forms for his policies within the Class. [12]

11 The CEP Fact Sheet similarly describes the arbitrator's decision in the Part VIII ADR Process as "binding" and "not subject to any appeal." Dahl Decl. Ex. A, CEP Fact Sheet at 16.

12 When asked at the Fairness Hearing why Mr. Jones did not exclude himself from the Class if he found the finality provisions objectionable, Mr. Jones' counsel acknowledged that the Settlement provides good relief.

[*68] 119. Moreover, as noted above (*see* P 107), the parties had very good reasons for including the finality provisions of CEP and the Part VIII ADR Process in the Settlement Agreement. Based on the record before the Court, it is clear that the parties sought to make those

processes as streamlined and efficient as possible, to avoid burdening the Court and themselves with extended and drawn-out proceedings and to provide relief as quickly as possible to the Class. As discussed above, during settlement negotiations, plaintiffs' counsel insisted on a streamlined alternative dispute resolution process. *See* Weiss/Stoia Decl. P 72; Santillo Decl. P 13. The finality provision will allow the Class as a whole to obtain relief much more quickly and efficiently than if review of the Claim Evaluator's decisions were allowed.

120. In streamlining the process, however, the parties have been careful to ensure that the process will remain fair to claimants. Thus, they included in the Settlement objective scoring criteria both for CEP and the Part VIII ADR Process. Those criteria, which are part of the Settlement Agreement, have been reviewed by the Court and are being approved as part of the [*69] Settlement. The Claim Evaluator will be chosen by plaintiffs' counsel, and he or she will review claims and award relief pursuant to these Court-approved guidelines. Given these provisions of the Settlement Agreement, the Court finds that the claim review procedures are procedurally and substantively fair.

121. Based on its review of the Settlement Agreement, the Court finds that the CEP and the Part VIII ADR finality provisions strike a lawful, appropriate and fair balance by providing for general judicial supervision of the implementation of the detailed guidelines without burdening judicial resources or delaying relief to the Class. The Court also notes that many other courts have approved class action settlements in which a claim administrator or other non-judicial person determines class members' entitlement to relief without a right of appeal. *See, e.g., In re Prudential Ins. Co. of Am. Sales Practices Litig., 148 F.3d at 325*; *Stewart v. Rubin, 948 F. Supp. at 1082*; *Haynes v. Shoney's, Inc., 1993 U.S. Dist. LEXIS 749, 1993 WL 19915*, at *40-41; *cf. In re Dep't of Energy Stripper Well Exemption (Hertz), 846 F.2d 756, 759 (Temp. Emer. Ct. App. 1988)*. [*70] Moreover, limiting individual appeals is consistent with well-established general legal principles governing settlements and voluntary ADR. *E.g., Gramling v. Food Machinery & Chemical Corp., 151 F. Supp. 853, 856 (D.S.C. 1957)*.

122. This Court has reviewed the Settlement Agreement and has provided all Class Members -- including Mr. Jones -- with an opportunity to be heard on any aspect of the Settlement, including CEP and the Part VIII ADR Process. This Court has approved those processes, specifically including the substantive standards that will govern evaluation of all submitted claims. The Court's review of the Settlement -- including CEP and the Part VIII ADR Process -- satisfies any right a Class Member might have had to have a court consider his or her claims. Once this Court enters its Final Judgment, Class Members' rights and claims are extinguished and released, except to the extent they arise under the Settlement. The Settlement Agreement that creates those contractual rights can prescribe their terms -- and can prohibit review of final and binding determinations in the Court-approved CEP and Part VIII ADR Process. *See, e.g., Bachman v. Miller, 559 F. Supp. 150, 152 (D.D.C. 1982)* [*71] ("From the time of the approval of the settlement by this Court, any claim . . . Movants may have had against the [defendant] was res judicata -- the settlement agreement itself finally disposed of Movant's claims. . . . When Movants brought their claims [in the claim-review process], their requests for relief arose under the settlement agreement.").

123. Mr. Jones' counsel acknowledged that there are good reasons for the finality provision, but nevertheless argued that there should be a review process. After due consideration and for the reasons stated above, the Court disagrees. Moreover, if Mr. Jones' real concern is that the settlement might be implemented in a manner that is systemically inconsistent with the terms of the Settlement Agreement, the Settlement contemplates that the Court will retain jurisdiction over the Settlement to ensure that such systemic inconsistencies do not occur. *See Security Pac. Fin. Servs. v. Jefferson, 259 Ill. App. 3d 914, 921, 632 N.E.2d 299, 304, 198 Ill. Dec. 240, 245*. *See* P 107 above; Stipulation of Settlement at 70.

124. The Court therefore finds that Mr. Jones' only timely objection (about the CEP Guidelines) [*72] is without merit and, in any event, is moot. Mr. Jones' other objections are untimely and are overruled. Furthermore, these claims also are without basis and do not prevent this Court's final approval of the Settlement.

125. Most of the other objectors challenge the adequacy of the settlement benefits, while a few criticize certain aspects of CEP, the class notice, the scope of the release, and plaintiffs' requested attorneys' fees. One other individual makes an assortment of objections that are all factually unfounded.

a. **Adequacy of Settlement Benefits** -- A number of objections are based on the objectors' preference for some type of relief other than the death benefits and opportunity to buy a new policy that comprise two forms of General Policy Relief. In making this objection, these Class Members ignore the Claim Evaluation Process, through which they can seek a cash award. Moreover, their assertion that the free death benefits are worthless because the objectors do not expect to die is misguided. Regardless of whether a death benefit actually is paid, the *free* protection itself has value to the Class as a whole, as demonstrated by Class Members' prior purchase of life [*73] insurance. *See In re Real Estate Title & Settlement Servs. Antitrust Litig., 1986 U.S. Dist. LEXIS 24435, 1986 WL 6531*, at *18 (E.D. Pa. June 10, 1986) (extra title insurance provides benefit to all class members, regardless of whether they make any claim for the insurance), *aff'd, 815 F.2d 695 (3d Cir. 1987), cert. denied, 485 U.S. 909 (1988)*. Similarly flawed is the objectors' assertion that Settlement Scrip is worthless because they may not wish to use it. Settlement Scrip provides Class Members with an opportunity to purchase a life insurance product with a substantial AGL contribution if they so wish. This opportunity has value. *See Dunk v. Ford Motor Co., 48 Cal. App. 4th 1794, 1805, 56 Cal. Rptr. 2d 483, 490 (4th Dist. 1996)* (fact that some class members might not use settlement relief to obtain discounted products does not warrant disapproval of settlement). Moreover, Settlement Scrip is fully transferable by Class Members to family members or third parties (for value if they wish), and AGL will set up a website to allow Class Members and others to post an interest in transferring or obtaining Scrip. Under certain circumstances (defined [*74] in the Settlement Agreement), simplified underwriting will apply to policies purchased with Scrip.

b. Furthermore, the narrow focus of these objectors on their own personal situations ignores that they have chosen to litigate their claims in a class action and that the proposed settlement must be analyzed in terms of the relief provided to the entire Class. *See In re Xoma Corp. Sec. Litig. v. Steven C. Mendell, 1992 U.S. Dist. LEXIS 10502*, at *10 (N.D. Cal. July 10, 1992) ("the Court must be concerned with ensuring fairness to the class as a whole, rather than with satisfying any particular plaintiffs' demands"). If the objectors want *individualized* relief, CEP exists to provide it.

c. The objection that the General Policy Relief is based on the original face amount of each Class Member's policy, rather than on the value of the policy at some later date, is similarly based on the narrow personal situation of the three Class Members who make this objection. They object to this provision because the face amounts of their particular policies have increased since the date of purchase. For many other Class Members, however, this will not be the case; their policies' face amounts have [*75] *decreased* since the date of purchase. Because of these variations, it was necessary to establish some standard that could be uniformly applied throughout the Class -- most logically, the value of the policy on the date of the transaction that gave rise to each Class Member's complaint. Again, the interest of the entire Class is the relevant issue, not the personal preferences of these few objectors.

d. The objectors' preferences for other types of relief are irrelevant. The issue is not whether the proposed settlement could have offered *different* or even more generous relief, the only question is whether the benefits *actually being offered* are fair, reasonable and adequate. If they are, the settlement should be approved. *See Bowling v. Pfizer, 143 F.R.D. at 169* (settlement is "not a wish-list of class members that the Defendant must fulfill").

e. Finally, the objector's complaint that the premiums on the policies that may be purchased with Settlement Scrip will vary depending on the insured's age, sex and medical condition ignores the fact that premium amounts are always based on these factors. In addition, AGL's contribution to the policy purchased with [*76] Settlement Scrip depends on the amount of the first-year base premium. Purchasers who pay higher premiums will get larger contributions from AGL.

f. **CEP is an Efficient and Fair Process** -- One Class Member (Kenneth Klayman, who is a lawyer) criticized the $ 38.7 million upper limit on CEP relief. The objector's apparent concern that this sum may not be enough to cover the awards that are ultimately issued has no basis in fact. As noted above, the parties' actuarial experts have concluded that the $ 38.7 million should be more than sufficient to pay all CEP awards.

g. Additionally, Mr. Klayman seems to suggest that he did not have sufficient information at the time he made his election for CEP to know whether he wanted to participate in the process. However, as the notice states, even if Mr. Klayman elected CEP and later decided he did not want to participate, he would automatically receive General Policy Relief. *See* Dahl Decl. Ex. A, Notice at 12. Furthermore, to the extent Mr. Klayman complains about not having enough information about the Settlement, much of the information was publicly available. The class notice specifically explained how Class Members could obtain [*77] additional information about the Settlement, including the Stipulation of Settlement (which includes the CEP Guidelines and is on file with the Clerk of the Court), and how they could review documents and other discovery produced in the litigation. Mr. Klayman, a lawyer residing in San Diego, could have reviewed these documents at the offices of Lead Counsel in San Diego, but chose not to do so.

h. **The Notice Is Clear and Comprehensive** -- The objection of Class Member Kathy Wood that the notice does not "make sense" to her is without merit. The class notice provided clear and detailed information about the lawsuit, the relief made available under the proposed settlement, and the choices -- including whether to opt out or object -- that Class Members were required to make. *See* Priest Aff. P 24 ; Harrison Aff. P 11, p. 35; Corcoran Decl. P 18; Sexton Decl. P 9.

i. **The Scope of the Release Is Proper** -- Class Member Henry Clinton's objections that the release will give AGL free rein to engage in misconduct in the future, that the settlement lacks any provision to prevent such misconduct, and that the release bars Class Members "from responding to fresh actions by the [*78] company adversely affecting their interests" is also unfounded. The release expressly states that it does not alter a Class Member's right (*i*) to make a claim for benefits that become payable pursuant to the express terms of the policy or (*ii*) to assert a claim that independently arises from acts, facts or circumstances arising after the end of the Class Period. *See* Release P II. Moreover, if Mr. Clinton (or any other Class Member), felt that the release was too broad, he could have requested exclusion from the Class.

j. **Objections to Attorneys' Fees Are Unfounded** -- The objections to the amount of attorneys' fees and expenses to be paid to plaintiffs' counsel overlook the corresponding benefits Class Members will receive because of plaintiffs' counsel's commitment of time and resources to this action. This case involved contentious litigation. Plaintiffs and their counsel faced the significant risk that they could have walked away from a litigation of this matter empty-handed. The record before the Court reflects the enormous and continuous resources (including out-of-pocket expenses) plaintiffs' counsel have dedicated to this litigation. In addition, plaintiffs' [*79] counsel will have continuing obligations to the case for which no additional compensation will be awarded. *See* Weiss/Stoia Decl. P 192.

k. The objection that plaintiffs' counsel did not adequately represent the Class, but rather "became hirelings for the Company," has absolutely no basis in fact. Likewise, the objection by Robert W. Bennett that plaintiffs' counsel improperly negotiated their fees at the same time as the settlement is unfounded. The terms of the settlement were finalized *before* an agreement on plaintiffs' attorneys' fees was concluded. Santillo Decl. P 27; Weiss/Stoia Decl. P 79. Moreover, the Court notes that the payment of fees and expenses to plaintiffs' counsel will have *no effect* on the relief available to Class Members.

l. **The Remaining Objections Are Without Merit** -- Mr. Bennett makes several other objections that are not based on the facts. [13] For example, Mr. Bennett objects to the determination at the Fairness Hearing of "some matters that should have been ruled upon sooner (such as certification of the class, class representatives and lawyers for the class)." While *Fed. R. Civ. P. 23(c)(1)* provides that a class certification order "may [*80] be altered or amended before the decision on the merits," all of the issues that Mr. Bennett cites were addressed (at least preliminarily) in the Court's December 17, 1998 Order.

13 The Court notes that Mr. Bennett's counsel filed a notice of appearance in the case but did not appear at the June 3, 1999 Fairness Hearing.

m. Mr. Bennett also claims it is unconstitutional to enter an order enjoining any Class Members who have not timely excluded themselves from the Class from bringing an action based on the same claims or facts underlying this suit. Again, Mr. Bennett is simply incorrect. Every Class member who wants to pursue an independent action has been given the opportunity to opt out of this case. Any Class Member who has not exercised that option has voluntarily submitted to the jurisdiction of this Court. *See, e.g., Phillips Petroleum Co. v. Shutts, 472 U.S. at 811-12, 105 S. Ct. at 2974, 86 L. Ed. 2d at 641-42.* [14]

14 Mr. Bennett's objection "to a Magistrate presiding over the 'fairness hearing'" is equally unfounded.

[*81] n. Another objector (Mr. Clinton) contends that policyholders' interests conflict with AGL's interest in increasing the company's earnings and stock price for its shareholders. Rather than stating an objection to the settlement, Mr. Clinton appears to be expressing a concern about how AGL, as a stock company, weighs various factors in making financial decisions. This concern is irrelevant to any consideration of the fairness of this settlement and, in any event, Mr. Clinton cites no improper conduct on the part of AGL.

o. Finally, some submissions that are styled "objections" are actually complaints about the underlying sales transactions, rather than objections to the settlement. These submissions are perfect candidates for CEP, which was designed to deal with just such complaints.

126. **Views of Experienced Class Counsel** -- Another factor to be considered in determining whether to approve the Settlement is the experience of class counsel and their views of the Settlement. *Williams v. Vukovich, 720 F.2d at 922-23*. Plaintiffs' counsel have extensive experience in litigating and settling large, nationwide class actions -- including life insurance sales practice [*82] cases. Numerous courts have recognized their vast experience and expertise, and have given counsel's opinion substantial weight in approving other similar settlements. *E.g.*, *Elkins v. Equitable Life Ins. Co. of Iowa, 1998 U.S. Dist. LEXIS 1557, 1998 WL 133741*, at *28; *In re Manufacturers Life Ins. Co. Premium Litig., 1998 U.S. Dist. LEXIS 23217*, No. 96-CV-230 BTM (AJB), slip op. at 14 (S.D. Cal. Dec. 21, 1998); *In re Prudential Ins. Co. of Am. Sales Practices Litig., 962 F. Supp. at 542*; *Natal v. Transamerica Occidental Life Ins. Co.*, No. 694829 (Cal. Super. Ct., San Diego County, July 28, 1997). This factor also weighs in favor of finding the Settlement fair, reasonable and adequate.

127. **The Public Interest** -- The final factor to be considered is the public interest. The proposed settlement would avoid complex and protracted litigation, provide valuable relief to the Class, and "foster[] the goals of certainty, finality and economy, which lie at the heart of our general preference for settlement of class actions." *Berry v. School Dist. of City of Benton Harbor, 184 F.R.D. at 106*. In addition, the proposed settlement would resolve the parties' dispute "in a manner which [*83] does its best to ensure that Defendants can continue to provide valuable service to Class Members in an atmosphere that will foster trust and confidence." *In re Dun & Bradstreet Credit Servs. Customer Litig., 130 F.R.D. at 372*. In these circumstances, the public interest clearly weighs in favor of approving the settlement.

128. **The Settlement is Fair, Reasonable and Adequate** -- For all of the reasons set out above, the Court finds that the Settlement in this case is fair, reasonable and adequate.

VII. FINDINGS OF FACT AND CONCLUSIONS OF LAW WITH RESPECT TO PLAINTIFFS' ATTORNEYS' FEES AND EXPENSES

A. Attorneys' Fees and Expenses of Plaintiffs' Counsel of Record

129. The Settlement provides a minimum of $ 169 million in economic value and other benefits, and up to $ 193.6 million in total classwide benefits. *See* Weiss/Stoia Decl. P 6. Consequently, plaintiffs have requested an award of attorneys' fees and the reimbursement of expenses in an amount not to exceed $ 19.5 million, currently comprised of $ 19.1 million in fees and approximately $ 389,858 in current expenses. *See* Plaintiffs' Fee Declarations filed on May 21, 1999. This fee request [*84] reflects more than 18,300 hours of time over nearly 2 years, valued at $ 5.01 million at current rates. *Id.*, Weiss/Stoia Decl. PP 190-91. The Court finds that the fee and expense negotiations were conducted at arm's length, only after the parties had reached agreement on all terms of the Settlement. There is no evidence in this case that the Settlement, or the fee and expense agreement, was in any way collusive. Under these circumstances, the Court gives great weight to the negotiated fee in considering the fee and expense request.

130. Such agreements between plaintiffs and defendants in class actions are encouraged, particularly where the attorneys' fees are negotiated separately and only after all terms of the settlement have been agreed to between the parties. *See Williams v. MGM-Pathe Communications Co., 129 F.3d 1026, 1027 (9th Cir. 1997)* ("parties to a class action properly may negotiate not only the settlement of the action itself, but also the payment of attorneys' fees"); *Hensley v. Eckerhart, 461 U.S. 424, 437, 103 S. Ct. 1933, 1941, 76 L. Ed. 2d 40, 53 (1983)* (noting that negotiated, agreed upon attorneys'

fees are the "ideal" toward [*85] which the parties should strive and stating that "ideally, of course, litigants will settle the amount of a fee"); *Johnson v. Georgia Hwy. Express, Inc., 488 F.2d 714, 720 (5th Cir. 1974)*.

131. The Court finds that plaintiffs' counsel are indeed entitled to be paid fees and their expenses as a result of the substantial common benefit provided to the Class and, for the reasons discussed below, approves plaintiffs' counsel's request for an award of attorneys' fees and expenses for the full amount of $ 19.5 million. *See Boeing Co. v. Van Gemert, 444 U.S. 472, 478, 100 S. Ct. 745, 749, 62 L. Ed. 2d 676, 681 (1980)* ("a lawyer who recovers a common fund for the benefit of persons other than . . . his client is entitled to a reasonable attorney's fee from the fund as a whole"). As the court noted in *Malchman v. Davis, 761 F.2d 893, 905 n.5 (2d Cir. 1985), cert. denied, 475 U.S. 1143 (1986)*:

> Where . . . the amount of the fees is important to the party paying them, as well as to the attorney recipient, it seems to the author of this opinion that an agreement "not to oppose" an application for fees up to a point is essential [*86] to the completion of the settlement, because the defendants want to know their total maximum exposure and the plaintiffs do not want to be sandbagged. It is difficult to see how this could be left entirely to the court for determination after the settlement.

See also Hardin Decl. PP 5-6.

132. The preferred approach to calculating attorneys' fees to be awarded in a common benefit case is as a percentage of the class benefit. *In re Telectronics Pacing Systems, Inc. Accufix Atrial "J" Leads Prods. Liab. Litig., 1999 U.S. Dist. LEXIS 7133M*DL 1057, Master File No. C-1-95-87, slip op. at 63 (S.D. Ohio, W. Div. Mar. 5, 1999); *see also In re Pacific Enterprises Secs. Litig., 47 F.3d 373, 379 (9th Cir. 1995)* ("Twenty-five percent is the 'benchmark' that district courts should award in common fund cases."); *see also* Hardin Decl. PP 10-11. This accomplishes two objectives. First, it is consistent with the private marketplace where contingent fee attorneys are routinely compensated on a percentage of recovery method. *In re Public Service Co. of New Mexico*, Fed. Sec. L. Rep. (CCH) P 96,988, at 94,291-92, [1992 Transfer Binder] (S.D. Cal. July 28, 1992) ("If this were [*87] a non-representative litigation, the customary fee arrangement would be contingent, on a percentage basis, and in the range of 30% to 40% of the recovery."). Second, it provides a strong incentive to plaintiffs' counsel to obtain the maximum possible recovery in the shortest time possible under the circumstances. *See also In re Continental Illinois Sec. Litig., 962 F.2d 566, 572 (7th Cir. 1992)*; *Duhaime v. John Hancock Mut. Life. Ins. Co., 989 F. Supp. 375, 377 (D. Mass. 1997)* (the advantage of the percentage method is that it "focuses 'on result, rather than process, which better approximates the workings of the market place.'") (citation omitted). As the Seventh Circuit has noted:

> The contingent fee uses private incentives . . . to align the interests of lawyer and client. . . . At the same time as it automatically aligns interests of lawyer and client, rewards exceptional success, and penalizes failure, the contingent fee automatically handles compensation for the uncertainty of litigation.

Kirchoff v. Flynn, 786 F.2d 320, 325-26 (7th Cir. 1986).

133. Finally, the percentage approach reduces the burden of the Court [*88] to review and calculate individual attorney hours and rates and expedites getting the appropriate relief to class members. *See In re Continental Illinois, 962 F.2d at 572*; *In re Activision Sec. Litig., 723 F. Supp. 1373 (N.D. Cal. 1989)*.

134. Plaintiffs' Request For An 11.5% Award Is Reasonable -- Plaintiffs' counsel's request for fees and reimbursement of expenses totals 11.5% of the minimum value of the settlement, only 10.1% if the costs normally borne by the Class but paid here by AGL are considered. This represents a far lower percentage than is awarded in contingent class actions here and elsewhere. Indeed, throughout the Sixth Circuit, attorneys' fees in class actions have ranged from 20%-50%. *See, e.g., In re Cincinnati Microwave Inc. Sec. Litig.*, Consolidated Master File No. C-1-95-905, Order and Final Judgment (W.D. Ohio Mar. 21, 1997) (awarding 30%); *Meyers v. Abbott Laboratories*, No. 97-C-612, Memorandum (5th Cir. Ct. Davidson County, Tenn., Mar. 26, 1998) (awarding 25%); *Telectronics*, slip op. at 71 (awarding 28%); *Adams v. Standard Knitting Mills, Inc.*, Fed. Sec. L. Rep. (CCH) P 96,377, [1978 Transfer Binder] [*89]

(E.D. Tenn. Jan. 6, 1978) (35.8% award); *see also* Hardin Decl. PP 19-20 & n.3.

135. Moreover, in the above cases the fees and expenses awarded were deducted from the common fund, reducing the amount of the fund available to the class. Here, AGL will pay plaintiffs' counsel's attorneys' fees and expenses over and above the settlement costs and benefits with no reduction of class benefits. Finally, the fee and expense request does not include the additional effort and expense plaintiffs' counsel will expend in implementing and monitoring and administering the Settlement, for which they shall receive no additional compensation.

136. **Plaintiffs' Counsel's Fee And Expenses Request Satisfies Sixth Circuit Criteria** -- The Sixth Circuit has adopted neither the percentage approach nor the lodestar multiplier approach as the sole determinant of the awards in common fund cases, requiring only that awards of attorneys' fees by federal court be "reasonable under the circumstances." *Rawlings v. Prudential-Bache Properties, Inc., 9 F.3d 513, 516 (6th Cir. 1993)*. However, *Ramey v. Cincinnati Enquirer, Inc., 508 F.2d 1188, 1196 (6th Cir. 1974), cert.* [*90] *denied, 422 U.S. 1048, 45 L. Ed. 2d 700, 95 S. Ct. 2666 (1975)*, set out six specific factors a court should consider in assuming a reasonable award from a common fund:

> . the value of the benefit conferred upon the class;
>
> . society's stake in rewarding attorneys who produce such benefits in order to maintain an incentive to others;
>
> . whether the services were undertaken on a contingent fee basis;
>
> . the value of the services on an hourly basis;
>
> . the complexity of the litigation; and
>
> . the professional standing and skill of all counsel.

Accord In re Rio Hair Naturalizer Prods. Liab. Litig., 1996 U.S. Dist. LEXIS 20440, 1996 WL 780512, at *17 (E.D. Mich. Dec. 20, 1996). Application of these factors further demonstrates that plaintiffs' counsel's request is reasonable.

a. **Value Of The Benefits Obtained** -- Courts frequently consider this factor to be the most critical. *See e.g., Hensley, 461 U.S. at 436, 103 S. Ct. at 1941, 76 L. Ed. 2d at 52* ("the most critical factor is the degree of success obtained"). In this instance, plaintiffs have negotiated a process which provides substantial economic relief, including relief [*91] tailored to each Class Member's individualized circumstances, through a fair and expeditious process. The minimum economic value to the Class is $ 169 million and the total relief to the Class, assuming only 5% Scrip usage, is in excess of $ 253.9 million. *See* PP 56-58 above. In the Court's view, this result is extraordinary and warrants approval of plaintiffs' request.

b. The role of class actions in the public interest has long been noted. As the court in *In re Rio Hair* noted:

> Without compensation to those who are willing to undertake the inherent complexities and unknowns of consumer class action litigation, enforcement of the federal and state consumer protection laws would be jeopardized. As the Supreme Court has recognized, without a class action, small claimants individually lack the economic resources to vigorously litigate their rights. *Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 161, 40 L. Ed. 2d 732, 94 S. Ct. 2140 (1974)*. Thus, attorneys who take on class action matters enabling litigants to pool their claims provide a huge service to the judicial process.

In re Rio Hair, 1996 WL 780512, at *17. Absent the efforts [*92] of plaintiffs' counsel, these nearly 710,000 Class Members would have received no relief at all.

c. The Contingent Nature Of The Fee -- Plaintiffs' counsel expended over 18,300 hours of time and effort valued at over $ 5 million at current rates. In addition, plaintiffs' counsel advanced the Class nearly $ 390,000 in costs of litigation. This task was undertaken entirely on a contingent basis with plaintiffs' counsel bearing the full risk of no recovery at all. *See In re Rio Hair*, 1996 WL 780512, at *18 (recognizing risks entailed in a major investment of attorney time and financial resources over a period of nearly two years). The risk of loss in any litigation is quite real. Plaintiffs' counsel's efforts here demonstrates their commitment to obtaining valuable and meaningful relief for the Class.

d. The Value Of The Services On An Hourly Basis -- Plaintiffs' counsel expended over 18,300 hours of attorney time valued at over $ 5 million at current rates in litigating and resolving this action. *See* Plaintiffs' Counsel's Fee and Expense Declarations. This expenditure of time and effort, on a wholly contingent basis, confirms the reasonableness of plaintiffs' [*93] counsel's fee request under the lodestar/multiplier approach. It is important to note, however, that time expended is just one factor in examining the reasonableness of a fee award using lodestar.

e. This case also involved complex actuarial, accounting, financial and related issues requiring a level of experience and expertise few other plaintiffs' counsel have achieved. Moreover, the Court understands that additional time and effort will be required after approval to ensure that the Settlement is properly implemented. Under these circumstances, plaintiffs' counsel's request for a multiplier of 3.8 is fully warranted. This multiplier is well within the range of multipliers for similar litigations, which have ranged from 1-4 and have reached as high as 10. *See, e.g., In re Beverly Hills Fire Litig., 639 F. Supp. 915 (E.D. Ky. 1986)* (multiplier of 5); *Ace Seat Cover Co. v. Pacific Life Ins. Co.*, Case No. 97-CI-00648, Slip op. at 87 (Ky. Cir. Ct., Kenton County Nov. 19, 1998) (multiplier of 2.65); *Willson v. New York Life Ins. Co., 1995 N.Y. Misc. LEXIS 652*, at *94 (multiplier of 4.6); *Michels v. Phoenix Home Life Mutual Ins. Co., 1997 N.Y. Misc. LEXIS 171*, [*94] at *95 (multiplier of 3.3); *In re Prudential Ins. Co. of America Sales Practices Litig., 962 F. Supp. 450* (multiplier of 5.1); *Natal v. Transamerica Occidental Life Ins. Co.*, No. 694829 (Cal. Super. Ct., San Diego County July 28, 1997) (multiplier of 2.2); and *Duhaime v. John Hancock Mut. Life Ins. Co., 989 F. Supp. 375* (multiplier of 2.4). *See generally*, Hardin Decl. PP 24-27.

f. The Complexity Of The Litigation -- Litigation of this case involved claims of insurance product performance requiring a knowledge of complex actuarial, accounting, investment and financial concepts. Litigating the case through trial would have entailed extensive proof of AGL's internal procedures for establishing dividends and interest crediting rates, the performance of AGL's investment portfolio, policy pricing assumptions, product development and other critical determinations. All of this would require substantial expert testimony covering a period of over 15 years. *See* Weiss/Stoia Decl. PP 150-56. Without question, the claims litigated by plaintiffs' counsel were "complex."

g. The Professional Skill And Standing Of Counsel -- Plaintiffs' counsel [*95] here are among the most experienced in the country in both complex class actions and in similar life insurance deceptive sales practices litigation. **The** Settlement is a direct result of their experience, reputation and ability in these sorts of cases. Similarly, AGL was represented by able counsel, both in-house and its outside counsel. The professional skill and standing of the representation in this case is beyond question and supports approval of the requested award.

137. In sum, plaintiffs' counsel's request for attorneys' fees and reimbursement of expenses is fair and reasonable under all relevant criteria. The Court hereby approves the requested fee and expense award in the amount of $ 19.5 million, to be paid within ten days of the Court's entry of the Final Order and Judgment.

B. Attorneys' Fees and Expenses of Objectors Weiss and Smolen

138. Martin S. Sir, on behalf of a group of counsel ("Objectors' Counsel") has requested an award of attorneys' fees and reimbursement of expenses in any amount not to exceed $ 600,000 in connection with Objector's Counsels' representation of Class Members Matthew Weiss and Marsha Smolen.

139. As noted above, the objections [*96] raised by Mr. Weiss and Ms. Smolen resulted in a *First Amendment* to the Stipulation of Settlement. As further noted above, this amendment enhanced the relief available to Class Members.

140. Based on the submissions of Objectors' Counsel to this Court, on defendant's and Lead Counsel's representation to this Court that they do not object to awarding Objectors' Counsel the amounts for which they have applied, and on the fact that this amount will not reduce the amount of relief available to Class Members, this Court finds it appropriate to award Objectors' Counsel $ 600,000 in attorneys' fees and expenses. The

defendant is instructed to pay this amount to Objectors' Counsel in the manner specified in the May 24, 1999 agreement resolving Mr. Weiss' and Ms. Smolen's objections, which is on file with the Court.

THE HONORABLE JOHN T. NIXON,

UNITED STATES DISTRICT COURT

Dated: August 10, 1999

ORDER - entered on the docket 8/7/01

Plaintiff class members Harry Brix, Mariann Brix, and the Harry G. Brix and Mariann Brix 1993 Family Trust (collectively "the Brix's"), filed in this Court an "*Ex Parte* Application to Deem that Harry Brix, Mariann Brix, and Harry G. [*97] Brix and Mariann Brix 1993 Family Trust as Excluded from the Manners Class Action." In their *Ex Parte* Application the Brix's requested the Court to determine that they had properly opted out of the plaintiff class in the instant federal lawsuit so that they could pursue an action against American General in California State court. A hearing on the Brix's *Ex Parte* Application was scheduled for February 23, 2000. In an Order dated February 22, 2000, the Court granted American General's Motion for Continuance of this hearing pending the resolution American General's motion for summary judgment in the related California State court case. (Doc. No. 200.) American General's motion for summary judgment in the State action alleged that the Brix's claims against American General were barred by the statute of limitations. (Doc. No. 198 at 2.) If the State court found that the Brix's claims against American General were barred, their *Ex Parte* Application to be deemed excluded from the Manners class would be moot. A finding that the Brix's properly opted out of the plaintiff class would only be necessary if the Brix's were able to bring claims against Defendant that exceed [*98] the scope of the settlement in the above captioned case. (Id.)

In its February 22nd Order the Court reserved judgment on two motions pending the disposition American General's summary judgment motion in the California State action, to wit, Defendant's Motion for Expedited Discovery, (Doc. No. 197), and the Brix's Motion to Permit Attorney Eva Geist to Participate in Hearing Telephonically, (Doc. No. 199). (Doc. No. 200.) The Court has recently been informed by the parties that American General was granted summary judgment in the California case. It is the understanding of this Court that the California State court's decision in favor of American General, renders all of the pending motions in this matter moot. Accordingly, Defendant's Motion for Expedited Discovery, (Doc. No. 197), the Brix's Motion to Permit Attorney Eva Geist to Participate in Hearing Telephonically, (Doc. No. 199), and their *Ex Parte* Application to be Deemed Excluded from the Manners Class Action are all DISMISSED without prejudice. Should the Brix's prevail upon appeal of the State court ruling, they may renew their *Ex Parte* Application in this Court.

It is so ORDERED.

Entered this the 7th [*99] day of August, 2000.

JOHN T. NIXON, SENIOR JUDGE

UNITED STATES DISTRICT COURT

Positive
As of: Aug 01, 2011

QUINCIE RANKIN, individually and on behalf of others similarly situated; Plaintiff, vs. DAVID P. ROTS, et al., Defendants.

Case No. 02-CV-71045

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

2006 U.S. Dist. LEXIS 45706*; *38 Employee Benefits Cas. (BNA) 1501

June 28, 2006, Decided

PRIOR HISTORY: *Rankin v. Rots, 220 F.R.D. 511, 2004 U.S. Dist. LEXIS 6585 (E.D. Mich., 2004)*

COUNSEL: [*1] For Quincie Rankin, individually, on behalf of all others similarly situated and on behalf of the Kmart Corporation Retirement Savings Plan A, Plaintiff: Glen M. Connor, Whatley Drake, Birmingham, AL; I. Mark Steckloff, Sachs Waldman, Detroit, MI; Mary Ellen Gurewitz, Sachs Waldman (Detroit), Detroit, MI.

For David P. Rots, Defendant: Donald R. Bachand, III, Garratt & Bachand (Bloomfield Hills), Bloomfield Hills, MI.

For Charles C. Conaway, Defendant: Erin E. Kelly, Mark B. Blocker, Scott R. Lassar, Walter C. Carlson, Sidley, Austin, Chicago, IL; Sharon M. Woods, Todd R. Mendel, Barris, Sott, Detroit, MI.

For Richard J. Statuto, Lilyan H. Affinito, Richard G. Cline, Willie D. Davis, Joseph P. Flannery, James D. Adamson, Robert D. Kennedy, Robin B. Smith, Thomas T. Stallkamp, Defendant: Daniel P. Colling, Miller, Canfield, (Detroit), Detroit, MI; Lisa B. Deutsch, Dewey Ballantine (New York), New York, NY; Robert C. Myers, Seth C. Farber, Dewey Ballantine, New York, NY; Walter B. Connolly, Jr., Connolly, Rodgers, Detroit, MI.

For Jim Defebaugh, Don Morford, Defendant: Cara J. Heflin, Howard & Howard (Ann Arbor), Ann Arbor, MI; Jon R. Steiger, Quinn, Emanuel, Los Angeles, [*2] CA; Philip T. Carter, Howard & Howard, Bloomfield Hills, MI.

JUDGES: AVERN COHN, UNITED STATES DISTRICT JUDGE.

OPINION BY: AVERN COHN

OPINION

MEMORANDUM AND ORDER GRANTING PLAINTIFF'S MOTION FOR FINAL APPROVAL OF PROPOSED SETTLEMENT, AMENDMENT TO PLAN ALLOCATION AND FINAL CERTIFICATION OF THE CLASS AND FINAL JUDGMENT

I.

This is a case under the Employment Retirement Income Security Act ("ERISA"), *29 U.S.C. § 1001 et seq.* claiming breach of fiduciary duty which has as its genesis the collapse of Kmart Corporation into bankruptcy. On March 18, 2002, plaintiff Quince Rankin filed a complaint seeking recovery on behalf of herself and other similarly situated Kmart employees who invested in Kmart stock through participation in Kmart's 401(K) plan under which Kmart matched voluntary participant contributions with investments in Kmart stock. Plaintiff named as defendants various officers and directors of Kmart which she claimed to be fiduciaries within the meaning of ERISA and have breached their fiduciary duties with respect to the administration of the 401(K) plan essentially by continuing to invest in Kmart stock at a time when Kmart was in serious decline and which [*3] resulted in significant losses to the Plan.

Before the Court is plaintiff's Motion for Final Approval of the Settlement, to Amend the Plan of Allocation and for Final Certification of the Class. For the reasons that follow, the motion is GRANTED. This Order serves as the final Order and Judgment in this case.

II.

A.

There are two Kmart retirement savings plans at issue. Kmart Retirement Savings Plan A and Kmart Retirement Savings Plan B (collectively, the Plan). The plans are virtually identical.

The Plan is both defined contribution plan and an eligible individual account plan. The Plan maintains an individual account for each participant and provides benefits based solely on the amount contributed. There are two sources for contributions: voluntary contributions by participants and matching contributions by Kmart. The matching or employer contributions are part of an Employee Stock Ownership Plan (an "ESOP") which under ERISA allows the matching contributions to be invested in the company's stock and limits a participant's ability to transfer contributions to other investments. From March 15, 1999 to January 25, 2002, the Plan provided that the ESOP assets at all times shall [*4] be invested primarily in [Kmart] stock. See Art. 14.1. [1] The Plan also provides that a participant's employer contributions must be in Kmart stock until the participant reaches age 55 and had been a participant for five full years. After January 1, 1999, a participant age 55 who had been a participant for five years could elect to have future employer contributions invested in any of the investment funds by making a proper election with Kmart. During that time, the Plan held significant amounts of its assets in Kmart stock.

1 After January 25, 2002, when Kmart filed for bankruptcy, the Plan was amended to provide that the matching contributions would no longer be made in Kmart stock.

B.

On March 18, 2002, plaintiff filed the complaint against defendants claiming breach of fiduciary duty under ERISA. The breach of fiduciary duty claims can be broadly divided into two categories: (1) that the defendants breached their duty of prudence by continuing to retain and invest in Kmart stock and (2) that the defendants [*5] breached their duty to disclose by making material misrepresentations about the strength of Kmart and the propriety of investing in Kmart stock.

Defendants then filed motions to dismiss. On August 20, 2003, the Court entered an order denying defendants' motions to dismiss. *Rankin v. Rots, 278 F. Supp. 2d 853 (E.D. Mich. 2003)*.

On April 16, 2004, the Court conditionally certified the case as a class action under *Rule 23(b)(1)(A)* and *(B)*. *Rankin v. Rots, 220 F.R.D. 511 (E.D. Mich. 2004)*. The Court left open the class definition. At that point, the parties engaged in discovery and settlement negotiations.

On November 16, 2005, the parties entered into a Settlement Agreement. On February 9, 2006, the Court entered an Order Preliminarily Approving Settlement, Certifying Class for Purposes of Settlement, Approving Form and Manner of Notice and Scheduling Hearing on Fairness of the Settlement Agreement Pursuant to *Fed. R. Civ. P. 23(e)*. The terms of the Settlement Agreement are incorporated by reference.

On June 26, 2006, the Court held a hearing on the instant motion for approval of the settlement for which members [*6] of the class, defined below, had been given notice and an opportunity to be heard.

III.

A.

As noted above, the Court left open the class definition. Per the settlement agreement, the Court approves the maintenance of this case as a class action under *Fed. R. Civ. P. 23(a)* and *23(b)(1)* and *(b)(2)*. The class consists of the following individuals:

> All participant and beneficiaries of the Kmart Retirement Savings Plan A (now known as the :Kmart Retirement dsavings Plan") and Kmart Retirement Savings Plan B (now knowns as the "Kmart Retirement Savings Plan for Manteno Distribution Center Union Employees") and any of their predecessor plans, from March 15, 1999 to May 6, 2003, inclusive (the "Class Period"), and who purchased sold, or held any unites in the Kmart Stock Fund during the Class Period, excluding the defendant to the Litigation and members of their families.

The Court finds that (a) the joinder of all members is impracticable; (b) there are questions of law and fact common to the class; (c) the claims raised by plaintiff are typical of the claims of the class; (d) plaintiff has fairly and [*7] adequately represented the interests of the class; and (e) the prosecution of separate actions by individual members of the class would create a risk of (i) inconsistent or varying adjudications with respect to individual members of the class that would establish incompatible standards of conduct for all named defendants; (ii) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members of the class; and (f) plaintiff has alleged that the named defendants have acted or refused to act on grounds generally applicable to the class. The Court further finds that Rankin has adequately represented the class and is hereby approved as Class Representative.

The certification of the class is without prejudice to the Kmart Officers and Directors' right to oppose class certification in the litigation if this Order and Judgment and Order does not become effective as provided in the Settlement Agreement.

B.

The settlement provides an immediate economic benefit to the class in the form of an $ 11.75 million cash payment, plus an additional $ 200,000 for administrative expenses. The Amended Plan of Allocation, [*8] filed June 23, 2006, sets forth specific calculations as to a Participant's share, or "compensable unit."

IV.

A.

Fed. R. Civ. P. 23(e)(1)(C) provides that "the court may approve a settlement . . . that would bind class members only after a hearing and on finding that the settlement . . . is fair, reasonable, and adequate."

In assessing the fairness, reasonableness, and adequacy of a proposed settlement, the Court should "compare the terms of the compromise with the likely rewards of litigation." *Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. 414, 425, 88 S. Ct. 1157, 20 L. Ed. 2d 1 (1968), reh'g. denied, 391 U.S. 909, 88 S. Ct. 1649, 20 L. Ed. 2d 425* This comparison requires consideration of two main elements. First, although the Court need not, and should not, decide the merits of the controversy, it should consider the existence of serious questions of law and fact which place the ultimate outcome of the litigation in doubt. *See Florida Trailer and Equipment Company v. Deal, 284 F.2d 567, 571 (5th Cir. 1960)*. Second, the Court should consider the vagaries of litigation and compare the significance of [*9] immediate recovery by way of the compromise to the mere possibility of relief in the future, after protracted and expensive litigation. The Court should also consider the judgment of counsel and the presence of good faith bargaining between the contending parties. The Court will not substitute its business judgment for that of the parties; 'the only question . . . is whether the settlement, taken as a whole, is so unfair on its face as to preclude judicial approval.'" *Zerkle v. Cleveland-Cliffs Iron Co., 52 F.R.D. 151, 159 (S.D.N.Y.1971)*.

The Court's determination also requires consideration of "whether the interests of the class as a whole are better served if the litigation is resolved by the settlement rather than pursued." Manual for Complex Litigation (Third) § 30.42 at 238 (1995). Relevant factors considered by the Court include: (a) the likelihood of success on the merits weighed against the amount and form of the relief offered in the settlement; (b) the risks, expense, and delay of further litigation; (c) the judgment of experienced counsel who have competently evaluated the strength of their proofs; (d) the amount of discovery completed and the character [*10] of the evidence uncovered; (e) whether the settlement is fair to the unnamed class members; (f) objections raised by class members; (g) whether the settlement is the product of arm's length negotiations as opposed to collusive bargaining; and (h) whether the settlement is consistent with the public interest. *See Granada Invs., Inc. v. DWG Corp., 962 F.2d 1203, 1205 (6th Cir.1992)*; *Williams v. Vukovich, 720 F.2d 909, 922-23 (6th Cir. 1983)*; *Kogan v. AIMCO Fox Chase, L.P., 193 F.R.D. 496, 501-02 (E.D. Mich. 2000)*; *Steiner v. Fruehauf Corp., 121 F.R.D. 304, 305-06 (E.D. Mich.1988)*.

B.

In light of the foregoing, the Court finds that the settlement amount and terms are fair, reasonable, and adequate. This was a complex ERISA case. This case alleges breach of fiduciary duty in regard to holdings in alleged risky company stock in individual retirement accounts. Although this case is not unique in that there have been several similar ERISA cases filed across the country, as plaintiff points out, there have been very few, if any, which have reached the stage of a decision on the merits. Although plaintiffs survived a motion [*11] to dismiss by defendants, whether they would prevail on the merits of their breach of fiduciary duty claims is far from clear. As such, the decision to settle with a guarantee of monetary recovery was sound. The settlement amount is reasonable when compared to the range of possible outcomes. As explained in plaintiffs' papers, the settlement provides the class with a recovery of between 18 and 46 percent of the claimed damages, depending upon how and when damages are measured. Within the particular circumstances of this factually and legally complex ERISA class action lawsuit, the amount and form of relief is fair, adequate, and reasonable.

In order to further evaluate the reasonableness of the settlement, the Court on November 29, 2005 appointed Professor Theodore St. Antoine as an Independent Fiduciary to review the terms of the settlement and advise the Court as to whether it is fair, reasonable, and adequate. In reports dated February 2, 2006 and February 3, 2006, the Independent Fiduciary concluded that the settlement was fair and reasonable under the circumstances.

The Court will briefly comment on the objections raised by class members. According to plaintiff's papers, there [*12] are over 100,000 class members. Out of this number, only four participants filed documents with the Court, two of which can be construed as objections. The class reaction can be described as overwhelmingly supportive. The thrust of the two objections is that the class does no receive enough money form the settlement. At best, the objections are conclusory allegations. Importantly, there is no suggestion that the settlement is the result of any collusion between the plaintiff and defendants or that plaintiff is an inadequate class representative or that plaintiff's counsel is inadequate. The objections are therefore no impediment to approval of the settlement.

Overall, the Court is satisfied that the Settlement Agreement be approved.

V.

Accordingly, it is ORDERED AND ADJUDGED that:

The Court has jurisdiction over the subject matter of this litigation and over all parties to this litigation and Setltement Agreement, inlcuing the Plans and all members of the class.

The Settlement Agreement has been negotiated vigorously, in good faith, and at arm's-length by the plaintiff and her counsel on behalf of the Plans and the class members and that plaintiff has acted independently and that [*13] her interests are identical to the interests of the Plans and the class members.

The Settlement Agreement complies with the terms of the Department of Labor's Class Exemption for the Release of Claims and Extensions of Credit in Connection with Litigation, PTE 2003-39, does not constitute a "prohibited transaction" as defined in *ERISA §§ 406(a)* or *(b)*, and is supported by a determination from the Independent Fiduciary that the Settlement Agreement is authorized by, as is appropriate for, the Plans. The Settlement Agreement complies with Internal Revenue Service *Revenue Ruling 2002-45, 2002-2 C.B. 116 (June 26, 2002)*.

The Class Notice and Publication Notice transmitted to the Settlement Class Members pursuant to the Preliminary Approval Order and the Settlement

Agreement constituted the best notice practicable under the circumstances and provided individual notice to all members of the Class who could be identified through reasonable efforts. The Class Notice and Publication Notice provide valid, adequate, and sufficient notice of, among other things, these proceedings, the Settlement, the Released Claims, and the Plan of Allocation to all persons entitled to such notice. [*14] Such notice has fully satisfied the requirements of *Fed. R. Civ. P. 23* and the requirements of due process.

The case against the named defendants is DISMISSED WITH PREJUDICE on the merits, and the Released Claims are released and discharged as of the Effective Date of this Final Order and Judgment, without costs to any party.

The plaintiff, the Plans, and all members of the class are enjoined and barred from commencing or prosecuting any action that purports to challenge the Plan of Allocation (or amounts distributed thereunder) or that asserts any of the Released Claims against any of the Released Parties, either directly, representatively, derivatively, or in any other capacity, whether by a complaint, counterclaim, or otherwise, in any local, state, or federal court, or in any agency or other authority or forum wherever located. Any person or entity who knowingly violates this injunction may be required to pay the costs and attorneys' fees incurred by the named defendants or other Released Party as a result of the violation.

The Settlement Agreement, the Preliminary Approval Order, this final Order and Judgment, all drafts of the foregoing, [*15] and any negotiations or proceedings relating to the foregoing shall not be construed as or deemed to be evidence of an admission, concession, or of any liability or wrongdoing by any Kmart Officer and Director, and shall not be offered or received in evidence, or subject to discovery, in this or any other action or proceeding except to enforce the terms of the Settlement Agreement or except as may be required by law or court order. This final Order and Judgment is not a finding of the validity or invalidity of any of the claims asserted or defenses raised in this Litigation.

Disbursements for payment of (a) the Independent Fiduciary, (b) postage or printing costs incurred for providing Class Notice and Publication Notice, and (c) the Distributable Settlement Payment are hereby approved.

Without affecting the finality of this final Order and Judgment, the Court retains jurisdiction to implement, interpret, or enforce this final Order and Judgment, the Preliminary Approval Order, and the Settlement Agreement.

In the event that (i) the Settlement Agreement is terminated pursuant to its terms, (ii) the Settlement Agreement, Preliminary Approval Order, and Order and Judgment and Order [*16] do not for any reason become effective, or (iii) the Settlement Agreement, Preliminary Approval Order, or final Order and Judgment are reversed, vacated, or modified in any material respect, then any and all orders entered pursuant to the Settlement Agreement, including this final Order and Judgment, shall be deemed vacated.

Dated: June 28, 2006

AVERN COHN

UNITED STATES DISTRICT JUDGE

TERESA J. TODD, individually and on behalf of herself and all others similarly situated, Plaintiff, v. RETAIL CONCEPTS, INC., Defendant.

No. 3:07-0788 Class Action

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION

2008 U.S. Dist. LEXIS 117126

August 22, 2008, Decided
August 22, 2008, Filed

COUNSEL: [*1] For Teresa J. Todd, individually and on behalf of all others similarly situated, Plaintiff: Charles F. Barrett, LEAD ATTORNEY, Barrett & Associates, P.A., Nashville, TN; Charles L. Holliday, LEAD ATTORNEY, Spragins, Barnett & Cobb, PLC, Jackson, TN; Clinton H. Scott, J. Brandon McWherter, Justin S. Gilbert, Michael L. Russell, LEAD ATTORNEYS, Gilbert Russell McWherter PLC, Jackson, TN; David McMullan, Don Barrett, LEAD ATTORNEYS, Don Barrett, P.A., Lexington, MS.

For Retail Concepts, Inc., doing business as Sun & Ski Sports, Defendant: Heather S. Esau Zerger, W. Perry Brandt, LEAD ATTORNEYS, Bryan Cave, LLP, Kansas City, MO; W. Brantley Phillips , Jr., Wallace Wordsworth Dietz, LEAD ATTORNEYS, Bass, Berry & Sims, Nashville, TN.

For Attorney General of Texas, Objector: Jeffrey M. Graham, LEAD ATTORNEY, Office of the Attorney General-Texas, Financial Litigation Division, Austin, TX.

JUDGES: ROBERT L. ECHOLS, UNITED STATES DISTRICT JUDGE.

OPINION BY: ROBERT L. ECHOLS

OPINION

MEMORANDUM

Pending before the Court are Plaintiff Teresa J. Todd's Motion For Final Approval Of Proposed Class Action Settlement (Docket Entry No. 64) and Plaintiff's Motion For Award Of Attorney's Fees And Expenses And Payment Of Plaintiff Incentive [*2] Award (Docket Entry No. 65). Defendant Retail Concepts, Inc. ("Retail Concepts"), did not file any opposition to these motions, having previously joined Plaintiff in executing the Settlement Agreement and moving for its preliminary approval. The Court received a letter dated May 29, 2008 from the Texas Attorney General's Office objecting to the Settlement Agreement. (Docket Entry No. 63).

The Court held a Fairness Hearing on August 1, 2008. At that time the Court heard arguments made by counsel for the parties, as well as argument made by Jeff M. Graham on behalf of the Texas Attorney General's Office. No class member appeared in support of, or in opposition to, the Settlement Agreement.

I. THE LITIGATION AND SETTLEMENT

A. Background of the case

Plaintiff Teresa J. Todd filed the instant action on July 30, 2007 against Retail Concepts, Inc., doing business as Sun & Ski Sports. Retail Concepts sells a variety of sport equipment, clothing, and accessories in retail stores located in ten states, including one store in Nashville, Tennessee. On behalf of herself and other putative class members, Plaintiff alleged that Retail Concepts willfully violated the Fair and Accurate Credit Transaction [*3] Act, *15 U.S.C. § 1681 et seq.* ("FACTA") by printing on electronic receipts made at the point of sale or transaction the expiration dates of customers' credit cards and debit cards. Specifically, Plaintiff alleged that Retail Concepts violated *15 U.S.C. § 1681c(g)(1)* which provides:

> [N]o person that accepts credit cards or debit cards for the transaction of business shall print more than the last five digits of the card number or the expiration date upon any receipt provided to the cardholder at the point of the sale or transaction.

The potential civil penalties for willful noncompliance with *§ 1681c(g)* are set forth in *15 U.S.C. § 1681n(a),* which provides:

> Any person who willfully fails to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to the sum of--
>
> (1)(A) any actual damages sustained by the consumer as a result of the failure or damages of not less than $ 100 and not more than $ 1,000; or
>
> * * *
>
> (2) such amount of punitive damages as the court may allow; and
>
> (3) in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's [*4] fees as determined by the court.

Plaintiff did not allege in her Complaint that she or any member of the purported class suffered identity theft or experienced other injury as a result of Retail Concepts' failure to comply with FACTA.

During the exchange of written discovery in the case, Retail Concepts acknowledged that, after December 4, 2006, the date when all retailers were required to be FACTA-compliant, it printed the expiration date of its customers' credit and debit cards on approximately 335,736 receipts issued in states other than New York, where Retail Concepts was FACTA-compliant. Retail Concepts also agreed that, from December 4, 2006 until the time all Retail Concepts stores became FACTA-compliant, the average sales price at its stores was approximately $ 125.00 per transaction. (Docket Entry No. 64-2, Stanley Aff. P 4.)

Counsel took the depositions of Plaintiff and the *Rule 30(b)(6)* corporate designee for Retail Concepts. Thereafter, Plaintiff filed a Motion for Class Certification, and Retail Concepts filed its opposition to the motion. Following briefing on the class certification motion, the parties agreed to mediate the case before Tracy Shaw of Howell & Fisher, PLLC. [*5] After a full day of mediation, the parties reached an agreement to settle the claims in dispute on a class basis. The parties executed a Class Action Settlement Agreement on March 27, 2008, (Docket Entry No. 54-1), and the Court entered an Order Of Preliminary Approval of Settlement on April 25, 2008. (Docket Entry No. 59.)

B. Terms of the Class Action Settlement Agreement

Under the Class Action Settlement Agreement, the relief negotiated by the parties includes an agreement by Retail Concepts to offer customers discount coupons for a discount of $ 15.00 off the customer's next purchase of $ 125.00 or more and such coupons will be made available for a period of approximately six (6) months or until 335,000 discount coupons have been distributed, whichever occurs first. The number of discount coupons shall not exceed 335,000, and all discount coupons will expire and become void on December 31, 2008. Retail Concepts will not have any obligation to distribute discount coupons until after the Effective Date, which is defined in section 1.3 of the Settlement Agreement and, in no event shall Retail Concepts be obligated to distribute or honor the discount coupons for a period exceeding six [*6] (6) months. Retail Concepts' stores rely on repeat customers due to the specialized nature of the merchandise offered. (Stanley Aff. P 10.)

Further, Retail Concepts agreed to pay Teresa Todd as class representative an incentive payment of $ 3,000.00. Retail Concepts also agreed not to oppose

Plaintiff's request for, and to pay Plaintiff, attorney's fees in an amount not to exceed $ 120,000.00 within fifteen (15) days after the Effective Date. The Settlement Agreement also provides in section 5.1: "Provided that no material modifications (which include modifications with more than a *de minimis* effect on the cost to Retail Concepts of performing its obligations under this Settlement Agreement) are made to the Settlement Agreement or its exhibits, Retail Concepts agrees not to appeal any approval of fees that does not exceed $ 120,000.00."

The Settlement Agreement expressly addresses in section 5.2 "Litigation Expenses and Reimbursements." That paragraph provides: "Litigation Class Counsel and Retail Concepts agree to bear their own respective Litigation expenses and shall not seek any such expenses or Litigation-related reimbursements from the Court."

C. Notice provided to potential class [*7] **members**

The Court approved the Notice of Pendency and Proposed Settlement of Class Action (the "Notice") form and the manner in which the Notice was to be given to Settlement Class members. Notice was sent out in three ways, via: (1) Retail Concepts' internet homepage; (2) one in-store posting at or near the cash register in each of Retail Concepts' stores; and (3) one email to all customers for which Retail Concepts has email addresses.

The court-approved Notice has been available to customers through a link on Retail Concepts' homepage, www.sunandski.com, since May 5, 2008, and the link will remain active on the website until December 31, 2008. (Stanley Aff. PP 5-7.) Retail Concepts placed the Notice at the checkout cash registers in each of its stores around the country (except its New York store) beginning on or around May 5, 2008, and these Notices will remain posted until December 31, 2008. Finally, on May 5, 2008, Retail Concepts sent a mass email to its entire customer list, which includes over 115,000 customers. (Id. PP 8-9.) Retail Concepts represents that the email stated: "Please click here to find notice of FACTA Class Action Litigation Settlement," and the link takes the [*8] consumer to the Notice form. Although these latter facts are not included in Mr. Stanley's affidavit, the Court accepts as true the representations of counsel made in the brief.

D. The response to the Notice

No members of the Settlement Class contacted the parties or the Court to make objection to the Settlement Agreement. Also, there have been no requests for exclusion from the Settlement Class.

The Attorney General of Texas, appearing through Mr. Jeff Graham, Assistant Attorney General, filed a letter dated May 29, 2008 (Docket Entry No. 63) asking the Court to disapprove the proposed settlement on the ground that the Settlement Agreement "merely offers coupons of little or no value to the affected class and should therefore not be given judicial approval." Relying on the Class Action Fairness Act of 2005, *28 U.S.C. § 1711, et seq.* [2], Mr. Graham argued in his letter and at the Fairness Hearing that offering coupons to consumers for future purchases does not adequately compensate the class. First, it rewards the entity accused of improper actions with additional sales. Second, it gives little of value to the injured Class Members, while at the same time rewarding Class Counsel with attorney's [*9] fees paid in cash. In this case, each Class Member will receive a coupon worth $ 15.00, useable only if the Class Member spends an additional $ 125.00 or more at the store accused of the improper actions; yet, Class Counsel stand to gain as much as $ 120,000.00 in cash for attorney's fees. Noting that "coupons are not as good as cash[,]" Mr. Graham contends that Class Members do not deserve a settlement that is categorically inferior to that which Class Counsel agreed to for themselves.

2 *Section 1712(e)* reads:

> JUDICIAL SCRUTINY OF COUPON SETTLEMENTS.--In a proposed settlement under which class members would be awarded coupons, the court may approve the proposed settlement only after a hearing to determine whether, and making a written finding that, the settlement is fair, reasonable, and adequate for class members. The court, in its discretion, may also require that a proposed settlement agreement provide for the distribution of a portion of the value of unclaimed coupons to 1 or more charitable or governmental organizations, as agreed to by the parties. The distribution and

> redemption of any proceeds under this subsection shall not be used to calculate attorneys' fees under this section.

In [*10] conjunction with Mr. Graham's remarks, the Court has examined Exhibit E to Notice of Settlement of Class Action (Docket Entry No. 61-5), which lists each store location for Retail Concepts that was not FACTA-compliant and the percentage of total sales volume generated by each store location in the period December 2006 to August 2007. Of the eighteen (18) stores listed, eight (8) of them are located in Texas and the Texas stores accounted for 47.8% of the total sales volume at issue. By contrast, only one of Retail Concepts' stores is located in Tennessee, and that store accounted for 5.7% of the total sales volume. Thus, because there are more potential customers in Texas who may be affected by this Settlement Agreement than there are similar consumers in Tennessee, the Court gives careful consideration to Mr. Graham's objection to the Settlement Agreement. As will be discussed in more detail below, however, the Court finds that the objections of the State of Texas should be overruled and the Settlement Agreement approved.

E. Subsequent change in law

On June 3, 2008, the Credit and Debit Card Receipt Clarification Act of 2007 became law. The Act retroactively amends *15 U.S.C. § 1681n* [*11] by adding *subsection (d)* which provides:

> For the purposes of this section, any person who printed an expiration date on any receipt provided to a consumer cardholder at a point of sale or transaction between December 4, 2004 and June 3, 2008, but otherwise complied with the requirements of *section 1681c(g)* of this title for such receipt shall not be in willful noncompliance with *section 1681c(g)* of this title by reason of printing such expiration date on the receipt.

The effect of this retroactive statute is to undercut completely the merits of the federal claim brought by Plaintiff Todd in her Complaint against Retail Concepts. Were it not for the existence of the executed Settlement Agreement, Retail Concepts could now move to dismiss Plaintiff's Complaint for failure to state a claim and succeed.

Despite this change in legal circumstances, Retail Concepts has not asked the Court to vacate the Settlement Agreement, and the company is willing to go forward with the bargain it made with Plaintiff at the time of mediation in Spring 2008. As a result of Retail Concepts' willingness to move ahead with final approval of the Settlement Agreement, each Class Member stands to gain a $ 15.00 [*12] discount coupon good toward the next purchase of $ 125.00 in merchandise at a Retail Concepts store. This is a tangible benefit Class Members will receive, even where they have experienced no injury as a result of Retail Concepts' conduct. Such a benefit would be illusive under federal FACTA law as it exists today. This remains true whether the consumer who benefits from the discount coupon hales from Texas or Tennessee, or some other affected state.

II. THE SETTLEMENT WARRANTS FINAL APPROVAL

The Court should approve a class action settlement if, following direct notice in a reasonable manner to all class members who would be bound by the proposal and a hearing, the Court determines that the settlement "is fair, reasonable, and adequate." *Fed.R.Civ.P. 23 (e)*; *International Union, United Auto., Aerospace, and Agricultural Implement Workers of Am. v. General Motors Corp., 497 F.3d 615, 631 (6th Cir. 2007)*. Several factors guide the Court's inquiry:

> (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 [*13] representatives; (6) the reaction of absent class members; and (7) the public interest.

Id. It is also pertinent for the Court to consider the risk, expense and delay of further litigation. *Granada Investments, Inc. v. DWG Corp., 962 F.2d 1203, 1205 (6th Cir. 1992)*; *UAW v. General Motors Corp., 2006 U.S. Dist. LEXIS 14891, 2006 WL 891151 at *14 (E.D. Mich. 2006)*. The fairness of a settlement turns to large degree on the merits of the parties' legal dispute.

International Union, 497 F.3d at 631. While the Court is not required to decide the merits of the case or resolve any unsettled legal questions, the Court cannot judge the fairness of the compromise without weighing the Plaintiff's likely success on the merits against the amount and form of the relief offered in the settlement. Id. This Court enjoys wide discretion in assessing the weight and applicability of these factors. *Granada Investments, Inc. 962 F.2d at 1205-1206*.

The Court finds that the Settlement Agreement is fair, reasonable and adequate, and it will be approved. The most critical factor weighing in the Court's analysis is that federal law recently changed so that Class Members would be left with no benefit at all if the Court were to disapprove the [*14] Settlement Agreement. In light of the recent enactment of *15 U.S.C. § 1681n(d)*, Plaintiff today could not bring this lawsuit against Retail Concepts. Thus, Plaintiff and the Class Members she represents could expect no likelihood of success on the merits. By approving the Settlement Agreement, the Court preserves a benefit for Class Members that was negotiated at arms length by the parties and gives effect to their compromise.

The Court finds there is no risk of fraud or collusion in this case. Plaintiff's lawsuit highlighted a serious problem in Retail Concepts' software that caused expiration numbers of credit and debit cards to be printed on receipts. As described at length in the affidavit of Valerie R. Nixon, the company's IT Director (Docket Entry No. 73), upon receiving notice of Plaintiff's lawsuit, Retail Concepts immediately took steps to correct the problems identified with its outdated software, expending substantial company resources to do so. Retail Concepts' response to the lawsuit not only brought the company into compliance with federal law, but also confirmed that each consumer would receive what Congress intended the consumer to receive: the company's use of electronic [*15] techniques to mask financial information at the point of sale or transaction in order to minimize the possibility of identity theft. There are strong and important public interests in deterring identity theft and ensuring that private companies comply with applicable federal laws.

The Court further finds that the litigation was complex and expensive and likely to continue in light of Retail Concepts' initial opposition to class certification. The company has stores in ten states, and counsel were required to consider the ramifications of a settlement affecting various states and jurisdictions. The parties engaged in sufficient discovery to frame the issues on the merits and for class certification. Without settlement, the parties would have incurred additional litigation expense.

Both sides are represented by able and experienced class counsel who hold the opinion that the Settlement Agreement should receive final approval. None of the class members have appeared to challenge the Settlement Agreement. Thus, it appears that absent class members offer no resistance to its approval.

The primary objection to approval is that expressed by Mr. Graham for the State of Texas that coupon settlements [*16] are generally not a fair and effective way to settle class action litigation. See e.g., *Synfuel Technologies, Inc. v. DHL Express (USA), Inc., 463 F.3d 646, 653 (7th Cir. 2006)* (vacating approval of class action settlement granting relief in the form of pre-paid Letter Express packages because they are similar to coupons, a method of compensation that has been widely criticized). The Court might agree with Mr. Graham in a different case. But here, the Settlement Agreement provides a clear financial benefit to Class Members that they would not today be entitled to receive in view of the recent change in FACTA law. The Court finds that it is in the best interest of affected consumers to approve the Settlement Agreement to ensure that consumers receive something of value, and a $ 15.00 credit on the next purchase of $ 125.00 or more is certainly not insignificant. Under the facts and circumstances of this case, the Court finds the discount coupon is fair, reasonable, and adequate compensation to consumers for Retail Concepts' alleged violation of federal law. See *Palamara v. Kings Family Restaurants, 2008 U.S. Dist. LEXIS 33087, 2008 WL 1818453 at * (W.D. Pa. April 22, 2008)* (approving class action settlement concerning [*17] FACTA violation where restaurants agreed to provide vouchers giving consumers options for free appetizers, soup, desserts and other small menu items when visiting restaurants in future).

III. THE MOTION FOR ATTORNEY'S FEES AND EXPENSES

The Court finds that Plaintiff's request for attorney's fees and expenses should be granted in part and denied in part. The declaration of Charles Barrett (Docket Entry No. 65-5) establishes that class counsel and their paralegals devoted 350.95 hours to this litigation at various hourly rates, to reach a total of $ 104,713.75 in attorney's fees. Retail Concepts did not object to the number of hours expended or the hourly rates requested because it is bound by the Settlement Agreement not to object unless the award requested or permitted exceeds $ 120,000.00.

In Plaintiff's Memorandum of Law in support of the motion for award of attorney's fees, Plaintiff asks the Court to apply a multiplier of 0.145981306 to the lodestar amount. The Plaintiff provides no explanation of, or support for, this unique multiplier, which would result in the payment of an additional $ 15,286.25 in attorney's fees. Plaintiff acknowledges that the application of a multiplier is [*18] left to the Court's sound discretion, citing *Baltimore v. City of Franklin, 06/16/2008, 2008 WL 2437637 at *5 (M.D. Tenn. June 16, 2008).*

Plaintiff has not identified any extraordinary aspect of this case that requires application of a multiplier to achieve a fully compensatory attorney's fee. It appears that Plaintiff is simply trying to reach the $ 120,000 ceiling for attorney's fees as provided in the Settlement Agreement at section 5.1 ("in an amount not to exceed $ 120,000.00"), even though Plaintiff did not actually incur such fees in litigating this case. The Court finds in its discretion that the multiplier should not be applied, and that class counsel are adequately compensated in the amount of $ 104,713.75 in actual attorney's fees.

Next, Plaintiff seeks litigation expenses of $ 7,485.50. As stated earlier in this opinion, the parties agreed in section 5.2 of the Settlement Agreement that each party would bear its own litigation costs and neither party would seek such expenses from the Court. In light of this express provision of the Settlement Agreement, the Court will not award litigation expenses to Plaintiff as requested. Accordingly, Plaintiff's motion for attorney's fees will be [*19] granted in part and denied in part as stated.

IV. CONCLUSION

The Court finds that the Settlement Agreement is fair, reasonable and adequate. The Court will approve the Settlement Agreement over the objections of the Texas Attorney General. The parties will be directed to perform the terms of their agreement.

Plaintiff's motion for attorney's fees and expenses will be granted in part and denied in part. Retail Concepts will pay to Plaintiff within fifteen (15) days of the Effective Date attorney's fees in the total amount of $ 104,713.75, but Plaintiff's request for the addition of a multiplier to increase attorney's fees to $ 120,000.00 and for litigation expenses will be denied.

An appropriate Final Judgment and Order Of Dismissal With Prejudice will be entered.

/s/ Robert L. Echols

ROBERT L. ECHOLS

UNITED STATES DISTRICT JUDGE