UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Thaddius Intravaia, *et al*., Plaintiffs, v. National Rural Electric Cooperative Association, *et al*., Defendants.	Case No. 1:19-cv-00973-LO-IDD

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

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INTRODUCTION

On August 6, 2020, this Court preliminarily approved the Parties' Class Action Settlement Agreement, which resolves Plaintiffs' claims against Defendants under the Employee Retirement Income Security Act ("ERISA") relating to the NRECA 401(k) Pension Plan (the "Plan"). *See ECF No. 97* (order granting preliminary approval).[1] The Court found on a preliminary basis that the terms of the Settlement are "sufficiently fair, reasonable, and adequate to warrant sending notice of the Settlement to the Settlement Class," and approved the distribution of the Settlement Notices as specified in the Settlement Agreement. *Id. at 2, 3-4*.

The events following this order confirm that the Court's preliminary analysis was correct. First, an Independent Fiduciary reviewed the Settlement pursuant to Department of Labor ("DOL") regulations and independently determined that the Settlement terms are reasonable. *See Declaration of Brock J. Specht in Support of Motion for Final Approval ("Third Specht Decl.") Ex. 1*. Among other things, the Independent Fiduciary found that (1) "[t]he Settlement is fair and balanced and . . . is advantageous to the Plan", (2) "[t]he terms of the release . . . are determined to be reasonable", (3) "[t]he Plan of Allocation is reasonable . . . [and] cost effective as Current Participants will be funded directly into their Plan accounts and Authorized Former Participants will have the opportunity to elect a rollover or receive a direct cash payment", and (4) "[c]onsidering the work performed, the extensive defenses that were raised, the results achieved, the litigation risk assumed by Plaintiffs' counsel; . . . the requested attorneys' fees are reasonable." *Third Specht Decl. Ex. 1 at 4-6.*

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[1] On September 11, 2020, the Parties submitted a Joint Motion to Substitute Settlement Agreement to correct a scrivener's error in the Class Action Settlement Agreement that the Court previously preliminarily approved. *ECF No. 99.* The Court granted that order on September 15, 2020. *ECF No. 100.*

Second, notice of the Settlement was provided to more than 93,000 class members, and in response only four objections were received. The fact that over 99.99% of class members voiced no concerns about the Settlement further demonstrates that the Settlement is fair and reasonable to the Settlement Class. *See In re Lumber Liquidators Chinese-Manufactured Flooring Prod. Mktg. Sales Practices*, No. 115MD2627AJTTRJ, 2018 WL 11203065, at *6 (E.D. Va. Oct. 9, 2018) ("A small number of objections and a low opt-out rate suggest that the proposed settlement is adequate."), *aff'd sub nom In re: Lumber Liquidators Chinese-Manufactured Flooring Prod. Mktg., Sales Practices & Prod. Liab. Litig.*, 952 F.3d 471 (4th Cir. 2020) (citing *In re The Mills Corp.*, 265 F.R.D. 246, 258 (E.D. Va. 2009)). Moreover, as discussed below, none of the four objections that were received raise any specific issue with respect to the adequacy of the Settlement.[2]

Accordingly, Plaintiffs respectfully request that the Court grant final approval of the Settlement. Defendants do not oppose this motion as parties to the Settlement.

BACKGROUND

I. PROCEDURAL HISTORY[3]

A. The Complaint

On July 25, 2019 Plaintiffs filed a Class Action Complaint Against NRECA and its Insurance and Financial Services Committee ("I&FS Committee"), asserting claims for breach of

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[2] One of the "objections" was actually supportive of the Settlement. *See Third Specht Decl. Ex. 2* ("I appreciate your action against NRECA.... I feel you've done the right thing."). The other objections either provide no basis for the objection or concern Class Counsel's request for attorneys' fees.

[3] The procedural history of the litigation was previously recounted in Plaintiffs' briefing in support of their motion for preliminary approval of the Settlement (*ECF No. 95*) and their pending motion for attorneys' fees, costs, and class representative service awards (*ECF No. 102*). For ease of reference, Plaintiffs have recounted that history here.

fiduciary duty, prohibited transactions, and equitable restitution under ERISA. *See ECF No. 1.* In summary, Plaintiffs alleged that Defendants caused the Plan to pay NRECA, as in-house service provider, excessive administrative fees for recordkeeping and other administrative services. *Id.* ¶¶ *6-8*. Plaintiffs also alleged that NRECA improperly used revenue from the Plan to subsidize other aspects of NRECA's business, including its obligations to its pension and health and welfare plans. *Id.* ¶¶ *9-10*.

B. Defendants' Motion to Dismiss and Plaintiffs' Amended Complaint

On September 20, 2019, Defendants moved to dismiss the Complaint for failure to state a claim. *ECF No. 32.* Specifically, Defendants argued that comparing the Plan, a multiple-employer plan, to other single-employer plans was insufficient to allege violations of ERISA. *See ECF No. 37 at 1-2.* Defendants also argued that because they had been subject to "monitoring and approval" by a third-party fiduciary during much of the statutory period (until 2017), the Complaint's allegations of imprudent and disloyal conduct were implausible. *Id. at 4.* In response, Plaintiffs amended the Complaint to incorporate additional allegations (including allegations comparing the Plan's fees to another multiple-employer plan). *See ECF No. 41.* Defendants then filed a renewed motion to dismiss the Amended Complaint, *ECF No. 42*, and on January 2, 2020, the Court denied Defendants' Motion to Dismiss the Amended Complaint, *ECF No. 69.*

C. Discovery

The Parties promptly proceeded with formal discovery. As part of the discovery process, Defendants produced extensive class data and more than 124,000 pages of documents, including (among others things) minutes and meeting materials from the I&FS Committee; I&FS Committee materials presented to the NRECA Board; all reports by the independent fiduciary and other third parties regarding the Plan's administrative expenses; third-party consultant studies regarding the Plan; documents related to NRECA's budget process; service provider contracts and invoices for

service providers to the Plan; and I&FS Committee financial summary reports. *ECF No. 95-1, Declaration of Brock J. Specht in Support of Plaintiffs' Motion for Preliminary Approval of Class Action Settlement ("First Specht Decl.") ¶ 13.* In addition, Plaintiffs subpoenaed five third parties (including the third-party fiduciary who was appointed following NRECA's settlement with the Department of Labor) and received more than 1,000 pages of documents from these third parties. *Id.* Further, Plaintiffs engaged two fiduciary experts, David Donaldson (the CEO of ERISASmart and a former investigator for the Department of Labor), and James Scheinberg (a nationally recognized expert on retirement-plan recordkeeping and administrative services). *Id.* Plaintiffs served their expert reports on Defendants on June 11, 2020. *Id. ¶ 14.* Shortly thereafter, the parties began engaging in arm's-length negotiations and reached the instant Settlement. *Id.*

II. SETTLEMENT TERMS[4]

In granting preliminary approval of the Settlement Agreement, the Court preliminarily certified the following Settlement Class:

> All participants and beneficiaries of the NRECA 401(k) Pension Plan at any time from July 25, 2013 through July 31, 2020 excluding members of the Insurance and Financial Services Committee, NRECA's Board of Directors, and the Plan Administrator.

ECF No. 97 at 3. This Settlement Class is consistent with certified classes in several similar ERISA suits, as it includes all participants in the Plans except those with fiduciary responsibilities relating to the Plans.[5]

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[4] The Settlement Agreement can be found on the docket at ECF No. 99-2. Unless otherwise specified, all capitalized terms used herein have the meaning set forth in the Settlement Agreement.

[5] *See, e.g.*, *Wildman v. Am. Century Servs. LLC*, No. 4:16-737, 2017 WL 6045487 (W.D. Mo. Dec. 6, 2017) ("*Wildman I*") (certifying litigation class of all plan participants and beneficiaries excluding Defendants, members of the board, and "employees with responsibility for the Plan's investment or administrative functions"); *Moreno v. Deutsche Bank Americas Holding Corp.*, No. 1:15-cv-09936, 2017 WL 3868803, at *11 (S.D.N.Y Sept. 5, 2017) ("*Moreno I*") (same); *Urakhchin v. Allianz Asset Mgmt. of Am., L.P.*, No. 8:15-cv-1614, 2017 WL 2655678, at *9 (C.D.

A. Monetary Relief

Under the Settlement, Defendants will contribute a Gross Settlement Amount of $10,000,000 to a Qualified Settlement Fund (the "Settlement Fund"). *Settlement Agreement* ¶¶ *2.31, 2.39, 5.4-5.5.* After accounting for any Attorneys' Fees and Costs, Administrative Expenses, and Class Representative service awards approved by the Court, the Net Settlement Amount will be distributed to eligible Class Members in accordance with the Plan of Allocation in the Settlement. *Id.* ¶ *5.9.* Under the Plan of Allocation, the Settlement Administrator shall determine an *Average Account Balance* for each eligible Class Member. *Id.* ¶ *6.4.1*. For purposes of making this determination, the *Average Account Balance* shall be calculated based on the quarter-ending account balance for each Authorized Former Participant and Current Participant for each quarter during the Class Period. *Id.* The Settlement Administrator shall then determine the total settlement payment available to each Authorized Former Participant and Current Participant by calculating each such participant's pro-rata share of the Net Settlement Fund based on his or her *Average Account Balance* compared to the sum of the *Average Account Balances* for all Authorized Former Participants and Current Participants. *Id.* ¶ *6.4.2.*[6]

Current Participants will have their Plan accounts automatically credited with their share of the Settlement Fund. *Settlement Agreement* ¶ *6.5.* Former Participants will be required to submit

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Cal. June 15, 2017) ("*Urakhchin I*") (same); *see also Moreno v. Deutsche Bank Americas Holding Corp.*, No. 1:15-cv-09936, ECF No. 335 at ¶ 3 (S.D.N.Y. Oct. 9, 2018) ("*Moreno II*") (certifying similar class for settlement purposes); *Urakhchin v. Allianz Asset Mgmt. of Am., L.P.*, No. 8:15-cv-1614, 2018 WL 3000490, at *5-6 (C.D. Cal. Feb. 6, 2018) ("*Urakhchin II*") (same).

[6] If the dollar amount of the settlement payment to an Authorized Former Participant is calculated by the Settlement Administrator to be less than $5.00, then that Authorized Former Participant's payment or pro rata share shall be zero for all purposes. *Id.* ¶ *6.4.2.* "[T]he justification for this … is obvious, as this *de minimis* recovery would cost more in processing than its value, and thus would increase administrative costs and diminish recovery to class members overall while providing marginal benefits to the few class members." *Sims v. BB&T Corp.*, 2019 Nos. 1:15–cv–732, 1:15–cv–841, 2019 WL 1995314, at *4 (M.D.N.C. May 6, 2019).

a claim form that will allow them to elect to have their distribution rolled over into an individual retirement account or other eligible employer plan, or to receive a direct payment by check. *Id.* ¶ *6.6.*[7]

Under no circumstances will any monies revert to Defendants. Any uncashed checks will revert to the Settlement Fund for distribution to the Plan to defray Plan expenses. *Id.* ¶¶ *6.11, 6.12.*

B. Prospective Relief

The Settlement also provides for significant non-monetary relief. For a period of at least six years following the Settlement Effective Date, NRECA will retain an independent fiduciary that will do the following:

- Approve any administrative services agreements between NRECA and the Plan, including any amendments;
- Approve the expense methodology for direct expenses charged to the Plan by NRECA and monitor NRECA's compliance with that methodology; and determine whether such direct expenses comply with ERISA Section 408(c)(2);
- Undertake a periodic, comprehensive independent consultant study to analyze the Plan's administrative expenses to utilize in providing a recommendation to the I&FS Committee as to whether as to whether the engagement of NRECA to provide administrative services to the 401(k) Plan remains prudent and reasonable in light of the nature, quality and cost of the services to the 401(k) Plan.

Settlement Agreement ¶ *7.2.* In addition, NRECA will retain a separate qualified independent party to conduct a periodic review and approval of the methods by which third-party provider costs are shared between the Plan and NRECA or any other benefit plan of NRECA, with a report to the I&FS Committee including analysis as to whether such methods are reasonable and proper under applicable law. *Id.* ¶ *7.4.* Also, with respect to NRECA expenses that will be allocated among the plans to which NRECA provides services, NRECA will retain a separate qualified independent

[7] The Claim Form also allows the Settlement Administrator to verify the addresses of Class Members who are sent checks. *Id. Ex. 3.*

fiduciary to review and approve the methodology for such allocation. *Id.* ¶ *7.3.* Further, the Committee will adopt a process of reviewing and approving a detailed annual budget for the provision of services by NRECA to the Plan and will closely monitor the budgeted and actual costs. *Id.* ¶ *7.5.*

C. Release of Claims

In exchange for the relief provided by the Settlement, the Settlement Class will release Defendants and affiliated persons and entities as described in the Settlement Agreement (the "Released Parties") from all claims:

- That were asserted in the Action or that are or that arise out of, relate to, or are based on any of the allegations, acts, omissions, facts, matters, transactions, or occurrences that were alleged, asserted, or set forth in the Amended Class Action Complaint, or in any complaint previously filed in the Action;
- That would be barred by *res judicata* based on entry by the Court of the Final Approval Order;
- That relate to the direction to calculate, the calculation of, and/or the method or manner of allocation of the Qualified Settlement Fund pursuant to the Plan of Allocation; or
- That relate to the approval by the Independent Fiduciary of the Settlement Agreement, unless release of such claims would violate ERISA.

Settlement Agreement ¶ *2.41*.

III. PRELIMINARY APPROVAL OF THE SETTLEMENT

On August 6, 2020 the Court issued an Order granting preliminary approval of the proposed Settlement. *ECF No. 97*. In its Order, the Court preliminarily certified the Settlement Class for Settlement purposes and found that the terms of the Settlement were "sufficiently fair, reasonable, and adequate to warrant sending notice of the proposed settlement to the proposed settlement class . . ." *Id. at 2.* The Court therefore approved the distribution of the Settlement Notices as specified in the Settlement Agreement. *Id. at 3-4.* In addition, the Court appointed Analytics Consulting

LLC ("Analytics") to serve as the Settlement Administrator, distribute the Settlement Notices, and carry out the other duties specified in the Settlement Agreement. *Id. at 2-4.*

IV. CLASS NOTICE AND REACTION TO THE SETTLEMENT

Pursuant to the Court's Order preliminarily approving the Settlement, Analytics mailed Settlement Notices to each of the Class members identified by the Plan's recordkeeper. *See Declaration of Jeff Mitchell ("Mitchell Decl.")* ¶ *9.* In total, 95,718 Settlement Notices were mailed. *Id.*

Prior to sending these Notices, Analytics cross-referenced the addresses on the class list with the United States Postal Service National Change of Address Database. *Id.* ¶ *8.* In the event that any Settlement Notices were returned, Analytics re-mailed the Notice to any forwarding address that was provided, and performed a skip trace in an attempt to ascertain a valid address for the Class Member in the absence of a forwarding address. *Id.* ¶¶ *14-15.* As a result, the notice program was very effective. Out of 95,713 Settlement Notices that were mailed, only ~0.61% were ultimately undeliverable despite these efforts. *Id.* ¶ *16.*

If any Class Members desired further information, Analytics established a settlement website at www.NRECA401kfeesettlement.com. *Id.* ¶ *17.* Among other things, the Settlement Website includes: (1) a "Frequently Asked Questions" page containing a clear summary of essential case information; (2) a "Home" page and "Important Deadlines" page, each containing clear notice of applicable deadlines; (3) case and settlement documents for download (including the Settlement Notices, Former Participant Claim Form, Amended Class Action Complaint, Settlement Agreement, Preliminary Approval Order, and Plaintiffs' Motion for Approval of Attorneys' Fees, Expenses, and Class Representative Service Awards and related documents); (4) contact information for Class Counsel and Defendants' Counsel; and (5) email, phone, and U.S. mail contact information for Analytics. *Id.* In addition, Analytics created and maintained a toll-

free telephone support line (1-833-962-1868) as a resource for Class Members seeking information about the Settlement. *Id.* ¶ *18*. This telephone number was referenced in the Notices, and also appears on the settlement website. *Id.*

The deadline to submit objections to the Settlement was November 19, 2020. *ECF No. 97 at 5.* As of that date, only four out of more than 93,000 class members lodged "objections" with Class Counsel and Defendants' Counsel. This miniscule number (approximately 0.004%) demonstrates overwhelming support for the Settlement. As explained further below (*see infra* at 16-19), one "objection" is actually supportive of the settlement, and Class Counsel respectfully believes the three others should be overruled.

V. REVIEW AND APPROVAL BY INDEPENDENT FIDUCIARY

Pursuant to Paragraph 3.1 of the Settlement Agreement and applicable ERISA regulations,[8] the Settlement was submitted to an Independent Fiduciary, Jim Carroll of Carroll Services, LLC, for review following the Court's preliminary approval order. *See Third Specht Decl. Ex. 1.* After reviewing the Settlement and numerous other case documents, including several pleadings, expert reports and documents produced by Defendants, and interviewing counsel for each of the Parties, the Independent Fiduciary concluded that (1) "[t]he Settlement is fair and balanced and . . . is advantageous to the Plan", (2) "[t]he terms of the release . . . are determined to be reasonable", (3) "[t]he Plan of Allocation is reasonable . . . [and] cost effective as Current Participants will be funded directly into their Plan accounts and Authorized Former Participants will have the opportunity to elect a rollover or receive a direct cash payment", and (4) "[c]onsidering the work performed, the extensive defenses that were raised, the results achieved, the litigation risk assumed

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

by Plaintiffs' counsel; . . . the requested attorneys' fees are reasonable." *Third Specht Decl. Ex. 1 at 4-6.*

ARGUMENT

I. STANDARD OF REVIEW

"It has long been clear that the law favors settlement." *United States v. Manning Coal Corp.*, 977 F.2d 117, 120 (4th Cir. 1992). "This is particularly true in class actions." *Clark v. Duke Univ.*, No. 1:16-CV-1044, 2019 WL 2588029, at *4 (M.D.N.C. June 24, 2019). Federal Rule of Civil Procedure 23(3)(2) instructs a court to approve a class action settlement if it is "fair, reasonable, and adequate."

"The Fourth Circuit has bifurcated the analysis into consideration of fairness, which focuses on whether the proposed settlement was negotiated at arm's length, and adequacy, which focuses on whether the consideration provided the class members is sufficient." *Clark*, 2019 WL 2588029, at *4 (quotation marks and citations omitted). This is the same standard the Court applied in preliminarily approving the Settlement. In so doing, the Court found that "the Settlement is sufficiently fair, reasonable, and adequate." *ECF No. 97 at 2.* There is no reason to reach a different result on final approval, especially since (1) the Settlement has now been independently reviewed and approved by an Independent Fiduciary, and (2) only a miniscule number of absent class members (approximately 0.004%) have objected to the Settlement.

II. THE SETTLEMENT IS FAIR

To evaluate a settlement's fairness and whether the settlement was negotiated at arm's length, the Court considers four factors: "(1) the posture of the case at the time settlement was proposed, (2) the extent of discovery that had been conducted, (3) the circumstances surrounding the negotiations, and (4) the experience of counsel in the area [of law at issue]." *In re Jiffy Lube*

Sec. Litig, 927 F.2d 155, 159 (4th Cir. 1991). Here, each of these four factors indicate the settlement is fair and reasonable.

A. Posture of the Case and Extent of Discovery Conducted

Both the posture of the case and the extent of discovery undertaken reflect that the case was ripe for Settlement. The case was settled following a thorough investigation and adversarial briefing and argument on Defendants' motion to dismiss. *First Specht Decl. ¶ 12.* When, as here, the parties settle after "vigorously contest[ing] a motion to dismiss,'" such "adversarial encounters dispel any apprehension of collusion between the parties." *In re Neustar, Inc. Sec. Litig.*, No. 1:14CV885 (JCC/TRJ), 2015 WL 8484438, at *3 (E.D. Va. Dec. 8, 2015) ("*Neustar II*") (quoting *In re MicroStrategy, Inc. Sec. Litig.*, 148 F. Supp. 2d 654, 664 (E.D. Va. 2001)).

Plaintiffs then vigorously pursued discovery, resulting in the production of more than 124,000 pages of documents and extensive class data from Defendants, as well as additional information from multiple third parties. *See First Specht Decl. ¶ 13*. Plaintiffs also engaged two highly qualified experts, who independently analyzed the materials that were produced and prepared comprehensive expert reports. *Id.* This further favors approval of the settlement. *See In re Neustar, Inc. Sec. Litig.*, No. 1:14CV885 (JCC/TRJ), 2015 WL 5674798, at *10 (E.D. Va. Sept. 23, 2015) ("*NeuStar I*") (finding fairness factor satisfied where the parties had engaged in formal discovery and plaintiff's counsel had "conducted in-depth reviews of publicly available information.").

B. Circumstances Surrounding Negotiations and Experience of Counsel

"In the absence of any evidence to the contrary, it is presumed that no fraud or collusion occurred." *Galiastre v. Capt. George's Seafood Restaurant, LP*, No. 2:17cv379, 2019 WL 2288441, at *3 (E.D. Va. May 29, 2019). Here, the record reflects that counsel for both sides engaged in extensive arm's-length negotiations over multiple weeks. *First Specht Decl. ¶ 14.*

Moreover, counsel for both sides are well-respected members of the ERISA class action bar, *id.*, which "further minimizes concerns that the Settling Parties colluded to the detriment of the class's interests." *In re MicroStrategy, Inc. Sec. Litig.*, 148 F. Supp.2d 654, 665 (E.D. Va. 2001).

Class Counsel have extensive experience litigating ERISA class actions, including both trial experience and settlement negotiation experience. *First Specht Decl. ¶¶ 17-19.* In over a dozen other ERISA cases, courts have found them adequate to serve as class counsel. *See id. ¶ 17.* Accordingly, "it is entirely warranted for this Court to pay heed to their judgment in approving, negotiating, and entering into a putative settlement." *In re The Mills Corp. Secs. Litig.*, 265 F.R.D. 246, 255 (E.D. Va. 2009) ("*Mills*"); *see also Neustar I*, 2015 WL 5674798, at *12.

III. THE SETTLEMENT PROVIDES ADEQUATE RELIEF

To evaluate the adequacy of a settlement, the Court must examine:

> (1) the relative strength of the plaintiffs' case on the merits; (2) the existence of any difficulties of proof or strong defenses the plaintiffs are likely to encounter if the case goes to trial; (3) the anticipated duration and expenses of additional litigation; (4) the solvency of the defendants and the likelihood of recovery on a litigated judgment; and (5) the degree of opposition to the settlement.

Solomon v. Am. Web Loan, Inc, No. 4:17CV145, 2020 WL 3490606, at *4 (E.D. Va. June 26, 2020) (quoting *Jiffy Lube*, 927 F.2d at 158-59). Once again, each of the relevant factors support approval of the settlement.[9]

[9] The fourth *Jiffy Lube* factor has little bearing on the analysis here. The solvency of the Defendants has not been an issue in this case. *See Sims*, 2019 WL 1995314, at *5 ("Class Counsel have not expressed any concerns as to the solvency of the defendants or their ability to recover if they were to proceed to trial."). Thus, this factor "is largely beside the point given the other factors weighing in favor of a negotiated resolution." *Henley v. FMC Corp.*, 207 F. Supp. 2d 489, 494 (S.D.W.Va. 2002).

A. Relative Strength of Plaintiffs' Case and Applicable Defenses.

The first two factors of the adequacy inquiry "compel the Court to examine how much the class sacrifices in settling a potentially strong case in light of how much the class gains in avoiding the uncertainty of a potentially difficult case." *Mills,* 265 F.R.D. at 256. Both of these measures confirm that the settlement provides adequate relief to the class.

As the Independent Fiduciary concluded, the Settlement is "advantageous to the Plan and reflects the inherent risks at trial as Plaintiffs would have had to overcome the various defenses put forth by Defendants." *Third Specht Decl. Ex. 1 at 4.* The $10 million settlement amount represents approximately 22% to 38% of the of the estimated excess administrative expenses calculated by Plaintiffs' expert. *See First Specht Decl. ¶ 8.* This compares favorably with recoveries in other ERISA class actions. *See Sims*, 2019 WL 1995314, at *5 (approving $24 million settlement that represented 19% of estimated damages, including damages due to excessive recordkeeping expenses); *Urakhchin v. Allianz Asset Mgmt. of Am., L.P.*, No. 8:15-cv-01614, 2018 WL 8334858 (C.D. Cal. July 30, 2018) ("*Urakhchin III*") (approving $12 million settlement in ERISA case involving proprietary funds and allegations of excessive fees, where that amount represented approximately one-quarter of estimated total plan-wide losses of $47 million); *Johnson v. Fujitsu Tech. & Business of Am., Inc.*, No. 5:16-cv-03698-NC, 2018 WL 2183253, at *6-7 (N.D. Cal. May 11, 2018) (approving $14 million settlement in ERISA case involving alleged excess fees, where that amount represented "just under 10% of the Plaintiffs' most aggressive 'all in' measure of damages"); *accord In re Rite Aid Corp. Sec. Litig.,* 146 F.Supp.2d 706, 715 (E.D. Pa. 2001) (noting that since 1995, class action settlements have typically "recovered between 5.5% and 6.2% of the class members' estimated losses"). Moreover, the recovery will be distributed equitably to class members pursuant to a uniform formula based on their average account balances

in the Plan. *See Settlement Agreement* ¶ *6.4.* This is also consistent with settlements approved in other cases.[10]

In addition, Defendants have agreed to significant prospective relief going forward, including independent fiduciary review of all administrative expenses paid to NRECA, independent analysis of the cost and quality of services provided by NRECA to the Plan, and periodic review and approval by an independent third party of the methodologies by which shared expenses are allocated to the Plan. *See supra* at 6-7. This relief further supports approval of the Settlement. *See Moreno v. Deutsche Bank Americas Holding Corp.*, No. 1:15-cv-09936, ECF No. 348 at 4-5 (S.D.N.Y. Mar. 7, 2019) (finding that "non-monetary benefits", including independent fiduciary review of the proprietary investments in the plan, "have significant value for Plan participants")*; accord Brown v. Transurban USA, Inc.*, 318 F.R.D. 560, 573 (E.D. Va. 2016) (finding that "significant prospective relief" required under the settlement supported adequacy).

While Plaintiffs were confident in their case, proceeding to trial presented significant risks. "[N]o matter how confident one may be of the outcome of litigation, such confidence is often misplaced." *Mills*, 265 F.R.D. at 256. In two recent class action trials involving defined contribution plans, the defendants were the prevailing party. *See Sacerdote v. New York Univ.*, 328 F. Supp. 3d 273 (S.D.N.Y. 2018); *Wildman v. Am. Century Servs., LLC*, 362 F. Supp. 3d 685, 711 (W.D. Mo. 2019) ("*Wildman II*"). And in another recent case involving recordkeeping expenses, the court granted summary judgment in favor of the defendants. *See Pledger v. Reliance Trust Co.*, No. 1:15-cv-04444-MHC, 2019 WL 10886802 (N.D. Ga. March 28, 2019).

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[10] *See, e.g., Velazquez v. Mass. Fin. Servs.*, No. 1:17-cv-11249, ECF No. 91-1, ¶ 6.4.3 (June 14, 2019); *Sims v. BB&T*, No. 1:15-cv-00732, ECF No. 436-2, ¶ 6.4.2 (Nov. 30, 2018); *Urakhchin v. Allianz Asset Mgmt. of Am., L.P.*, No. 8:15-cv-1614, ECF No. 174-3, ¶ 6.4.3 (Dec. 26, 2017); *Kruger v. Novant Health, Inc.*, No. 1:14cv208, ECF No. 44-2, ¶ 6.4 (M.D.N.C. Nov. 9, 2015).

Moreover, even if Plaintiffs prevailed on the issue of liability, significant issues would have remained regarding damages. *See Sacerdote*, 328 F. Supp. 3d at 280 (finding that "while there were deficiencies in the Committee's [fiduciary] processes—including that several members displayed a concerning lack of knowledge relevant to the Committee's mandate—plaintiffs have not proven that … the Plans suffered losses as a result."); *Wildman II*, 362 F. Supp. 3d at 710 (finding plaintiffs failed to prove a loss to the plan). Thus, "the damages issue would have become a battle of experts at trial, with no guarantee of the outcome." *Mills*, 265 F.R.D. at 256.

Indeed, this case presented special risks that are not present in a typical case. First, this case was unique in that it involved a multiple-employer plan. *See First Specht Decl. ¶ 10.* Although Plaintiffs identified another multiple-employer plan that they determined to be appropriate for purposes of making expense comparisons and estimating damages, *see First Am. Compl., ECF No. 41 at ¶ 42*, Defendants likely would have challenged that comparison and the sufficiency of a single comparator to prove damages. Second, Defendants also likely would have also argued, as they did in their motion to dismiss, that their conduct was reviewed and approved by a third-party fiduciary and that the Department of Labor was also aware of Defendants' practices during much of the class period. *See ECF No. 47*. While Plaintiffs maintained that this third-party review did not relieve Defendants of their fiduciary duties, it is uncertain how this issue would have played out at trial. While the Court recognized at the motion to dismiss stage that independent fiduciary review does not operate as a "whitewash," it also stated that such review can "provide[] evidence that a fiduciary satisfied their duties." *Order Denying Motion to Dismiss, ECF No. 69, at 4* (citing *DiFelice v. U.S. Airways, Inc.*, 497 F.3d 410, 421 (4th Cir. 2007)).

Given the substantial recovery that was obtained, and risks of further litigation, it was reasonable and appropriate for Plaintiffs to reach a settlement on the terms that were negotiated.

See Kruger v. Novant Health, Inc., No. 1:14cv208, 2016 WL 6769066, at *5 (M.D.N.C. Sept. 29, 2016) ("settlement of a 401(k) excessive fee case benefits the employees and retirees in multiple ways").

B. Anticipated Duration and Expenses of Additional Litigation

The third *Jiffy Lube* factor asks the Court "to weigh the settlement in consideration of the substantial time and expense litigation of this sort would entail if a settlement was not reached." *Mills*, 265 F.R.D. at 256 (citation omitted). "This factor is based on a sound policy of conserving the resources of the Court" and avoiding "unnecessary and unwarranted expenditure of resources and time" by the parties. *Id*.

This factor strongly supports the Settlement here. It is well-recognized that ERISA class cases involving retirement plans "often lead[] to lengthy litigation." *Krueger v. Ameriprise Fin., Inc.*, No. 11–CV–02781 (SRN/JSM), 2015 WL 4246879, at *1 (D. Minn. July 13, 2015). Indeed, these cases can extend for a decade before final resolution, sometimes going through multiple appeals. *See, e.g., Tussey v. ABB, Inc.*, 850 F.3d 951 (8th Cir. 2017) (recounting lengthy procedural history of case that was initially filed in 2006, and remanding to district court a second time); *Tibble v. Edison Int'l*, CV 07-5359 SVW (AGRx), 2017 WL 3523737, at *15 (C.D. Cal. Aug. 16, 2017) (outlining remaining issues ten years after suit was filed in 2007); *Abbott v. Lockheed Martin Corp.*, 2015 WL 4398475, at *4 (S.D. Ill. July 17, 2015) (noting that the case had originally been filed on "September 11, 2006"). One of the chief advantages of the Settlement in this case is that it provides immediate and guaranteed relief to the Class.

C. The Degree of Opposition to the Settlement

The lack of opposition to the Settlement also favors Court approval. Out of more than 93,000 class members, only four lodged objections, amounting to less than 0.004% of the Class. This miniscule number of objections indicates that class members overwhelmingly support the

Settlement *See, e.g.*, *Skochin v. Genworth Fin., Inc.*, No. 3:19CV49, 2020 WL 6532833, at *14 (E.D. Va. Nov. 5, 2020) ("It is also significant that objections were lodged by 0.021% of the class. . . [T]he fact that so few members of the class objected to, or opted out of, the settlement is a testament to the conclusion that the Notice was adequate as well as to whether the settlement is fair and reasonable."); *Mills*, 265 F.R.D. at 258 (observing that limited or no objections and few opt-outs from the Class "gives the Court a great deal of confidence in the settlement[']s adequacy"); *MicroStrategy*, 148 F. Supp. 2d at 667–68 ("Such a lack of opposition to the partial settlement strongly supports a finding of adequacy"). Moreover, the few objections that were received raise no specific issues with respect to the adequacy of the Settlement.

One objection was based on the misplaced concern that claims against NRECA's *defined benefit* plan would be included within the scope of the release included in the Settlement Agreement. *See Third Specht Decl. Ex. 2 at 1.* The Class Member was otherwise supportive of Class Counsel's work, noting "I appreciate your action against NRECA.... I feel you've done the right thing." *Id.* Class Counsel has advised that class member that the release would not include claims against the defined benefit plan. *See Third Specht Decl. Ex. 2 at 2.*

The second objection states only that the objector "wish[es] to object to any part of the settlement" but does not explain why. *See Third Specht Decl. Ex. 3.* This unsupported objection should be overruled. *Neustar II*, 2015 WL 8484438, at *4 ("giving no weight at all" to objection that "is devoid of actual argument").

The third objection concerns Class Counsel's request for fees and costs. *See Third Specht Decl. Ex. 4.* The objector believes that a fee award of one-third of the Settlement amount would be "excessive" and that such an award, in addition to litigation costs, would be "patently unfair."

Id.[11]

The objector's concerns with fairness are understandable, but he does not appear to consider the substantial amount of work performed by Class Counsel on this case or the risks assumed in undertaking this matter on a contingency basis. It is well-established and customary for attorneys to recover fees for their services through an award from a common fund—there would be no fund to distribute but for the efforts of Class Counsel. *See Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). As the Fourth Circuit acknowledged in a similar case, "[s]cores of unnamed [plan] participants benefited substantially from this lawsuit, while [Class Counsel] bore the entirety of the costs and risks. Equity thus demands that the enriched participants pay a proportional share of reasonable attorneys' fees." *Brundle ex rel. of Constellis Employee Stock Ownership Plan v. Wilmington Tr., N.A*, 919 F.3d 763, 785 (4th Cir. 2019).

The same is true in this case. Class Counsel has achieved a $10 million recovery on behalf of the Settlement Class that compares favorably to other ERISA class actions and represents a significant portion of the alleged damages in this case. *See supra* at 13. For this success, Class Counsel should be awarded a fee commensurate with the level of success achieved on behalf of the class and consistent with awards approved in similar cases. As the Fourth Circuit has noted, a one-third fee award is typical in ERISA class actions, *Brundle,* 919 F.3d at 788 n.14 (citing cases), and several district courts within the Fourth Circuit have approved a one-third fee award in ERISA class action settlements such as this. *See Clark v. Duke Univ.*, No. 1:16-CV-1044, 2019 WL 2579201, at *5 (M.D.N.C. June 24, 2019); *Sims v. BB&T Corp.*, Nos. 1:15cv-732, 1:15-cv-841,

[11] To be clear, although the objector estimated that litigation costs could be as much as $1.5 million, Class Counsel incurred only a fraction of that amount. *See Memo. in Support of Pls' Motion for Approval of Attorneys' Fees and Costs, and Class Representative Service Awards (ECF No. 102), at 1*.

2019 WL 1993519, at *2 (M.D.N.C. May 6, 2019); *Kruger*, 2016 WL 6769066, at *2 (citing additional cases). Notably, the objector provides no analysis under the relevant factors showing the requested amount to be unreasonable under the circumstances.

The fourth and final objection also appears to be directed at attorneys' fees. This objection states in its entirety:

> I am a Class Member with over one million dollars in the NRECA 401K plan. Is this settlement a joke or something? This is the problem with our justice system. Why would anyone call this a fairness hearing when it is only fair to some ??????? bunch of lawyers who have made a sweet heart [sic] deal with another group of lawyers because this is what they do.
>
> This settlement will just cost Nreca in the future, enrich a Law firm that had very little cost and pay the class members nothing. Just tell Nreca to quit doing this and forget the rest. This would be better for all class members in the future. There is nothing fair about paying my class council [sic] over three million dollars for damage done to me.

Third Specht Decl. Ex. 5. This objection should be overruled for the reasons articulated above. Much like the third objection, this objection fails to consider the substantial time and expenses that Class Counsel invested, or the risks assumed in taking this matter on a contingency basis. In contingent fee cases such as this, a one-third fee is standard, *see supra* at 18, and it does not result in a windfall to Class Counsel under the circumstances of this case. *See Mills*, 265 F.R.D. at 261–62 (overruling two objections to attorneys' fees, observing that the average lodestar multiplier identified in a study cited by one objector was 4.5, which was "substantially higher than the applicable multiplier in this case").[12]

To the extent that this objector challenges the adequacy of the relief provided under the Settlement, he appears to be misinformed. The Settlement will not "pay the class members

[12] Here, the requested fee represents a multiplier of approximately 3 and falls squarely within the reasonable range. *See ECF No. 102 at 20.*

nothing." *See Third Specht Decl. Ex. 5.* To the contrary, it will yield a net payout of $6,168,939.57 to the class (after approval of all fees, expenses, and class representative service awards), and represents a significant fraction of the damages alleged in this case. Further, this objector's suggestion that the Settlement is the product of collusion between Class Counsel and Defendants' counsel is baseless. "The objectors to a class settlement generally bear the burden of proving any assertions they raise challenging the reasonableness of a class action settlement." *Skochin*, 2020 WL 6532833, at *10 (citations omitted). Both this Court and the Independent Fiduciary found that the Settlement is the product of extensive "arm's length negotiations, only after Class Counsel had received pertinent information and documents from Defendants and non-parties," *ECF No. 97 at 2*; *see also Third Specht Decl. Ex. 1 at 8* ("[T]he Settlement is at least as favorable as an arms' length transaction agreed to by unrelated parties would likely have been."). Accordingly, the objections should be overruled, and the Settlement should be finally approved.

IV. THE SETTLEMENT IS REASONABLE.

Finally, in this District, "'there is a strong initial presumption that the compromise is fair and reasonable.'" *Mills*, 265 F.R.D. at 258 (quoting *MicroStrategy*, 148 F. Supp. 2d at 663). In evaluating a settlement's reasonableness, this Court has recognized that a "settlement is a compromise, a yielding of the highest hopes in exchange for certainty and resolution." *Id.* (citation and quotations omitted). This Settlement was the product of thorough deliberation after adversarial briefing and expert review of thousands of pages of documents. For this and all the reasons explained above, the Settlement is reasonable.

The Independent Fiduciary's positive assessment of the Settlement also supports final approval. As the Independent Fiduciary found, "[t]he Settlement is fair and balanced . . . [and] is advantageous to the Plan." *Third Specht Decl. Ex. 1 at 4.* The Independent Fiduciary also found

that the scope of the release is reasonable, *id.*, and the Plan of Allocation is reasonable and "cost effective," *id.* at 5. Such findings further weigh in support of approval of the Settlement.

V. THE CLASS NOTICE WAS REASONABLE

The class notice program in this case also was reasonable and satisfied the requirements of Due Process and Rule 23. The "best notice" practicable under the circumstances includes individual notice to all class members who can be identified through reasonable effort. Fed. R. Civ. P. 23(c)(2)(B). That is precisely the type of notice that was provided here.

As noted above, the Settlement Administrator mailed the Court-approved Settlement Notices to Class Members via U.S. Mail to their last known address. *See supra* at 8. This type of notice is presumptively reasonable. *See Phillips Petroleum Co. v. Shutts,* 472 U.S. 797, 812 (1985). Moreover, the Notices were supplemented through the Settlement Website and telephone support line. *See supra* at 8. This is more than sufficient to meet the standard under Rule 23, and is consistent with other ERISA settlements that have been approved. *See, e.g.*, *Sims v. BB&T Corp.*, Nos. 1:15–cv–732, 1:15–cv–841, ECF No. 439 (M.D.N.C. Dec. 13, 2018) (approving substantially similar notice plan); *Kruger*, 2016 WL 6775855, at *1 (M.D.N.C. Sept. 29, 2016) (same); *Moreno II*, No. 1:15-cv-09936, ECF No. 335 (same); *Urakhchin II*, 2018 WL 3000490, at *6-7 (same).

The content of the Settlement Notices also was reasonable. The Settlement Notices included, among other things: (1) a summary of the lawsuit; (2) a clear definition of the Settlement Class; (3) a description of the material terms of the Settlement; (4) a disclosure of the release of claims; (5) instructions for submitting a claim (in the event one is required); (6) instructions as to how to object to the Settlement and a date by which Settlement Class members must object; (7) the date, time, and location of the final approval hearing; (8) contact information for the Settlement Administrator; and (9) information regarding Class Counsel and the amount that Class Counsel may seek in attorneys' fees and expenses. *Settlement Agreement, Exs. 1 & 2.* This information was

"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." *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306, 314 (1950); *see also NeuStar I*, 2015 WL 5674798, at 12 (approving substantially similar method of notice).

VI. THE COURT SHOULD CERTIFY THE CLASS FOR FINAL APPROVAL

In its Order for Preliminary Approval of the Settlement, the Court preliminarily certified the following Settlement Class:

> All participants and beneficiaries of the NRECA 401(k) Pension Plan at any time from July 25, 2013 through July 31, 2020 excluding members of the Insurance and Financial Services Committee, NRECA's Board of Directors, and the Plan Administrator.

ECF No. 97.

In their memorandum of law in support of their motion for preliminary approval, Plaintiffs established that: (1) the class is sufficiently numerous; (2) Plaintiffs raised common issues in the First Amended Consolidated Complaint; (3) Plaintiffs' claims are typical of other class members' claims; (4) Plaintiffs are adequate class representatives; (5) Class Counsel is experienced and competent; (6) class certification is appropriate under Fed. R. Civ. P. 23(b)(1)(A) due to the risk of inconsistent adjudications; and (7) class certification is appropriate under Fed. R. Civ. P. 23(b)(1)(B) because any individual adjudication would be dispositive of the interests of other class members. *See ECF No. 95 at 10-16*. Nothing has changed since the Court preliminarily certified the class for preliminary approval, and no class member has objected to class certification or indicated that they wish to proceed individually. Accordingly, the Court should reaffirm its approval of Settlement Class for purposes of final approval. *See Sims v. BB&T Corp.*, 2017 WL 3730552 (M.D.N.C. Aug. 28, 2017) (certifying similar class for litigation purposes and appointing Nichols Kaster, PLLP as class counsel); *see also supra* n.5.

CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that the Court enter an order granting final approval of the Settlement in the form submitted herewith.

Dated: December 3, 2020

Respectfully submitted,

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COUNSEL FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I hereby certify that, on December 3, 2020, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notice of such filing to all counsel of record.

/s/ Gregg C. Greenberg
Gregg C. Greenberg