IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

GREGORY AHRENS, *et al.*, Plaintiffs, v. UCB HOLDINGS, INC., *et al.*, Defendants.	Case No. 1:15-cv-00348-TWT

MEMORANDUM IN SUPPORT OF PLAINTIFFS' UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT& PLAN OF ALLOCATION

Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, Plaintiffs submit this Memorandum in support of their unopposed motion to preliminarily approve the proposed settlement of this case, to preliminarily approve the plan of allocation and to set various dates related to the approval of the settlement.

The Settlement provides for payments from Defendants of $5.5 million plus certain important non-monetary relief to resolve the claims of Class members whom Plaintiffs contend were not paid the correct amount under the Plan or had their benefits reduced. Based on the data provided by Defendants and the calculations of Plaintiffs' actuarial expert, the settlement represents more than 60% of what those Class Members could have obtained in this litigation before interest, plus important non-monetary provisions including a plan amendment that recognizes these amounts as benefits properly paid by the Plan. In addition, for those Class Members who received what Defendants contend was an overpayment but never returned any money, those Class Members will be able to keep the entirety of what they have received, and the Plan will be amended to recognize the prior amount of benefit payments that these Class Members received and retained (with the goal of providing tax protection with respect to those payments), but will receive no additional monetary payment from this Settlement. Given the uncertainties of establishing both liability and the amount of recovery, as well as

the delay of litigation, Plaintiffs submit that this is an excellent result that should be preliminarily approved by the Court.

I. HISTORY AND STATUS OF THE CASE

This is an action under the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. § 1001, *et seq*., on behalf of a class of participants in the UCB, Inc. Defined Benefit Pension Plan (the "UCB Plan" or the "Plan"). Plaintiffs are former employees of UCB, Inc. (or a subsidiary or affiliate) who are participants in the UCB Plan and who were employees of Northampton Medical, Inc. ("Northampton") or Whitby Pharmaceuticals, Inc. or Whitby, Inc. (collectively "Whitby") immediately before UCB acquired the companies in 1994.

A. Factual Background Alleged in Complaint

The following summarizes the allegations in the Complaint. In 1994, UCB, Inc. acquired two companies, Northampton and Whitby. The complaint alleges that UCB consistently represented both before and after the acquisitions that Whitby and Northampton employees would receive credit for their years of pre-acquisition service when calculating their retirement benefits under the UCB Plan. Compl. (ECF No. 1) ¶¶ 50-55. As pension benefits are a product of the number of years a participant worked (described as credited service under the Plan), the longer a participant works the greater their pension benefit (assuming everything else is the same). *Id.* ¶ 65.

In 2005, UCB adopted the Eighth Amendment to the UCB Plan, which froze the Plan and modified certain terms of the Plan. Compl. ¶¶ 67-73. In 2005, Plaintiffs received pension statements ("2005 pension statements") from UCB (which was the plan administrator) and/or Mercer (the third party administrator) that stated that Plaintiffs' credited service included the years they worked at Northampton or Whitby. *Id*. ¶¶ 77-78. Statements provided to Plaintiffs between 2006 and 2011 also included the years they worked for Northampton and Whitby in the calculation of their pension benefits. *Id*. ¶¶ 94-103.

Beginning in 2011, UCB sent letters to Plaintiffs claiming that their pension benefits had previously been overstated. *Id.* ¶¶ 113, 115. These letters claimed that under the terms of the Plan the years Plaintiffs spent working for Northampton and Whitby should not have been included when calculating their pension benefits. *Id.* ¶¶ 114, 116-119. The letters also enclosed "revised 2005 Pension Statements" that reflected UCB's reduction of Plaintiffs' years of service (to omit pre-acquisition service credit) and reduced their benefits. *Id*. ¶¶ 117-18, 120-127.

Two Plaintiffs, Mary Ann Geiger and Timothy Walker, had already begun receiving pension benefits: Geiger in the form of an annuity and Walker in the form of a lump sum. Compl. ¶¶ 129-30. After UCB informed Plaintiffs Geiger and Walker that their benefits were allegedly overpaid, UCB requested that Plaintiffs Geiger and Walker refund UCB for its purported overpayment, plus interest. *Id.*

Geiger sent a check in the amount of $3,671.94 for the claimed overpayment and interest. Compl. ¶ 132. Walker sent a check for $73,296.09, for the claimed overpayment (but not interest). Compl. ¶ 133.

Plaintiffs submitted written claims for benefits seeking to have the years they worked at Northampton and Whitby included in the calculation of their pension benefits. Compl. ¶¶ 135-36. UCB denied Plaintiffs' claims and Plaintiffs submitted appeals of the denials, which UCB also denied. Compl. ¶¶ 137-43. After exhausting their administrative remedies, Plaintiffs brought this suit. Compl. ¶ 144.

The Complaint alleges ten counts: (I) a claim for benefits pursuant to ERISA § 502(a)(1)(B) alleging that the terms of the UCB, Inc. Defined Benefit Pension Plan required service to be based on employment at companies acquired by UCB before UCB acquired those companies in 1994 (aka pre-acquisition service); (II) a claim under ERISA § 204(g) alleging a change to the terms of the Plan regarding what years would be included in credited service was an impermissible cutback; (III) a claim alleging a violation of ERISA § 102 with respect to the disclosure of provisions concerning whether pre-acquisition service was excluded from credited service under the Plan; (IV) a claim alleging breach of fiduciary duty under ERISA § 404(a)(1)(A), (B) & (D) related to disclosures concerning whether pre-acquisition service was included as credited service under the Plan; (V) a claim alleging breach of fiduciary duty under ERISA § 404(a)(1)(A) & (B) related to

disclosures in 1994 concerning whether pre-acquisition service was included as credited service under the Plan; (VI) a claim alleging breach of fiduciary duty under ERISA § 404(a)(1)(A), (B) & (D) related to disclosures in 2005 benefit statements concerning whether pre-acquisition service was included as credited service under the Plan; (VII) a claim alleging violations of ERISA § 503 and a breach of fiduciary duty under ERISA § 404(a)(1)(D) related to letters that Defendants sent Plaintiffs in 2011 and 2012; (VIII) a claim alleging breach of fiduciary duty under ERISA § 404(a)(1)(A) & (B) and ERISA § 405 alleging breaches for failure to take corrective action to correct or remedy breaches by other fiduciaries as a result of causing the Plan to pay out benefits based on pre-acquisition service; (IX) a claim alleging breach of fiduciary duty under ERISA § 404(a)(1)(A) & (B) as to alleged misrepresentations and omissions made in the letters issued in 2011 and 2012; and (X) a claim for declaratory and injunctive relief pursuant to ERISA § 502(a)(3) to prevent recoupment.

Plaintiffs' Complaint sought the following relief: (1) a declaration that the Class is entitled to have their benefits calculated under the Plan with pre-acquisition service, (2) an injunction enjoining UCB from retroactively applying any plan amendments to the Class that prevents inclusion of their years of service at an acquired company, (3) an order reforming the terms of the Plan to ensure years of service at an acquired company is included in the calculation of their years

of crediting service, (4) an order requiring UCB to re-calculate Class Members' benefits under the Plan by including their years of service at an acquired company and pay benefits according to this re-calculation, (5) an order requiring UCB to pay prejudgment interest or disgorge any profits they have earned on benefits wrongfully withheld, (6) an injunction preventing Defendants from recouping and attempting to recoup any purported overpayments that UCB claims should not have been paid, and (7) declaratory relief for Defendants' failure to follow certain provisions of ERISA. Compl. at Prayer for Relief.

B. Procedural Background

Plaintiffs filed their Complaint on February 3, 2015. ECF No. 1. Defendants filed a motion to dismiss counts IV through VIII on May 15, 2015. ECF No. 25. On January 6, 2016, the Court granted Defendants' motion. ECF No. 37. While the motion to dismiss was pending, the Parties had some discussions about settlement and agreed to submit their dispute to a mediator; on February 2, 2016, the Court ordered the case be stayed pending settlement discussions. ECF No. 43.

While the case was stayed, Plaintiffs' counsel engaged in informal discovery related to both the scope of the Class and amount of potential relief. Declaration of Joseph Creitz In Support of Class Certification, filed contemporaneously, at ¶11. As part of this discovery, Defendants provided Plaintiffs' counsel with relevant data on Class Members, including each of their years of Pre-Acquisition Service.

Id. . Using this data, Plaintiffs' actuary calculated the benefit that each Class Member would have had if credited with their years of Pre-Acquisition Service. *Id.*. The aggregate total was approximately $9.1 million before interest. *Id.* After the calculations were performed, the Parties mediated before Retired Magistrate Judge Morton Denlow in Chicago on July 26, 2016. *Id*. After mediating for almost 10 hours, the Parties reached agreement on the essential terms of a settlement. *Id.*

II. TERMS OF THE SETTLEMENT

A. Benefits to Class Members

Under the Settlement, Defendants have agreed to resolve the claims of Plaintiffs and the Class for $5.5 million (plus interest at an agreed-upon rate from July 26, 2016), have agreed to have the Plan recognize the amount of benefit paid as provided under the Plan of Allocation, and have agreed not to recoup any "overpayments" from other Class Members who received and retained pension benefit payments that included their years of pre-acquisition service. Settlement Agreement ¶¶ IV.A-C. Out of the $5.5 million, an amount will be deducted to pay attorneys' fees and expenses, and after payment of any court-approved attorneys' fees and expenses, the remaining amount (the Net Settlement Amount) will be allocated to Class Members pursuant to the Plan of Allocation proposed by Class Counsel and subject to approval by the Court. *Id.* ¶ IV.A.

The Settlement provides that the Net Settlement Amount will be allocated among participants through the UCB Pension Plan (which is intended to preserve

the tax-favored nature of these payments). *Id.* Class members entitled to an allocation from the Net Settlement Amount will receive distributions consistent with the manner in which they elect (or previously elected) to receive their benefits. Class members who previously elected a lump sum payment will be provided a distribution within the later of (a) 30 days after which the Class member submits all appropriate documentation under the Plan or (b) 60 days from the date on which the Settlement becomes Non-Appealable. *Id.* ¶ VI.A.1. With respect to Class Members who elected to receive their pension in the form of an annuity and have already been receiving annuity payments, they will receive an increased annuity going forward, and with respect to annuity payments previously made to such Class Members, they will, within 60 days of the date on which the Settlement becomes Non-Appealable, be provided with a restorative payment representing the difference between the prior monthly payments received and the adjusted annuity amount, with interest. *Id.* ¶ VI.A.2. For all other Class Members, they will receive a distribution in the same time and manner that they receive other benefits under the Plan. *Id.* ¶ VI.A.3. Within 30 calendar days after entry of the final order and judgment approving the settlement (the "Final Order"), Defendants will provide Class Members who are entitled to start receiving payments as of the date of the Final Order with the necessary forms required by the UCB Plan to elect and receive a distribution of benefits under the Plan. *Id.* Defendant also will provide

such Class Members an updated statement of their benefits. *Id.* For Class Members who both (a) are entitled to begin receiving payments under the UCB Plan as of the date on which the Final Order is entered and (b) submit the necessary forms required by the UCB Plan to elect and receive a distribution of benefits under the Plan within 30 calendar days after the Final Order becomes Non-Appealable, Settlement payments to such Class Members will begin within 60 calendar days of the date on which the Final Order becomes Non-Appealable. *Id.*

The Settlement requires Defendants to bear the costs incurred in administering the Settlement (other than the costs incurred by Plaintiffs or Class Counsel and costs of posting notice on a website provided by Class Counsel, which will be paid out of the Settlement to the extent approved by the Court). *Id.* ¶¶ III.D, IV.G. The Settlement ensures that none of Defendants' costs to implement and administer the Settlement will result in a charge or an expense to Class Members. *Id.* at ¶ VII.C.

In exchange for these benefits, the Settlement Class will release Defendants and certain other Releasees from all claims that were or could have been asserted arising out of the events alleged in the Complaint or alleged in the administrative claims brought by Plaintiffs. *Id.* ¶ XIII.A. Notably, the released claims are expressly tied to the events arising out of the events alleged in the Complaint or administrative claims brought by Plaintiffs. *Id*. The events on which the Complaint

was based concerned the entitlement to pre-acquisition service credit, disclosures related to pre-acquisition service credit, the procedures and disclosures related to recalculation of pension benefits related to pre-acquisition service credit, and the procedures related to the administrative process whereby Plaintiffs challenged the recalculation of their benefits related to pre-acquisition service credit and attempted or actual recoupment of monies previously paid by the UCB Plan related to pre-acquisition service credit. Compl. ¶ 140, 151-155, 174, 181-183, 191, 200, 228-233. Equally important is a provision requiring Defendants to release all claims against Plaintiffs and the Class that Defendants could have asserted arising out of the facts or claims asserted in the Compliant, including any recoupment claims. Agmt. ¶ XIII.B. In short, both sides are releasing claims relating to pre-acquisition service credit at Northampton or Whitby.

III. THE PROPOSED SETTLEMENT MERITS PRELIMINARY APPROVAL

"Public policy strongly favors the pretrial settlement of class action lawsuits." *In re U.S. Oil & Gas Litig.*, 967 F.2d 489, 493 (11th Cir. 1992). To protect the interest of the class, Federal Rule of Civil Procedure 23(e) provides that a class action cannot be settled without court approval. Fed. R. Civ. P. 23(e). Approval under Rule 23(e) involves a two-step process in which the Court (1) determines whether a proposed class action settlement deserves preliminary approval and if so, directs notices to the Class for comment and then (2) after

notice is given to class members, the Court determines whether final approval is warranted. *See Melanie K. v. Horton*, No. 1:14-CV-710-WSD, 2015 WL 1799808, at *2 (N.D. Ga. Apr. 15, 2015) ("Approval is generally a two-step process in which a preliminary determination on the fairness, reasonableness, and adequacy of the proposed settlement terms is reached.").

The request for preliminary approval only requires an "initial evaluation" of the fairness of the proposed settlement. *Manual for Complex Litigation*, § 21.632 (4th ed. 2004). The purpose of preliminary approval is to determine "whether to direct notice of the proposed settlement to the class, invite the class's reaction, and schedule a fairness hearing." 4 William B. Rubenstein et al., *Newberg on Class Actions* § 13:10 (5th ed. 2013). Because the approval is only preliminary, courts generally undertake a limited review of the proposed settlement. *Id*. "The general rule is that a court will grant preliminary approval where the proposed settlement is neither illegal nor collusive and is within the range of possible approval." *Id*.

Two different standards have been used by courts within the Eleventh Circuit when considering whether to preliminarily approve a proposed class action settlement. Some courts find "[p]reliminary approval is appropriate where the proposed settlement is the result of the parties' good faith negotiations, there are no obvious deficiencies and the settlement falls within the range of reason." *In re Checking Account Overdraft Litig.*, 275 F.R.D. 654, 661 (S.D. Fla. 2011) (internal

quotations omitted). Other courts apply the factors used at the final approval stage, known as the *Bennett* factors:

> (1) the likelihood of success at trial; (2) the range of possible recoveries; (3) the point on or below the range of possible recoveries at which a settlement is fair, adequate and reasonable; (4) the complexity, expense and duration of litigation; (5) the substance and degree of opposition to the settlement; and (6) the stage of the proceedings at which the settlement was achieved.

Columbus Drywall & Insulation, Inc. v. Masco Corp., 258 F.R.D. 545, 558-59 (N.D. Ga. 2007) (quoting *Bennett v. Behring Corp.*, 737 F.2d 982, 986 (11th Cir. 1984)). Under either standard, the proposed Settlement warrants preliminary approval.

A. The Proposed Settlement is the Result of Good Faith Negotiations, Is Not Obviously Deficient, and Falls Within the Range of Reasonableness

The proposed Settlement is the result of good faith negotiations and is reasonable. "[A] presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arms-length negotiations between experienced, capable counsel after meaningful discovery." *In re Checking Account Overdraft Litig.*, 275 F.R.D. at 661-62. A court is "entitled to rely on the judgment of experienced counsel for the parties" in evaluating settlement. *Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977). A settlement is the result of good faith negotiations where it is reached after arms-length negotiations. *See Nelson v. Mead Johnson & Johnson Co.*, 484 F. App'x 429, 435 (11th Cir. 2012) (finding no

collusion in a settlement agreement that was reached as a "result of extensive arms-length negotiations moderated by a court-appointed mediator"). The presence of a mediator "lends further support to the absence of collusion." *Ingram v. The Coca-Cola Co.*, 200 F.R.D. 685, 693 (N.D. Ga. 2001) (finding the fact that the entire mediation was conducted under the auspices of a highly experienced mediator weighs against collusion). Likewise, that experienced counsel has been actively engaged in the litigation and diligently pursued the necessary discovery evidences the non-collusive nature of the settlement. *In re Motorsports Merch. Antitrust Litig.*, 112 F. Supp. 2d 1329, 1338 (N.D. Ga. 2000) (approving settlement and finding it was "was reached by arms-length negotiations after extensive discovery").

The Settlement here resulted from hard fought and arms-lengths negotiations, the principle terms of which were negotiated with the assistance of an experienced mediator, former Magistrate Judge Morton Denlow. Creitz Decl. ¶ 12. After Class Counsel received requested data regarding each participant's account, the parties mediated in Chicago on July 26, 2016. *Id.* After executing a Term Sheet on July 26, 2016, the Parties spent additional time formalizing the detail terms of the formal agreement and finalizing them in the Settlement Agreement before its execution on January 17, 2017. *Id*. The Settlement confers significant monetary benefits and injunctive relief that prohibits UCB from trying to recoup

any pension payments previously paid to Class Members. Agmt. XIII.B. Accordingly, the Settlement is within the range of reasonableness and the product of negotiations between the Parties conducted at arm's length.

B. Preliminary Approval is Appropriate Under the *Bennett* Factors

1. The Settlement Should be Preliminarily Approved Given the Uncertainty of Success

Settlement is favored where "success at trial is not certain for Plaintiff[s]." *Burrows v. Purchasing Power, LLC*, No. 1:12cv228800, 2013 WL 10167232, at *6 (S.D. Fla. Oct. 7, 2013). Courts, including the Eleventh Circuit, recognize that ERISA actions present complex issues, which makes settlement a favorable option given the risk of trying such cases. *See Gilley v. Monsanto Co.*, 490 F.3d 848, 852 (11th Cir. 2007) (remarking that ERISA cases present a level of complexity and challenge that Justice Holmes would have enjoyed); *In re Delphi Corp. Sec., Derivative & "ERISA" Litig.*, 248 F.R.D. 483, 496 (E.D. Mich. 2008) (granting settlement and reasoning the risk of litigation "is even more acute in the complex areas of ERISA law"); *In re Marsh ERISA Litig.*, 265 F.R.D. 128, 138 (S.D.N.Y. 2010) ("many courts have recognized the complexity of ERISA breach of fiduciary duty [cases]").

While Plaintiffs are confident in the merits of their claims, the risks involved in prosecuting a class action through trial cannot be ignored. This is a complex ERISA class action that originally alleged ten causes of action. Defendants dispute

many of the allegations in the Complaint and deny any wrongdoing or liability. Agmt. at p. 4. The Court dismissed five claims – including most of the breach of fiduciary duty claims – primarily based on statute of limitations. Plaintiffs recognize that while they believe their remaining claims are strong, they are all subject to potential defenses and arguments. Further, "the class might not prevail on the threshold issue of class certification," which also favors approving the settlement. *See Ingram,* 200 F.R.D. at 689 (analyzing the likelihood of success at trial and reasoning the uncertainty of a class being certified also favored settlement). Given these uncertainties and the risks inherent in proceeding with litigation, the Settlement should be preliminarily approved.

2. **The Settlement Is Within the Range of Possible Recoveries**

"The Court must [] establish the range of possible damages that could be recovered at trial and then combine this assessment with plaintiffs' likelihood of prevailing at trial and other relevant factors to determine whether the settlement falls at a point in the range that is fair to the class." *In re Motorsports Merch.Litig.*, 112 F. Supp. 2d at 1334 (Thrash, J.). Without pre-judgment interest, Plaintiffs' actuary calculated (using Defendants' data) that the total value of the class's years of pre-acquisition service amounted to $9.1 million. Creitz Decl. ¶ 11. Of course, the total value would increase depending on the rate at which the Court awarded pre-judgment interest, which is in the discretion of the Court. *Florence*

Nightingale Nursing Serv., Inc. v. Blue Cross/Blue Shield of Ala., 41 F.3d 1476, 1484 (11th Cir. 1995) ("The award of an amount of prejudgment interest in an ERISA case is a matter committed to the sound discretion of the trial court."). If the Court awarded interest at Georgia's generous post-judgment interest rate of 6.5%, Plaintiffs' actuary calculated that the total amount would increase to about $12 million. Creitz Decl. ¶ 11. But the Court may provide an award at a lower rate.

Based on Defendants' data and the calculations of Plaintiffs' actuary, the Settlement's monetary benefit of $5.5 million results in a recovery of 49% to 65% of the total value of Plaintiffs' pre-acquisition years of service, depending on whether interest is included. Such a result is well within the range of possible recovery. *See In re Checking Account Overdraft Litig.*, No. 1:09-MD-02036-JLK, 2013 WL 11319244, at *1 (S.D. Fla. Aug. 2, 2013) (approving class settlement that recovered 51% of probable damages as "a very fair settlement"). Courts in this District and this Circuit have approved settlements with no monetary relief. *E.g.*, *Hillis v. Equifax Consumer Servs., Inc.*, No. 104cv3400, 2007 WL 1953464, at * 4 (N.D. Ga. June 12, 2007) (approving settlement that provided class members in-kind benefits and injunctive relief but not a separate cash component). Further, given that "had the parties not reached the settlement[], tremendous resources of the parties and the Court would have been expended in an attempt to obtain a

judgment," the proposed Settlement should be approved. *In re Motorsports Merch.*, 112 F. Supp. 2d at 1335 (approving a settlement of antitrust claims relating to sales of NASCAR merchandise that had a cash payment of $5.6 million) (Thrash, J.); *Columbus Drywall*, 258 F.R.D. at 559 (approving $37.5 million settlement as within range of possibility though defendants faced over $250-$270 million in liability because of "the contingencies involved with continued litigation").

3. The Settlement is Above the Range of Possible Recovery at Which Settlement is Fair, Adequate, and Reasonable

The Court must determine whether the Settlement "falls within the range of reasonableness, not whether it is the most favorable possible result in the litigation." *In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. 297, 319 (N.D. Ga. 1993). If the settlement "is reasonable in light of the costs and risks hindering a Plaintiff's recovery, then it is likely fair, adequate and reasonable." *In re Motorsports Merch.*, 112 F. Supp. 2d at 1335. This factor should take into account "that compromise is the essence of a settlement." *In re Domestic Air Transp.*, 148 F.R.D. at 320.

This Settlement has two components: a monetary benefit based on Class Members' pre-acquisition service credits for the years worked at Northampton or Whitby, and injunctive relief. Both provide value to the class. *Hillis*, 2007 WL 1953464, at * 4 (approving settlement that included "the benefit of injunctive

relief"). The $5.5 million monetary settlement amount represents 60% of the aggregate value of the Class's years of Pre-Acquisition Service (as calculated by Plaintiffs' actuary). As courts have routinely approved settlements for a substantially smaller fraction of recovery, a 49% to 65% recovery of the aggregate value of the Class's Pre-Acquisition Service is well within the range of possible recovery and significantly higher than the average recovery in class action settlements. *E.g. In Domestic Air*, 148 F.R.D. at 325 (approving settlement equal to 12.7 to 15.3 percent of the potential recovery before trebling); *Columbus Drywall*, 258 F.R.D. at 559 (citing cases that approve settlements for "for low fractions of potential recovery"); *Faught v. Am. Home Shield Corp.*, 668 F.3d 1233, 1238 (11th Cir. 2011) (upholding settlement that did not offer a monetary component but permitted class members to re-submit home warranty claims in case alleging that defendants wrongly denied claims under home warranty contracts). Recognizing that settlement is the essence of compromise, this settlement falls well within the range of possible recoveries and "is reasonable in light of the costs and risks hindering [Plaintiffs'] recovery," making it likely to be "fair, adequate, and reasonable." *In re Motorsports Merch.*, 112 F. Supp. 2d at 1335.

4. The Settlement Should be Approved Given the Complexity, Expense, and Duration of Further Litigation

A "[s]ettlement [that] will alleviate the need for judicial exploration of . . . complex subjects, reduce litigation costs, and eliminate the significant risk that

individual claimants might recover nothing" merits preliminary approval. *Lipuma v. Am. Express Co.*, 406 F. Supp. 2d 1298, 1324 (S.D. Fla. 2005). The Court should also consider whether the Class will "obtain[] a significant benefit from the relatively rapid litigation and settlement of this case." *Ingram*, 200 F.R.D. at 690. At the time the Parties reached a settlement agreement, this case was in its infancy. The only significant development was briefing and a decision on the motion to dismiss. Plaintiffs would have had to seek certification of a class, which was likely to be opposed, conduct a fair amount of discovery, and would have surely faced summary judgment motions, all of which would have assured that "expenses associated with this action [would] only grow if litigation proceeds." *Columbus Drywall*, 258 F.R.D. at 559; *In re Motorsport Merch.*, 112 F. Supp. 2d. at 1338 (approving settlement in which the Parties still faced summary judgment motions, class certification, trial, and possible appeals). Even if Plaintiffs succeeded on summary judgment or trial, they would have faced the prospect of an appeal.

Having exchanged mediation statements regarding the merits of the case, each party had sufficient opportunity to assess the strengths and weaknesses of the case. *Ingram*, 200 F.R.D. at 691 (finding the current stage of that litigation supported settlement where mediation presentations informed each side of the merits of the case). As "the settlement offers plaintiffs the opportunity to obtain an immediate, certain recovery" the Settlement warrants preliminary approval.

Columbus Drywall, 258 F.R.D. at 559; *In re Domestic Air Transp.*, 148 F.R.D. at 326 (approving settlement of complex matter that faced trial and potential appeal and reasoning it was "proper to take the bird in the hand instead of a prospective flock in the bush"). The immediacy of payment is particularly important here where the payments concern retirement payments (and monies on which Class Members were counting on to receive).

5. **There Is No Opposition to the Settlement**

Some courts do not consider this factor until notice has been provided to settlement class members. *See Columbus Drywall*, 258 F.R.D. at 560 (concluding the court could not address this factor "because no notice has . . . been provided to the class members); *Melanie*, 2015 WL 1799808, at *3 (granting preliminary approval of class settlement where there was no apparent opposition to the settlement). Here, all of the Plaintiffs are on-board with the settlement. And if the Court grants preliminary approval, Notice will be sent to the Class Members and will inform them of the opportunity to object.

6. **The Stage of Proceedings Allowed Plaintiffs to Evaluate the Merits of the Case and the Settlement Relief**

This Circuit has long encouraged settlements to be reached in early stages of litigation. *See, e.g.*, *Cotton*, 559 F.2d at 1332 (approving settlement reached before summary judge and though "very little formal discovery was conducted" and reasoning that too often cases are "over discovered," which "wast[es] the time of

[the] Court, the parties and their attorneys[;] it often adds unnecessarily to the financial burden of litigation and may often serve as a vehicle to harass a party). This Settlement warrants preliminary approval as it provides the Class an added benefit of being reached in the relatively early stages of the litigation, avoiding what was sure to be costly discovery and expert fees. Further, it was reached after the parties were well informed of the merits of the case through the exchange of settlement briefs and hours of intensive negotiations conducted through the experienced retired Judge Denlow.

IV. THE PROPOSED PLAN OF ALLOCATION IS FAIR AND REASONABLE AND SHOULD BE PRELIMINARILY APPROVED

Courts apply the same standard of review "to the review of the allocation agreement as it does to the review of the overall settlement between plaintiffs and defendants." *In re Chicken Antitrust Litig. Am. Poultry*, 669 F.2d 228, 238 (5th Cir.1982). That is, a plan of allocation will be approved when it "provides a fair and reasonable basis upon which to allocate the fund." *Carpenters Health & Welfare Fund v. Coca-Cola Co.*, 587 F. Supp. 2d 1266, 1275 (N.D. Ga. 2008). A plan of allocation is "reasonable" if it reimburses class members based on the type and extent of their damages. *In re Ikon Office Sols., Inc., Sec. Litig.*, 194 F.R.D. 166, 184 (E.D. Pa. 2000). A class action settlement need not "benefit all class members equally." *Holmes v. Cont'l Can Co.*, 706 F.2d 1144, 1148 (11th Cir.

1983) (upholding settlement that provided for "higher allocations to certain parties" because they were "rationally based on legitimate considerations").

The proposed Plan of Allocation here was prepared with the assistance of Class Counsel's actuary. By basing Class Members' distributions on the relative strength of each Class Member's claim, the Plan of Allocation provides a reasonable, rational basis for Class Members to recover their present value pro rata share of the Net Settlement Amount. The Plan of Allocation distributes the Net Settlement Amount by grouping Class Members into one of three categories: (1) those that received a letter in 2011/2012 informing them that their pension benefits would not include credit for years worked at Northampton and Whitby (after previously being provided statements of benefits that were calculated with pre-acquisition service credit), (2) those that received a letter in 2011/2012 informing them that their pension benefits would not include credit for years worked at Northampton and Whitby, and who had previously received payment from the UCB Plan reflecting credit for such service and who did not return the payment to UCB or the UCB Plan, and (3) everyone else. *See* Plan of Allocation ¶ 2(a)-(c). Class Members will be allocated a percentage of the Net Settlement Amount based on their Recognized Claim. For Group 1 Class Members, their Recognized Claim will be based on the benefit they would have received if they received credit for 100% of the years they worked at Northampton or Whitby. *Id.* ¶ 3(a). Group 2

Class Members will not receive a monetary distribution, because they have already received and retained benefit payments reflecting the years they worked at Northampton and Whitby; however, the UCB Plan will be amended so that the Plan terms conform to the benefit payments these participants already received and retained. *Id.* ¶ 3(b). For Group 3 Class Members, their Recognized Claim will be calculated based on the benefit they would have received if they received credit for 50% of the years they worked at Northampton or Whitby and additional amount based on certain post-acquisition service with UCB. *Id.* ¶ 3(c).

This proposed division in the Plan of Allocation is equitable because it distributes the settlement based upon the timeliness and strength of each Class Member's claims. Specifically, those in Group 1 probably have the strongest claims because they do not face the same statute of limitations defenses as other Class Members and have facts more favorable to the merits as those participants were told in writing before the 2012 letters that their pensions would include the years they worked for Northampton and Whitby. The Group 2 Class Members will not receive a monetary distribution from the settlement because they have already received pension benefits that included the years they worked for Northampton and Whitby and have not returned any of those paid benefits to UCB. The Group 2 Class Members will receive the benefit of the settlement's injunction prohibiting Defendants from seeking to recover what it claims are "over paid" benefits and

with the goal of providing tax protections through a UCB Plan amendment that will recognize the benefit payments these participants already received and retained. Finally, the proposed Plan of Allocation is fair to the Group 3 Class Members because it discounts the percentage of the Net Settlement Amount for those individuals based upon the timeliness of their claims. For example, members with the oldest claims (that is those who left UCB in 1994) will be entitled to a percentage of the Net Settlement amount that is calculated based on the benefit they would have received if they received credit for 50% of the years they worked for Northampton or Whitby. This provides for an equitable distribution of the Settlement, making the proposed Plan of Allocation fair and reasonable, which warrants preliminarily approval. *See In re Sunbeam Sec. Litig.*, 176 F. Supp. 2d 1323, 1328 n.2 (S.D. Fla. 2001) (approving Plan of Allocation where it would "equitably distribute the settlement fund" and was fair, adequate, and reasonable).

V. THE COURT SHOULD ESTABLISH DATES FOR FAIRNESS HEARING AND FINAL APPROVAL OF THE SETTLEMENT

Plaintiffs request a date for the Final Approval Hearing to provide for a sufficient amount of time for the mailing of the Class Notice for Class Members to file any objections to or, if applicable, requests for exclusion from the Settlement, and for Class Counsel to respond to any objections. As such, Plaintiffs' counsel requests that the Court enter the proposed Order filed herewith, stay all

proceedings in the litigation other than those proceedings necessary to have the Settlement finally approved, and establish the dates set forth below:

Last day for Defendants to send the Settlement Class Notice to settlement Class Members	30 days after the Preliminary Approval Date
Last day for Defendants to file Declaration regarding settlement class notice	30 days after date on which Class Notice required to be sent
Last day for Class Counsel to file motion for award of attorneys' fees and costs	45 days after the Preliminary Approval Date
Last day for Settlement Class Members to file objections to the settlement	45 days after Class Notice is Sent
Last day for Class Counsel to file motion for final approval of settlement	75 days after the Preliminary Approval Date
Hearing on motion for final approval of settlement and application for attorneys' fees and costs	At least 110 days after filing of Motion for Preliminary Approval

VI. CONCLUSION

For the foregoing reasons, the Court should grant Plaintiffs' motion for preliminary approval of the Settlement and enter the proposed Order filed herewith.

Dated: January 17, 2017

Respectfully submitted,

/s/ Stephen Anderson

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LOCAL RULE 7.1(D) CERTIFICATION

The undersigned counsel certifies that the foregoing document has been prepared with one of the font and point selections approved by the Court in LR 5.1(B).

/s/ Joseph A. Creitz
Joseph A. Creitz

CERTIFICATE OF SERVICE

I hereby certify that I have on this day caused to be filed electronically via CM/ECF a true copy of the foregoing **PLAINTIFFS' MEMORANDUM IN SUPPORT OF THEIR MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT & PLAN OF ALLOCATION** in the United States District Court for the Northern District of Georgia, with notice of same being electronically served by the CM/ECF system, addressed to the following:

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This 17th day of January, 2017.

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