IN THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

Robert Berry, individually and on behalf of all others similarly situated,

Plaintiff,

v.

Wells Fargo & Company, Wells Fargo Clearing Services, LLC, Wells Fargo Advisors Financial Network, LLC, and Does 1-50,

Defendants.

C/A No. 3:17-00304-JFA

ORDER

This matter is before the Court on Plaintiff Robert F. Berry's ("Plaintiff") Motion for Class Certification ("Motion") pursuant to Rule 23 of the Federal Rules of Civil Procedure. Defendants Wells Fargo & Company, Wells Fargo Clearing Services, LLC, and Wells Fargo Advisors Financial Network, LLC (collectively "Defendants") oppose Plaintiff's Motion in its entirety. This Motion has been fully briefed and is, therefore, ripe for review.

I. FACTUAL HISTORY

Plaintiff worked as a financial advisor for Defendant Wells Fargo Clearing Services, LLC f/k/a Wells Fargo Advisors, LLC ("WFA") and its predecessors from 1994 until 2014. *See* Am. Compl. (ECF No. 22) at ¶ 4. From 2005 to 2014, he participated in the WFA Performance Award Contribution and Deferral Plan (the "Deferral Plan"), which provides retirement benefits to WFA's financial advisors. *See id.* at ¶¶ 17, 32-33. Defendants classify the Deferral Plan as a "top hat" plan available for "a select group of management and other highly compensated employees . . . ." *See id.* at ¶ 34.

Financial advisors can earn two types of deferred compensation under the Deferral Plan: performance awards and special awards. *See, e.g.*, 2012 PCG Compensation Plan at p. 14) (CONFIDENTIAL); *see also* 2015 PCG Compensation Plan at p. 8 of 28) (CONFIDENTIAL). WFA grants "special awards" in order to recruit financial advisors to join WFA. *See* 2014 Deferral Plan Document at § 5.03; *see also* Citro Tr. at p. 132 (CONFIDENTIAL).

See Citro Tr. at pp. 64, 73-74) (CONFIDENTIAL); *see also* Swiezynski Tr. at pp. 80-81 (CONFIDENTIAL). the Wells Fargo, LLC Performance Award Contribution Plan (the "Contribution Plan"). *See* Citro Tr. at p. 64) (CONFIDENTIAL); *see also* Swiezynski Tr. at pp. 80-81 (CONFIDENTIAL). All Deferral Plan participants are subject to the terms of the Deferral Plan Document. *See, e.g.*, 2014 Deferral Plan Document generally.

WFA creates an account for each participant for each award in the Deferral Plan and each award has a vesting schedule that starts when the award is granted and is not based on the number of years the participant has worked for WFA. *See id.* at §§ 5.01-5.02. Each account has either a cliff vesting formula (i.e. vests all at once) or an installment schedule. *See id.* at §§ 5.02(A)-(B). Section 5.05 of the Deferral Plan contains a "Forfeiture Clause" under which participants forfeit the unvested portions of their accounts when they leave WFA. *See id.* at § 5.05; *see also* Am. Compl. at ¶ 44. There are exceptions if the participant (a) dies; (b) is laid off; or (c) is at least 50 years old, has worked for WFA for at least three years, and agrees not to work in any capacity for

a bank, investment advisor, mutual fund, insurance company, or financial planner for three years. *See* 2014 Deferral Plan Document at §§ 3.15, 3.24, 3.29, and 5.05.

In 2014, when he was 62 years old and had worked for WFA for 20 years, Plaintiff left WFA and later began working as a financial advisor for another company. *See* Am. Compl. at ¶ 5. [redacted] *See* Swiezynski Tr. at pp. 104-05 (CONFIDENTIAL). As a result of the Forfeiture Clause, Plaintiff forfeited nearly $200,000 of deferred compensation. *See* Forfeiture Report, BERRY000001 (CONFIDENTIAL); *see also* Swiezynski Tr. at pp. 104-05 (CONFIDENTIAL). Plaintiff was one of [redacted] Deferral Plan participants whose deferred compensation was forfeited under the Forfeiture Clause [redacted] *See* Defs Supp. Resp. to First Set of Rogs) (CONFIDENTIAL).

Plaintiff brought a claim to require Defendants to recover deferred compensation forfeited from the Deferral Plans of Plaintiff and other current and former WFA employees allegedly in violation of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001, *et seq*. (ECF Nos 1, 22). Plaintiff now moves for class certification to pursue injunctive relief and damages against Defendants for violations of ERISA. (ECF No. 62). Defendants oppose Plaintiff's Motion in its entirety. (ECF No. 66).

II. PROCEDURAL HISTORY

On February 1, 2017, Plaintiff filed his initial Complaint (ECF No. 1) and filed his First Amended Class Action Complaint ("the Complaint") (ECF No. 22) on May 1, 2017. Defendants filed their Answer and Motion to Dismiss in Part on May 22, 2017. (ECF Nos. 25-26). Plaintiff

originally sought to pursue claims on behalf of participants in the Deferral Plan and the Contribution Plan. Defendants moved to dismiss Plaintiff's claims related to the Contribution Plan.

On July 31, 2017, the Court granted Defendants' Motion to Dismiss in part, and concluded that Plaintiff did not have standing to pursue claims under the Contribution Plan (Count II) because he was not a participant in that plan and had suffered no injury related to that plan. (ECF No. 47 at 8). The Court also dismissed Plaintiff's claim that Defendants violated ERISA's reporting and disclosure provisions (Count III) for lack of standing because Plaintiff failed to allege that he suffered an injury from being denied information. (ECF No. 47 at 13).

On March 3, 2018, Plaintiff filed his Motion. (ECF No. 62). Defendants responded with their Memorandum in Opposition to Plaintiff's Motion. (ECF No. 66). Plaintiff thereafter filed a Reply brief in further support of his Motion. (ECF No. 70).

III. LEGAL STANDARD

District courts have "wide discretion in deciding whether or not to certify a proposed class[.]" *In Re A.H. Robins Co., Inc.*, 880 F.2d 709, 728 (4th Cir. 1989) (quoting *Jenkins v. Raymark Indus., Inc.*, 782 F.2d 468, 471-72 (5th Cir. 1986), *abrogated by Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997)). To obtain certification, "a proposed class must satisfy Rule 23(a) and one of the three sub-parts of Rule 23(b)" of the Federal Rules of Civil Procedure. *Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, at 318 (4th Cir. 2006) (citing *Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 423 (4th Cir. 2003)).

Courts also read into Rule 23 two implied requirements for class certification: that there be "an identifiable class and that the plaintiff or plaintiffs be a member of such class." *In re A.H. Robins*, 880 F.2d at 728. Courts require plaintiffs to establish by a preponderance of the evidence

that the action complies with each part of Rule 23. *Brown v. Nucor Corp.*, 785 F.3d 895, 931 (4th Cir. 2015).

IV. ANALYSIS

Plaintiff seeks class certification for his two remaining claims, Count I and Count IV. In Count I, Plaintiff seeks declaratory relief that the Deferral Plan is not a "top hat" plan under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), that the Deferral Plan is subject to ERISA's vesting and anti-forfeiture requirements, and that the Forfeiture Clause in the Deferral Plan is invalid and unenforceable under ERISA. *See* (ECF No. 62-1 at 11); *see also* Am. Compl. at ¶¶ 64-69. Plaintiff also seeks a permanent injunction directing all Defendants to bring the Deferral Plan into compliance with ERISA, remedy all past violations of ERISA, remedy all past enforcement of the Forfeiture Clause in the Deferral Plan, including by reversing all past forfeitures of performance awards and special awards, and refrain from enforcing the Forfeiture Clause in the future. *See* (ECF No. 62-1 at 11); *see also* Am. Compl. at ¶¶ 64-69.

In Count IV, Plaintiff seeks damages on behalf of the Deferral Plan from the Plan Fiduciary Defendants (as defined in Am. Compl. at ¶¶ 8-9) for breach of fiduciary duty under ERISA § 404, 29 U.S.C. § 1104, by invoking the Forfeiture Clause and seeks to enjoin the Plan Fiduciary Defendants from continuing to violate their fiduciary duties. *See* (ECF No. 62-1 at 11); *see also* Am. Compl. at ¶¶ 85-94.

Plaintiff proposes the following class ("Class") definition:[1]

> All participants in the Wells Fargo Advisors Performance Award Contribution and Deferral Plan (the ["]Deferral Plan["]) since February 1, 2011, who earned deferred

[1] The Class is narrower than the class alleged in the Complaint (*see* Compl. at ¶ 54) to comply with the Court's July 31, 2017 Order (ECF No. 47). It is within the Court's discretion to adopt this modified definition. *See, e.g.*, *Brooks v. GAF Materials Corp.*, 284 F.R.D. 352, 360 (D.S.C. 2012) ("A district court has broad discretion in determining whether to modify . . . a class.") (citing *Gen. Tel. Co. of the SW v. Falcon*, 457 U.S. 147, 160 (1982)).

> compensation under the Deferral Plan and were denied compensation under the Deferral Plan's Forfeiture Clause (§ 5.05).[2]

(ECF No. 62-1 at 11-12).

A. Plaintiff Has Standing to Pursue Count I.

Defendants object to Plaintiff's Motion by alleging Plaintiff does not have standing to pursue Count I. (ECF No. 66 at 16). Count I seeks a declaration that the Deferral Plan violates ERISA's vesting rules and an injunction requiring Defendants to "[r]emedy all past enforcement of the Forfeiture Clause" under ERISA § 502(a)(3). Am. Compl. at ¶ 68. That provision of ERISA allows a participant, beneficiary, or fiduciary "to obtain other appropriate equitable relief" to redress violations of parts of ERISA "or the terms of the plan." 29 U.S.C. § 1132(a)(3).

To have Article III standing, a plaintiff must demonstrate that: (1) he has "suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs*., 528 U.S. 167, 180-81 (2000) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)).

Defendants focus on the redressability element of standing to argue that Plaintiff cannot identify any injury-in-fact he has suffered (or could suffer) that would be redressed by the relief sought in Count I. (ECF No. 66 at 16). Defendants reason that Plaintiff's alleged harm is retrospective while the remedy sought is prospective. (ECF No. 66 at 16). Arguably, a declaration that the Deferral Plan is not a top hat plan would have no bearing on Plaintiff or the awards he has already forfeited. (ECF No. 66 at 16). Similarly, Defendants allege, an injunctive order directing

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[2] Former employees who withdraw all of their retirement savings from a plan or otherwise close their plan accounts, as a matter of law, are still "participants" if they have colorable claim to benefits under the plan. *See, e.g.*, *In re Mut. Funds Inv. Litig*., 529 F.3d 207, 215-16 (4th Cir. 2008).

Wells Fargo to refrain from enforcing the Deferral Plan's forfeiture provisions would not remedy the harm Plaintiff alleges. (ECF No. 66 at 16-17).

However, Plaintiff compellingly argues that a declaration is appropriate here because a "declaration is a permissible prelude to claim for damages, that is, to monetary relief for a concrete harm already suffered." *Johnson v. Meriter Health Servs. Emp. Ret. Plan*, 702 F.3d 364, 369 (7th Cir. 2012). In *Johnson v. Mertier Health Services*, subclasses of pensioners were certified and each subclass sought a "declaration of the rights of its members under the plan and an injunction directing that the plan's records be reformed to reflect those rights." *Johnson*, 702 F.3d at 365. Meriter, the company providing the pension plan, challenged class certification by arguing that former members of the plan could not obtain declaratory or injunctive relief. *Id.* at 369. The court affirmed class certification, reasoning that "Meriter's further argument that class members who are no longer participants in the plan are not entitled to declaratory or injunctive relief because such relief is forward looking and they want retrospective relief – that is, money – is silly . . . ." *Id.*

Moreover, a court can reform plan terms under ERISA § 502(a)(3) and order that benefits be paid "under the plan as reformed." *CIGNA Corp. v. Amara*, 563 U.S. 421, 440 (2011). "[T]he fact that this relief takes the form of a money payment does not remove it from the category of traditionally equitable relief," *Id.* at 441, which falls "within the scope of the term 'appropriate equitable relief' in § 502(a)(3)" that District Courts may order. *Id.* at 442. Thus, Plaintiff's injury is redressable by declaration and injunction.

Plaintiff has shown that he suffered an injury-in-fact (lost retirement benefits). He has further shown that the injury was caused by Defendants' conduct (applying the Forfeiture Clause). Moreover, Plaintiff demonstrated that his injury is redressable by Count I (reformation of the

Deferral Plan and payment of benefits under the Deferral Plan, as reformed). Thus, Plaintiff and all others similarly situated have standing to pursue Count I.

B. The Proposed Class Definition is Proper for Pursuing Count IV.

Defendants challenge Count IV by arguing that the proposed Class definition is inadequate because it fails to include current members of the Deferral Plan. (ECF No. 66 at 18). Count IV of the Amended Complaint, in part, asserts a claim under ERISA § 502(a)(2). (ECF No. 62-1 at 11). According to Defendants, Plaintiff cannot pursue that claim for similar reasons that Count I fails. ERISA § 502(a)(2) permits the Secretary of Labor, plan participant, beneficiary, or fiduciary to bring suit for "appropriate relief" under ERISA § 409. 29 U.S.C. § 1132(a)(2). Among other relief, § 409 permits a court to require a plan fiduciary to "make good to such plan any losses to the plan resulting from" a breach of fiduciary duty. 29 U.S.C. § 1109(a). The Supreme Court has interpreted this statute to limit "recovery for a violation of § 409 [to] inure[] to the benefit of the plan as a whole." *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 140 (1985). The statute's language indicates "Congress' intent that actions for breach of fiduciary duty be brought in a representative capacity on behalf of the plan as a whole." *Russell*, 473 U.S. at 142 n.9.

In their brief, Defendants argue that because a claim under ERISA § 502(a)(2) redounds to the benefit of the plan as a whole, it is brought in a representative capacity and must abide by procedural safeguards to ensure that the interests of all beneficiaries are protected. (ECF No. 66 at 18) *See, e.g.*, *Coan v. Kaufman*, 457 F.3d 250, 259-61 (2d Cir. 2006) ("[W]e do not see how an action can be brought in a 'representative capacity on behalf of the plan' if the plaintiff does not take any steps to become a bona fide representative of other interested parties." (quoting *Russell*, 473 U.S. at 142 n.9)).

Defendants acknowledge that ERISA does not require compliance with Fed. R. Civ. P. 23 but argue that a plaintiff bringing suit in a representative capacity on behalf of a plan in an ERISA case must "take adequate steps under the circumstances properly to act in" that capacity. (ECF No. 66 at 18). *Kaufman*, 457 F.3d at 260 (quoting *Russell*, 473 U.S. at 142 n.9). Though present members of the Deferral Plan have not experienced harm, Defendants argue their interests must be considered by the Class and the Class thus fails for not including current members of the Deferral Plan. (ECF No. 66 at 19).

On the other hand, Plaintiff notes that ERISA § 502(a)(2) claims are commonly made on "behalf of the plan" where the class includes only participants who have lost money in their individual plan accounts. *See* (ECF No. 70 at 8); *see also DiFelice v. U.S. Airways*, 235 F.R.D. 70, 76 (E.D. Va. 2006)). ERISA does not require that all plan participants be included in the proposed Class, because not every participant will have suffered a loss. *See* (ECF No. 70 at 9); *see also* ERISA § 409(a), 29 U.S.C. § 1109(a). Indeed, courts certifying classes in ERISA cases typically only include those participants whose plan accounts lost money due to the breach. *See* (ECF No. 70 at 9); *see also DiFelice*, 235 F.R.D. at 76 (participants who invested in U.S. Airways stock); *see also Tatum v. R.J. Reynolds Tobacco Co.*, 254 F.R.D. 59, 64 (M.D.N.C. 2008) (participants who invested in Nabisco stock). If current participants have not suffered a loss, they should not be part of the Class because ERISA fiduciaries are only liable for "losses to the plan." *See* (ECF No. 70 at 9); *see also* ERISA § 409(a), 29 U.S.C. § 1109(a).

Moreover, the *Russell* case cited by Defendants stands for the principle that "ERISA § 409 does not provide a cause of action for extra-contractual damages caused by a fiduciary's breach" but rather allows recovery of losses to a benefits plan. *DiFelice*, 235 at 76 (citing *Russell*, 472 U.S. at 148). Here, Plaintiff is not pursuing extra-contractual damages but is rather seeking to recover

losses to the Deferral Plan. Thus, Plaintiff need not include present members of the Deferral Plan, who have not sustained losses, in the Class.

Finally, Plaintiff notes that current Deferral Plan participants do not have a protectable interest in participating in an illegal plan. *See Duke Univ.*, 2018 WL 1801946, at *8; *see also Sacerdote v. New York Univ.*, 2018 WL 840364, at *4 (S.D.N.Y. Feb. 13, 2018) ("no plan participant [has] a legal interest in continuing to invest in a plan that was adjudged imprudent"). If the Deferral Plan is adjudged to be in violation of ERISA, current members have no protectable interest in maintaining that violation. Because current Deferral Plan participants do not have a protected interest in the Class, Plaintiff's proposed Class definition is proper for pursuing Count IV.

C. The Proposed Class Meets Class Certification Prerequisites Under Rule 23(a), FRCP, for Both Count I and Count IV.

To obtain Class certification under Rule 23(a), FRCP, Plaintiff must satisfy four requirements: "(1) the [C]lass is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the [C]lass; (3) the claims . . . of the representative parties are typical of the claims . . . of the [C]lass; and (4) the representative parties will fairly and adequately protect the interests of the [C]lass." Fed. R. Civ. P. 23(a). These prerequisites are often referred to as "numerosity, typicality, commonality, and adequacy of representation, with 'the final three requirements . . . tend[ing] to merge." *City of Ann Arbor Employers' Ret. Sys. v. Sonoco Prods. Co.*, 270 F.R.D. 247, 250 (D.S.C. 2010) (quoting *Gariety v. Grant Thornton*, 368 F.3d 356, 362 (4th Cir. 2004)).

As an initial matter, the Court should "consider the definition of the [C]lass itself when determining the appropriateness of [C]lass certification," *Kirkman v. N.C. R.R. Co.*, 220 F.R.D. 49, 53 (M.D.N.C. 2004), in order to determine whether it is "precise, objective, and ascertainable

. . . [and whether it] captures all individuals or entities necessary for the efficient and fair resolution of common questions of fact and law in a single proceeding." Barbara J. Rothstein & Thomas E. Willging, *Managing Class Action Litigation: A Pocket Guide for Judges* 10 (3d ed. 2010).

As set forth below, the proposed Class meets all requirements for certification under Rule 23(a), FRCP.

1. The Proposed Class is so Numerous that Joinder of All Members is Impracticable.

To satisfy the "numerosity" requirement of Rule 23(a), FRCP, Plaintiff must demonstrate that "the [C]lass is so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). However, numerosity is not dependent on a specific number of Class members. *Brady v. Thurston Motor Lines*, 726 F.2d 136, 145 (4th Cir. 1984) (quoting *Cypress v. Newport News Gen. & Nonsectarian Hosp. Ass'n*, 375 F.2d 648, 653 (4th Cir. 1967)). Further, "[t]here is no mechanical test for determining whether in a particular case the requirement of numerosity has been satisfied." *Kelley v. Norfolk & W. Ry. Co.*, 584 F.2d 34, 35 (4th Cir. 1978).

Instead, numerosity is essentially a question of the "practicability of joinder," which "depends on many factors, including, for example, the size of the [C]lass, ease of identifying its numbers and determining their addresses, facility of making service on them if joined and their geographic dispersion." *George v. Duke Energy Ret. Cash Balance Plan*, 259 F.R.D. 225, 231 (D.S.C. 2009) (quoting *Kilgo v. Bowman Transp., Inc.*, 789 F.2d 859, 878 (11th Cir. 1986)).

In fact, the Fourth Circuit affirmed a trial court's decision to certify a class of eighteen members. *See Cypress*, 375 F.2d at 653 ("We . . . are of the opinion that eighteen is a sufficiently large number to constitute a class in the existing circumstances."). Likewise, other courts have certified proposed classes consisting of a similar number of members. *See, e.g.*, *Phila. Elec. Co. v. Anaconda Am. Brass Co.*, 43 F.R.D 452, 463 (E.D. Pa. 1968) ("While 25 is a small number

compared to the size of the other classes being considered, it is a large number when compared to a single unit. I see no necessity for encumbering the judicial process with 25 lawsuits, if one will do.").

Here, the record contains sufficient evidence that the size of the proposed Class is so numerous that joinder is impractical. Indeed, [redacted] former WFA employees forfeited deferred benefits under the Deferral Plan's Forfeiture Clause [redacted] (ECF No. 62-1 at 13-14) (citing Defs' Supp. Resp. to First Set of Rogs) (CONFIDENTIAL). All of these employees would qualify as Class members. Additionally, members of the Class are located [redacted] demonstrating geographical dispersion. *See, e.g.*, ECF No. 62-4 (Citro Tr. at p. 26) (CONFIDENTIAL). Finally, Defendants did not challenge Plaintiff's numerosity assertion. As such, the proposed number of Class members satisfies the "numerosity" requirement of Rule 23(a), FRCP.

2. There are Questions of Law and Fact Common to the Proposed Class.

To satisfy the "commonality" requirement of Rule 23(a), FRCP, Plaintiff must demonstrate that "there are questions of law or fact common to the [C]lass." Fed. R. Civ. P. 23(a)(2). However, Rule 23(a)(2) "'does not require that all questions of law or fact raised in the litigation be common' . . . ." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 368–69 (2011) (quoting 1 H. Newberg & A. Conte, Newberg on Class Actions § 3.10, pp. 3–48 to 3–49 (3d ed. 1992)). In fact, "'even a single question of law or fact common to the members of the [C]lass will satisfy the commonality requirement' . . . ." *Dukes*, 564 U.S. at 369 (quoting Richard A. Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103 Colum. L. Rev. 149, 175–76 n.110 (2003)).

Such common questions of law or fact "must depend upon a common contention . . . of such a nature that it is capable of classwide resolution—which means that determination of its truth

or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Dukes*, 564 U.S. at 350. "What matters to class certification . . . is not the raising of common 'questions'—even in droves—but, rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation." *Id.* (emphasis in original) (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 132 (2009)).

Rule 23(a)'s commonality requirement is often satisfied in ERISA cases because a class of participants in the same benefit plan may assert identical legal claims arising from the same common nucleus of operative facts: "[t]he representative nature of a[n ERISA] § 502(a)(2) suit makes it almost tautological that the named plaintiff's claim is typical of the rest of the class." *Knight v. Lavine*, 2013 WL 427880, at *3 (E.D. Va. Feb. 4, 2013). In general, "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." *Breadthauer v. Lundstrom*, 2012 WL 4904422, at *2 (D. Neb. Oct. 12, 2012).

Here, common questions of law and fact exist to satisfy the "commonality" prerequisite of Rule 23(a). These common questions include:

(1) Whether the Deferral Plan qualifies as a "top hat" plan under ERISA;

(2) Whether ERISA's vesting, anti-forfeiture, and funding requirements apply to the Deferral Plan;

(3) Whether the Defendants were fiduciaries of the Deferral Plan under ERISA;

(4) Whether Defendants kept the "forfeited" amounts from the Deferral Plan accounts of Class members; and

(5) The amount of damages suffered by the Deferral Plan because of Defendants' alleged breaches of fiduciary duty.

(ECF No. 62-1 at 14).

Defendants raise two issues as to commonality: (1) whether recruiting bonuses offset forfeited awards, and (2) the statute of limitations. (ECF No 66 at 20-26).

a. Any Offset Received by Proposed Class Members Does Not Destroy Commonality.

First, Defendants argue that determining whether WFA is liable to each proposed Class member for the alleged misclassification of the Deferral Plan would not lead to a common answer because relief would have to be individually computed. (ECF No. 66 at 21). According to Defendants, the Court cannot assess whether each proposed Class member has suffered actual harm without conducting individualized "mini-trials" into the compensation package each member received upon exiting WFA (ECF No. 66 at 24). In addition to liability, Defendants further argue that the question of damages must be determined on a case-by-case basis and that equity demands the Court weigh the compensation packages each member received upon exiting WFA against the money forfeited from their Deferral Plan to avoid providing a windfall to Class members. (ECF No. 66 at 24).

In response, Plaintiff accurately notes that Defendants' offset argument is irrelevant to the issue of commonality in the present case. (ECF No. 70 at 11). A future payment by an unrelated institution may not be offset against a debt owed by Defendants because they are not mutual debts between the same debtor and creditor. *Citizens Bank of Md. v. Strumpf*, 516 U.S. 16, 19 (1995) ("The right of setoff (also called 'offset') allows entities that owe each other money to apply their mutual debts against each other. . . ."). Accordingly, Defendants cannot use payments by a third party to offset their obligation to pay participants of the Deferral Plan.

Moreover, "the Supreme Court has never limited the injury-in-fact requirement to financial losses (otherwise even grievous constitutional violations may well not qualify as an injury)."

Pender v. Bank of Am. Corp., 788 F.3d 354, 366 (4th Cir. 2015). Plaintiff can assert a claim "where a plan sponsor benefits from an ERISA violation, but plan participants—perhaps through luck or agency intervention—suffer no monetary loss." *Id.* at 365.

> Requiring a financial loss for disgorgement claims would effectively ensure that wrongdoers could profit from their unlawful acts as long as the wronged party suffers no financial loss. We reject that notion . . . . Such a result would be hard to square with the overall tenor of ERISA, a comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans.

Id. at 366 (internal citations omitted).

Any signing bonuses Class members may have received from subsequent employers are entirely irrelevant as to whether Class members can recover for their exact vested benefits and whether the Court should certify the proposed Class. As a result, the Court would not need to conduct "mini-trials" to evaluate the equitable effects of compensation plans Class members received outside of WFA. Therefore, Defendants' argument fails to defeat Plaintiff's claim of commonality under Rule 23(a), FRCP.

b. Any Statute of Limitations Issues Would Only Limit Liability, Not Defeat Commonality.

Secondly, Defendants argue that individualized issues regarding the statute of limitations preclude Class certification. (ECF No. 66 at 24). ERISA requires a plaintiff to bring a claim for breach of fiduciary duty within the earlier of

> (1) six years after (A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission the latest date on which the fiduciary could have cured the breach or violation, or (2) three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation.

29 U.S.C. § 1113.

As to Plaintiff, Defendants argue that the statute of limitations possibly bars Plaintiff's claims because the statute of limitations could have begun to run when he should have read his

Deferral Plan documents, which detail how his Deferral Plan functioned. (ECF No. 66 at 25). As to the proposed Class, Defendants argue that individualized determinations would defeat commonality and typicality. *Id.* at 26.

Defendants point to *Broussard*, where the Fourth Circuit reversed a district court's certification of a class of franchisees, holding that "tolling the statute of limitations on each of the plaintiffs' claims depends on individualized showings that are non-typical and unique to each franchisee." *Broussard v. Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331, 342 (4th Cir. 1998). Because the "trial court's analysis of equitable tolling should thus have taken the form of individualized inquiry in what each franchisee knew about [defendant's] operation . . . and when he knew it," class certification was "preclude[d]." *Broussard*, 155 F.3d at 342.

Similar issues have doomed class certification in ERISA cases as well. In *Bond v. Marriott Int'l, Inc.*, the court denied class certification under ERISA regarding administration of a retirement plan because, "'when the defendants' "affirmative defenses (such as . . . the statute of limitations) may depend on facts peculiar to each plaintiff's case," class certification is erroneous.'" *Bond v. Marriott Int'l, Inc.*, 296 F.R.D. 403, 408 (D. Md. 2014) (quoting *Broussard*, 155 F.3d at 342).

In response, Plaintiff correctly notes that Defendants did not plead the statute of limitations in their Answer and, accordingly, waived that defense. *See* (ECF No. 70 at 13); *see also* Fed. R. Civ. P. 8(c)(1) (listing "statute of limitations" as an affirmative defense). However, even if Defendants timely raised the issue, ERISA does not prescribe a statute of limitations for § 502(a)(3) claims. *Pender*, 788 F.3d at 367-68. Instead the analogous state law statute of limitations would apply, which is the ten-year provision of North Carolina law as prescribed by the Deferral Plan. (ECF No. 62-6 at § 9.04). Since Plaintiff and Class members' claims would be made within

ten years of the forfeitures that took place between 2011 and 2016,[3] the statute of limitations is not an issue for any member of the Class for Count I or Count IV claims under ERISA § 502(a)(3).

The ERISA § 502(a)(2) claim in Count IV must be brought within the earlier of six years of the breach, or three years after Plaintiff had actual knowledge of the breach or violation. ERISA § 413, 29 U.S.C. § 1113. Plaintiff suffered a loss when his benefits were forfeited, which was when the cause of action accrued, and within the three-year statute of limitations. *See* (ECF No. 62-13) (showing forfeitures [REDACTED]); *see also* (ECF No. 1) (case filed on February 1, 2017); *see also* (ECF No. 47 at 15) (Order). Thus, Plaintiff brought his ERISA § 502(a)(2) claim (Count IV) within the statute of limitations.

Moreover, even if the three-year statute of limitations applies, it would simply shorten the Class period rather than defeat Class certification. *Duke Univ.*, 2018 WL 1801946, at *6. This defense does not defeat Plaintiff's showing of commonality. At most, the defense would limit Defendants' liability to the forfeitures that occurred within three years of when this case was filed. Thus, Defendants' second argument under commonality fails to preclude certification of the Class in question.

The questions raised by Plaintiff all arise out of a common nucleus of facts and circumstances. As a general matter, the determination of these common questions will result in common answers "apt to drive the resolution of the litigation." *Dukes*, 564 U.S. at 358 (citation omitted). Therefore, the commonality prerequisite of Rule 23(a), FRCP, has been satisfied.

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[3] Plaintiff's forfeiture took place [REDACTED], Plaintiff filed suit on February 1, 2017, and certification of the class is imminent. *See* (ECF No. 62-13) (showing forfeitures [REDACTED]); *see also* (ECF No. 1) (case filed on February 1, 2017); *see also* (ECF No. 47 at 15) (Order).

3. The Claims of the Representative Party are Typical of the Claims of the Class.

To satisfy the "typicality" requirement of Rule 23(a), FRCP, Plaintiff must demonstrate that "the claims . . . of the representative part[y] are typical of the claims of the [C]lass." Fed. R. Civ. P. 23(a)(3). "The typicality requirement goes to the heart of a representative part[y's] ability to represent a class, particularly as it tends to merge with the commonality and adequacy-of-representation requirements." *Deiter v. Microsoft Corp.*, 436 F.3d 461, 466 (4th Cir. 2006).

"The representative party's interest in prosecuting his own case must simultaneously tend to advance the interests of the absent class members." *Id.* "That is not to say that typicality requires the plaintiff's claim and the claims of class members be perfectly identical or perfectly aligned." *Id.* at 467. Put simply, "[t]he essence of the typicality requirement is captured by the notion that 'as goes the claim of the named plaintiff, so go the claims of the class.'" *Id.* at 466 (quoting *Broussard*, 155 F.3d at 340).

As a general matter, the "typicality" prerequisite is satisfied in instances where plaintiffs' claims arise out of the common course of conduct of one or more defendants. *See, e.g.*, *Bates v. Tenco Servs., Inc.*, 132 F.R.D. 160, 163 (D.S.C. 1990), *order amended*, 132 F.R.D. 165 (D.S.C. 1990) ("The question of typicality focuses on the similarity of the legal and remedial theories of claims of the named and unnamed plaintiffs."). "Whether each potential member of the class has suffered the same degree of harm, or each and every type of harm, does not preclude a finding of typicality." *Bates*, 132 F.R.D. at 163.

Here, the claims of the Class representative, Plaintiff, are typical of the proposed Class because they arise out of the same conduct and are premised on the same legal theory. The Class's claims center on whether the Deferral Plan is a "top hat" plan, and are brought under ERISA § 502(a)(2) and (3), 29 U.S.C. § 1132(a)(2) and (3).

Defendants challenge the typicality of Plaintiff's claims, relying on their argument against commonality. (ECF No. 66 at 26-27). Since Plaintiff started his own business after leaving WFA, he did not receive a signing bonus from a new firm to "offset" his forfeited benefits, so Defendants argue that Plaintiff's situation is not typical of other plaintiffs who did receive such an offset. (ECF No. 66 at 27). Defendants also re-allege their standing argument. (ECF No. 66 at 27). According to Defendants, the interests of past and current Deferral Plan participants severely conflict, and since Plaintiff is a past participant, his claims are not typical of all Deferral Plan members because Plaintiff only has an interest in pursuing relief to remedy past forfeitures. (ECF No. 66 at 27).

However, common conduct and theories exist irrespective of why the Forfeiture Clause was invoked for any member of the Class. Plaintiff's claims seek to remedy the harm suffered by the Deferral Plan through ERISA. *Knight*, 2013 WL 427880, at *3 (typicality was met in an ERISA case because the claims sought to remedy the "harm to the plan"). Moreover, as previously noted, Plaintiff and the proposed Class do have standing to pursue the present action. Typicality does not require Plaintiff to represent the interests of every current and former member of the Deferral Plan but rather only those members with claims under the Class definition. Accordingly, the typicality requirement of Rule 23(a)(3), FRCP, is met.

4. The Representative Party will Fairly and Adequately Protect the Interests of the Class.

To satisfy the "adequacy-of-representation" requirement of Rule 23(a), FRCP, Plaintiff must demonstrate that he, as the "the representative part[y,] will fairly and adequately protect the interests of the [c]lass." Fed. R. Civ. P. 23(a)(4). "The principal factor in determining the adequacy of class representatives is whether the plaintiffs have the ability and commitment to prosecute the action vigorously." *S.C. Nat'l Bank v. Stone*, 139 F.R.D. 325, 329 (D.S.C. 1991).

Such inquiry "involves two issues: (i) 'whether plaintiffs have any interest antagonistic to the rest of the class'; and (ii) whether plaintiffs' counsel are 'qualified, experienced and generally able to conduct the proposed litigation.'" *Id.* at 330 (quoting *Kirkpatrick v. J.C. Bradford & Co.*, 827 F.2d 718, 726 (11th Cir. 1987), *cert. denied*, 485 U.S. 959 (1988)). Additionally, "[t]he class representative must voluntarily accept a fiduciary obligation towards all the members of the putative class." *Runion*, 98 F.R.D at 317 (citing *Shelton v. Pargo, Inc.*, 582 F.2d 1298, 1305 (4th Cir. 1978)).

Defendants argue that Plaintiff fails the adequacy element of class certification because he will not be representing the interests of present Deferral Plan members or former Deferral Plan members whose forfeited benefits were "offset" by sign-on bonuses when they began working for new companies. (ECF No. 66 at 28-29). Defendants cite to *Tolbert v. RBC Capital Markets Corp.*, where plaintiffs, like in the instant case, moved for certification of a class seeking a declaration that a deferred compensation plan was not a lawful top hat plan, thereby invalidating that plan's forfeiture clause. *Tolbert v. RBC Capital Markets Corp.*, No. H-11-0107, 2016 WL 3034497 at *1 (S.D. Tex. May 26, 2016). In that case, the court denied class certification on adequacy grounds, noting that "Plaintiffs do not dispel Defendants' argument that any number of putative class members would not necessarily want the [plan's] top hat status declared invalid." *Id.* at 7. The court continued: "[b]ecause of these inherent conflicts of interest, Plaintiffs cannot show that they, as the class representatives, would fairly and adequately protect the interests of the class as a whole." *Id.*

However, the *Tolbert* case is distinguishable from the present case. While there was *inter*-class conflict in *Tolbert* (between members of the same class), Defendants allege that *intra*-Class conflict (between Class members and non-Class members) is fatal to Plaintiff's case. As noted

previously, Plaintiff only seeks to represent Deferral Plan participants who lost retirement benefits. Thus, he does not need to represent the interests of present Deferral Plan members since they are outside of the Class. Additionally, Plaintiff does, in fact, represent the interests of those who received an "offset" because they still lost retirement benefits to the Deferral Plan's Forfeiture Clause.

Defendants further argue that Plaintiff cannot adequately represent the interests of the Class because he has had meager involvement in the case and lacks familiarity with key Deferral Plan documents that govern the Deferral Plan at issue in this case. (ECF No. 66 at 31-32). However, Plaintiff has investigated the factual predicate of the case, has read the Amended Complaint and conferred with his attorney concerning the claims, has assisted his attorneys respond to discovery, and spent time preparing for his deposition. (ECF No. 70 at 17). Plaintiff understands his claims, arguing that "everything I had in my deferred compensation was my retirement benefit . . . I considered it belonging to me" and "the rules at Wells [Fargo] on vesting had nothing to do with ERISA law." Berry Tr. (ECF No. 62-12) at 89:15-23. Plaintiff also articulated that "Top hat plan pertains to . . . highly compensated individuals at a company. But at Wells Fargo, . . . it wasn't that way." *Id.* at 90:9-15.

Moreover, Plaintiff has also retained qualified counsel to prosecute this case. Proposed Class counsel prepared a detailed Complaint (ECF No. 1) and a First Amended Complaint (ECF No. 22), and successfully opposed portions of Defendants' Motion to Dismiss. *See* (ECF No. 26) (Motion to Dismiss); *see also* (ECF No. 30) (Plaintiff's Opposition); *see also* (ECF No. 47) (Order denying Motion to Dismiss in part). Further, Plaintiff's counsel have achieved significant recoveries in ERISA and other class actions. (ECF No. 62-15 through 17).

Here, Plaintiff will fairly and adequately protect the interests of the Class, as he possesses common interests and suffers common injuries as the other proposed Class members. He has been, throughout this litigation, available, willing and capable of and committed to vigorously prosecuting the interests of the Class. He does not have any interests adverse to the proposed Class. Finally, by asserting a representative role on behalf of the proposed Class, Plaintiff has accepted a fiduciary obligation towards all the members of the proposed Class. *Shelton v. Pargo, Inc.*, 582 F.2d 1298, 1305 (4th Cir. 1978).

Likewise, Plaintiff's counsel and counsel for the proposed Class will fairly and adequately protect the interests of the Class, as they are qualified, willing, capable, committed to vigorously prosecuting the claims of the proposed Class, and experienced in handling complex litigation. As such, the "adequacy-of-representation" prerequisite has been satisfied.

D. The Proposed Class Meets the Class Certification Requirements of Rule 23(b), FRCP.

In addition to meeting the criteria of Rule 23(a), FRCP, a class must satisfy one of the requirements of Rule 23(b), FRCP, to be certified. *Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, at 318 (4th Cir. 2006) (citing *Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 423 (4th Cir. 2003)). Plaintiff seeks to certify the proposed Class under Rule 23(b)(1) or, alternatively, under Rule 23(b)(3). (ECF No. 62-1 at 18).

1. Class Certification is Proper Under Rule 23(b)(1), FRCP.

The present Class meets the requirements of Rule 23(b)(1), FRCP. "Because of ERISA's distinctive 'representative capacity' and remedial provisions, 'ERISA litigation of this nature presents a paradigmatic example of a[Rule 23](b)(1) class.'" *In re Glob. Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 453 (S.D.N.Y. 2004) (quoting *Kolar v. Rite Aid Corp.*, 2003 WL 1257272, at *3 (E.D. Pa. March 11, 2003)). Indeed, "'[m]ost ERISA class action cases are certified under

Rule 23(b)(1).'" *Caufield v. Colgate-Palmolive Co.*, 2017 WL 3206339, at *6 (S.D.N.Y. July 27, 2017) (quoting *Kanawi v Bechtel Corp.*, 254 F.R.D. 102, 111 (N.D. Cal. 2008)).

A class may be certified under Rule 23(b)(1)(A) if separate actions "would create a risk of inconsistent or varying adjudications . . . that would establish incompatible standards of conduct" for the defendants, or under 23(b)(1)(B) if separate actions would create a risk that individual actions would be "dispositive of the interests of other members not parties to the individual" suits or "would substantially impair or impede their ability to protect their interests." Fed. R. Civ. P. 23(b)(1)(A) & (B). "Rule 23(b)(1)(A) considers possible prejudice to the defendants, while 23(b)(1)(B) looks to possible prejudice to the putative class members." *Tatum*, 254 F.R.D. at 66.

a. Class Certification for Count I is Proper Under Rule 23(b)(1)(A), FRCP.

Rule 23(b)(1)(A), FRCP, applies "in cases where the party is obliged by law to treat the members of the class alike . . . or where the party must treat all alike as a matter of practical necessity." *Amchem Prods.*, 521 U.S. at 614. This rule applies to ERISA plans because, under Rule 23(b)(1), plan administrators must "treat all similarly situated participants in a consistent manner." *Alday v. Raytheon Co.*, 619 F. Supp. 2d 726, 736 (D. Ariz. 2008). For this reason, courts inside and outside the Fourth Circuit have certified classes under Rule 23(b)(1)(A) in cases involving ERISA violations. *See, e.g.*, *In re Citigroup Pension Plan ERISA Litig.*, 241 F.R.D. 172, 180 (S.D.N.Y. 2006); *see also Taylor v. ANB Bancshares, Inc.*, 2010 WL 4627841, at *13 (W.D. Ark. Oct. 18, 2010), *report and recommendation adopted*, 2010 WL 4627672 (W.D. Ark. Nov. 4, 2010); *see also Knight*, 2013 WL 427880, at *4; *see also Sims v. BB & T Corp.*, 2017 WL 3730552, at *2 (M.D.N.C. Aug. 28, 2017) (certifying a class under Rule 23(b)(1)(A) because of the "risk of inconsistent and varying adjudications.").

Plaintiff argues that Rule 23(b)(1)(A) applies here because of the risk of inconsistent adjudications. (ECF No. 62-1 at 18-19). This case's central issue is whether the Deferral Plan qualifies as a "top hat" plan and, and thus must comply with ERISA's vesting, anti-forfeiture, and funding provisions. *See* Am. Compl. at ¶¶ 34, 46-48. Separate lawsuits over these issues could result in different outcomes, making it impossible for the Deferral Plan's administrator to treat similarly situated participants alike as required by ERISA. *See, e.g.*, *Knight*, 2013 WL 427880, at *4 (certifying a class under Rule 23(b)(1)(A) because the defendant risked facing "incompatible standards of conduct").

Defendants argue certification under Rule 23(b)(1) is inappropriate for Count I's request for injunctive relief because Plaintiff has no standing to pursue those claims and no interest in the Deferral Plan's continued operation. (ECF No. 66 at 33-34). Yet again, Defendants argue that certification of the Class presents a conflict between current and former members of the Deferral Plan and would negatively affect the interests of current Deferral Plan members.

However, Plaintiff does, in fact, have standing to bring his claims and any alleged conflict between current and former members of the Deferral Plan is irrelevant because current members in the Deferral Plan are not members of the Class. Thus, the proposed Class may be properly certified for Count I under Rule 23(b)(1)(A), FRCP.

b. Class Certification for Count IV is Proper Under Rule 23(b)(1)(B), FRCP.

Defendants argue certification of the Class under Rule 23(b)(1), FRCP, is not appropriate for Count IV because Plaintiff primarily seeks money damages in Count IV. (ECF No. 66 at 33-34). In their brief, Defendants claim it is well established that certification under 23(b)(1) is not appropriate where the action is primarily for monetary damages. *See* (ECF No. 66 at 33); *see also* *Dukes*, 564 U.S. at 347, 360 (holding class certification under Rule 23(b)(2) inappropriate where

money damages were primarily sought); *see also Zimmerman v. Bell*, 800 F.2d 386, 389 (4th Cir. 1986) (affirming denial of certification under Rule 23(b)(2) where the plaintiff sought money damages).

Further, Rule 23(b)(1) classes do not offer the procedural protections to absent class members of notice and an opportunity to opt out. *Dukes*, 564 U.S. at 362. When a class action is predominantly for money damages, the "absence of notice and optout violates due process." *Id.* at 363. Plaintiff admitted in his deposition that the basis for this lawsuit is "for funding and fulfillment of the obligation to pay [him] in retirement for [his] deferred comp" and that "[he] felt like that that [sic] money belonged to [hi] and not to Wells. And so [he] wanted to sue Wells because of that." *See* Berry Dep. at 30, 89; *see also* Am. Compl. at ¶ 93.

However, both *Dukes* and *Zimmerman*, which Defendants cited, primarily address class certification when money damages predominate under Rule 23(b)(2), which is not at issue here. *See Dukes*, 564 U.S. at 346, n.2 ("The applicability of [Rule 23(b)(1) and 23(b)(3)] to the plaintiff class is not before us."); *see also Zimmerman*, 800 F.2d at 389-90 ("We have held that [Rule 23] subsection (b)(2) was limited to claims where the relief sought was primarily injunctive or declaratory."). Although *Zimmerman* also addresses class certification under Rule 23(b)(1)(B), the court chose not to certify the proposed class under that provision, not because money damages were primarily sought, but because the cause of action was for securities fraud and "actions under the securities laws are not appropriate for class action treatment under Rule 23(b)(1)." *Zimmerman*, 800 F.2d at 389.

Moreover, Plaintiff posits that numerous courts have certified Rule 23(b)(1) classes in ERISA cases seeking monetary relief. *See* (ECF No. 70 at 18); *see also Duke Univ.*, 2018 WL 1801946, at *10; *DiFelice*, 235 F.R.D. at 76; *see also Tatum*, 254 F.R.D. at 63, 66; *see also Sims*,

2017 WL 3730552, at *1, *4. It appears that Defendants' claim that Rule 23(b)(1) class certification does not apply to actions where money damages are primarily sought is not well established after all. In fact, ERISA classes are often certified under Rule 23(b)(1) when monetary damages are primarily sought. Thus, the Class may be properly certified under Rule 23(b)(1)(B), FRCP, as to Count IV.

2. The Court Declines to Determine Whether Class Certification is Proper Under Rule 23(b)(3), FRCP.

If a court determines that class certification is proper under Rule 23(b)(1), FRCP, the court need not consider whether a class could also be certified under Rule 23(b)(3), FRCP. *See, e.g.*, *Savani v. Wash. Safety Mgmt. Sols., LLC*, 2012 WL 3757239, at *5 (D.S.C. Aug. 28, 2012) ("If a class action is maintainable under section (b)(1) and also under (b)(3), a court should certify the action under (b)(1) so that the judgment will have res judicata effect as to all the class."). Because Class certification is proper here under Rule 23(b)(1), FRCP, this Court declines to determine whether Class certification is proper under Rule 23(b)(3), FRCP.

E. The Proposed Class Satisfies the Implied Requirements of Rule 23, FRCP.

Plaintiff argues that the proposed Class is precisely defined, objective, and readily ascertainable. (ECF No. 62-1 at 22). Plaintiff supports his contention with Defendants' discovery responses, which confirm members of the Class are ascertainable from Defendants' records. (ECF No. 62-1 at 22-23). Finally, Plaintiff argues that he is a member of the Class because he lost his deferred compensation in the Deferral Plan due to the plan's Forfeiture Clause. (ECF No. 62-1 at 23). Defendants did not contest that the proposed Class is identifiable or that Plaintiff is a member of that Class. Pursuant to *In re A.H. Robins*, 880 F.2d at 728, the proposed Class is identifiable and Plaintiff is a member of that Class in satisfaction of the implied requirements of Rule 23, FRCP.

V. CONCLUSION

Plaintiff has established by a preponderance of the evidence that his action complies with each part of Rule 23, FRCP. *Brown v. Nucor Corp.*, 785 F.3d 895, 931 (4th Cir. 2015). Accordingly, this Court holds the following:

A. Plaintiff's Motion to Certify Class is hereby **GRANTED** under Rules 23(a) and (b)(1), FRCP;

B. The following Settlement Class is hereby certified:

> **All participants in the Wells Fargo Advisors Performance Award Contribution and Deferral Plan (the "Deferral Plan") since February 1, 2011, who earned deferred compensation under the Deferral Plan and were denied compensation under the Deferral Plan's Forfeiture Clause (§ 5.05).**

C. Plaintiff Robert F. Berry is appointed as Class representative;

D. Plaintiff's counsel is appointed as Class counsel;

E. Because classes certified under Rule 23(b)(1), FRCP, do not require notice to class members or permit class members to opt-out of the class, no notice or deadline for Class members to opt-out will be necessary.

IT IS SO ORDERED.

October 9, 2018
Columbia, South Carolina

Joseph F. Anderson, Jr.
United States District Judge