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

Robert Berry, individually and on behalf of all others similarly situated, Plaintiff, vs. Wells Fargo & Company, Wells Fargo Clearing Services, LLC, Wells Fargo Advisors Financial Network, LLC, and Does 1-50, Defendants.	C/A No. 3:17-cv-00304-JFA **ORDER**

I. INTRODUCTION

This matter comes before the Court on the motion of Robert Berry, individually and on behalf of all others similarly situated ("Plaintiff"), for final approval of the class action settlement (ECF No. 135) and class counsel's motion for an award of attorneys' fees, costs, and expenses, and a case contribution award to the class representative. (ECF No. 136).

This settlement resolves three years of litigation in this class action lawsuit which alleges that Wells Fargo & Company, Wells Fargo Clearing Services, LLC, Wells Fargo Advisors Financial Network, LLC, and Does 1-50 (collectively "Defendants") violated the Employee Retirement Income Security Act of 1974 ("ERISA") by causing class members to forfeit deferred compensation in the Wells Fargo Advisors, LLC Performance Award Contribution & Deferral Plan ("Deferral Plan") that should have vested under ERISA.

For the reasons stated below, the Court grants Plaintiff's motion for final approval of the class action settlement and class counsel's motion for an award of attorneys' fees, costs, and expenses and a case contribution award to the class representative.

II. FACTUAL AND PROCEDURAL BACKGROUND

In 1994, Plaintiff began working for the predecessor of Wells Fargo and remained with the Company through its various entity changes until he retired in February 2014. From 2005 to 2014, Plaintiff participated in the Wells Fargo Advisors, LLC Performance Award Contribution and Deferral Plan (the "Deferral Plan"). The Deferral Plan provides retirement benefits to Wells Fargo financial advisors. It contained a "forfeiture clause" under which participants forfeited the unvested portions of their plan accounts when they left Wells Fargo to work for another financial services business.

In 2014, Plaintiff retired from Wells Fargo after twenty years of services and founded his own financial business—Berry Financial Group in Lexington, South Carolina. Due to his employment with a financial business, Wells Fargo enforced the forfeiture provision contained in the plan agreement. Thus, Plaintiff forfeited nearly $200,000 in deferred compensation.

Plaintiff filed his complaint against Wells Fargo on February 1, 2017, and his first amended class action complaint on May 1, 2017. In the amended class action complaint, Plaintiff alleged Defendants violated ERISA by forfeiting his and other similarly situated individuals' deferred compensation in the Deferral Plan when they left Wells Fargo. This led to three years of extensive litigation.

On May 22, 2017, Defendants moved to dismiss portions of the amended complaint. After extensive briefing and a hearing, the Court granted the motion in part and denied it in part.

On March 1, 2018, Plaintiff filed a motion for class certification. After briefing, the Court granted the Plaintiff's motion and held that Plaintiff established by a preponderance of the evidence that the action complied with each part of Rule 23, FRCP. The Court certified the class under Federal Rules of Civil Procedure 23(a) and (b)(1).

After class certification, the parties began discovery. During this time, the Court issued six scheduling orders to allow the parties ample time to engage in discovery and mediate this action. On November 4, 2019, the parties notified the Court that they reached a settlement in principle and requested the Court stay the case to finalize the settlement terms. The Court granted the motion and stayed the case.

On January 31, 2020, Plaintiff filed a motion for preliminary approval of the settlement. On February 5, 2020, the Court granted the motion. On February 13, 2020, the Court entered an amended order preliminarily approving the settlement agreement and providing for notice to the class. The settlement class is comprised of:

> all persons who participated in the Deferral Plan between February 1, 2011, and the Settlement Agreement Execution Date [January 31, 2020], earned deferred compensation under the Deferral Plan, were denied compensation under the Deferral Plan's Forfeiture Clause, and have not as of the Settlement Agreement Execution Date released, in writing, their right to recover unpaid deferred compensation under the Deferral Plan (i.e., a "Prior Release").[1]

On March 5, 2020, Vicki L. Bayley filed a motion to intervene in this suit. On April 16, 2020, the parties filed responses in opposition, and then, on April 23, 2020, Vicki L. Bayley filed a reply. On June 1, 2020, the Court held a hearing on the motion. On June 2, 2020, the Court denied Vicki L. Bayley's motion to intervene and advised her to present her arguments in the form of an objection.

On May 1, 2020, Plaintiff filed a motion for final approval of the class action settlement and class counsel filed a motion for an award of attorneys' fees, costs, and expenses and a case

[1] The settlement class definition amends the original class definition by establishing an end to the class period and excluding individuals who previously released their claims to deferred compensation under the Deferral Plan.

contribution award to class representative, Robert Berry. These motions are presently before the Court.

Subsequently, the Court received eight objections to the settlement agreement. On May 13, 2020, Vicki L. Bayley ("Bayley") filed her objections to the settlement agreement. On May 15, 2020, Dean Zack ("Zack") filed his objection to the settlement agreement. Additionally, on May 15, 2020, Scott D. Burns filed his objection to the settlement agreement, however, he later withdrew it. On June 24, 2020, Mark F. Scribner, John Biondo, William Peragine, and John L. Perry (collectively the "Stoltmann objectors") filed their objections to the settlement agreement. Additionally, Jerry Cross filed an objection to class counsel's motion for an award of attorneys' fees, costs, and expenses. The parties filed response briefs to the objections, and Zack and Bayley filed replies.

On July 13, 2020, this Court held a hearing to determine the fairness of the settlement agreement and hear any objections from class members as to the settlement's terms. The Court declined to rule on the motion during the hearing and took the matter under advisement.

III. DISCUSSION

After reviewing the pleadings, applicable law, and considering the objections, the Court grants Plaintiff's motion and approves the settlement. Additionally, the Court grants class counsel's motion for an award of attorneys' fees, costs, and expenses and a case contribution award to class representative, Robert Berry. Accordingly, the objections are overruled.

The terms of the settlement provide $79 million to the settlement fund which will be used to compensate members of the settlement class, provide them with notice, administer the settlement, and pay attorneys' fees, expenses, costs, and a case contribution award. The amount each class member will receive will be based on how much the class member forfeited, the date of forfeiture,

and how many years of service the class member had with Wells Fargo on the date of the forfeiture. Class counsel estimates that the settlement is worth approximately $31,000 per class member. The settlement agreement provides that class members will receive their share of the settlement fund by a check sent to their last known address.

In exchange for the relief provided, the settlement agreement includes a release which states that Plaintiff and the settlement class waive all claims that were or could have been asserted in the amended complaint related to the Deferral Plan. The release also includes the calculation of each settlement class member's share of the settlement and tax liabilities made in accordance with the plan of allocation.

Finally, the settlement fund will be used to pay the attorneys' fees in the amount of $19.75 million, costs in the amount of $390,053, and a case contribution award to class representative, Robert Berry, in the amount of $10,000.

a. Motion for Final Approval of the Settlement

The Court has undertaken the required analysis and finds that the settlement is fair and adequate under Rule 23(e), and therefore, the Court approves the settlement.

Unlike most other civil suits, the Court must approve class action settlements. Fed. R. Civ. P. 23(e). Approval of class action settlements is committed to the "sound discretion of the district courts to appraise the reasonableness of particular class action settlements on a case by case basis, in light of the relevant circumstances." *Evans v. Jeff D.*, 475 U.S. 717, 742 (1986). Federal rule of Civil Procedure 23(e)(2) provides that the Court should determine whether a proposed settlement is "fair, reasonable, and adequate" after considering whether:

> (A) The class representatives and class counsel have adequately represented the class; (B) the proposal was negotiated at arm's length; (C) the relief provided for the class is adequate, taking into account: (i) the costs, risks, and delay of trial and appeal; (ii) the effectiveness of any proposed method

> of processing class member claims; (iii) the terms of any proposed award of attorney's fees, including timing of payment; and (iv) any agreement require to be identified under Rule 23(c)(3); and (D) the proposal treats the class members equitably relative to each other.

Id. These factors are very similar to the standards established by the Fourth Circuit for assessing whether a class action settlement is both fair and adequate. *In re: Lumber Liquidators Chinese Manufactured Flooring Prod. Mktg., Sales Practices & Prod. Liab. Litig*., 952 F.3d 471, 484 n.8 (4th Cir. 2020). "The fairness prong is concerned with the procedural propriety of the proposed settlement agreement, while the adequacy prong focuses on the agreement's substantive propriety." *In re Am. Capital S'holder Derivative Litig.*, 2013 WL 3322294, at 2 (D. Md. June 28, 2013).

Courts give a "strong initial presumption that the compromise is fair and reasonable." *See S.C. Nat'l Bank v. Stone*, 139 F.R.D. 335, 339 (D.S.C. 1991). "Absent evidence to the contrary, the court may presume that the settlement negotiations were conducted in good faith and that the resulting agreement was reached without collusion." *Kirven v. Cent. States Health & Life Co. of Omaha*, No. 3:11-cv-2149, 2015 WL 1314086, at 5 (D.S.C. Mar. 23, 2015).

As discussed below, the Court finds that the settlement is fair, reasonable, and adequate in accordance with Rule 23(e).

i. Fairness

In determining whether a settlement is fair, the Court should ask if the proposed settlement "was reached as a result of good-faith bargaining at arms-length, without collusion," *In re Jiffy Lube Sec. Litig.*, 927 F.2d 155, 159 (4th Cir. 1991). To make this determination, the Court must consider the following factors: "(1) the posture of the case at the time the settlement was proposed; (2) the extent of discovery that had been conducted; (3) the circumstances surrounding the

negotiations; and (4) the experience of counsel in the area of the class action litigation." *Id.* at 158-59.

Here *Jiffy Lube's* fairness factors weigh in favor of finding the settlement is the result of good faith bargaining at arm's length, and not the result of collusion. Under factor one, the posture of this case indicates that the parties did not settle prematurely. *See Domonoske v. Bank of America, N.A.*, 790 F. Supp.2d 466, 473 (W.D. Va. June 14, 2011) (observing the first factor requires that courts consider how far the case has come from its inception; settlement in an immature case pointes toward collusion, while settlement in a mature case points away from collusion.). Notable here, this Case has been pending since 2017. Over the past three years, Plaintiff has filed two detailed complaints, the Court has ruled on Defendants' motion to dismiss, Plaintiff's motion for class certification, and Plaintiff's motion to compel. The parties have engaged in extensive fact and expert discovery as well as participated in three mediation sessions. This case was not brought and settled immediately but rather involved contested issues and was vigorously prosecuted and defended.

Therefore, the Court concludes the posture of the case indicates the settlement was not the result of collusion and weighs in favor of finding the settlement is fair.

Under factor two, the Court finds that discovery in this case was adequate to develop the record and appraise the parties of the strengths and weaknesses of their own and their adversaries' claims and defenses. When the parties agreed to settle the case, class counsel served 128 requests for production, 21 interrogatories, and 77 requests for admission. Class counsel reviewed over 275,000 pages of documents, took eight additional depositions during discovery, and spent substantial time with an expert witness. The extent of discovery in this case as well as the parties'

efforts in fully litigating this action demonstrate that the parties reached a settlement agreement after fully evaluating the merits of the claims and each side's strengths and weaknesses.

Therefore, the Court finds the extent of discovery in this case weighs in favor of finding the settlement is fair.

Under factors three and four, the Court finds that the parties engaged in arm's length settlement negotiations, and that class counsel possessed significant experience with class action litigation and specifically, ERISA litigation. The parties engaged in three mediation sessions with an experienced mediator and each session was "hard fought." There is no indication of collusion in the record by the parties or by any class member. Additionally, the resumes submitted by class counsel establish that they are qualified, experienced, and competent. Class counsel's efficient and effective handling of this litigation before this Court is also evidence of their expertise in this area.

Therefore, the Court finds factors three and four weigh in favor of approving the settlement.

ii. Adequacy and Reasonableness

The Court finds Jiffy Lube's adequacy factors weigh in favor of finding the settlement is adequate under 23(e). To determine whether a settlement is adequate, the Court should consider:

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

Scardelletti v. Debarr, 43 Fed. Appx. 525, 528 (4th Cir. 2002) (citing *In re Jiffy Lube Sec. Litig.*, 927 F.2d at 158-159).

Factors one and two weigh in favor of finding the settlement is adequate. Genuine disputes exist regarding whether the Deferral Plan was a "top hat" plan under ERISA and if not, whether Defendants violated ERISA by denying Plaintiffs their deferred compensation. Although Plaintiff

has always maintained that his claims were strong, at trial, Plaintiff would have the burden of establishing that Defendants violated ERISA which means Plaintiff would also have to prove that the Deferral plan was not a "top hat" plan under ERISA. Then, Plaintiff would have to rebut Defendants' arguments to the contrary that the Deferral Plan did qualify as a "top hat" plan under ERISA because it was maintained for a "select group of management or highly compensated employees."

Even if Plaintiff was successful in proving liability, Plaintiff would also have to establish damages. As Plaintiff notes in the instant motion, establishing damages under ERISA is a "complicated and uncertain process." "The damages issue is uncertain because courts have not had the occasion to apply a damages measure in a case like this after a trial." *In re Marsh ERISA Litig.*, 265 F.R.D. 128, 144 (S.D.N.Y. 2010). Whereas with this settlement, recovery of a portion of the forfeited vested benefits is definite and provides the class members with immediate and tangible relief.

Therefore, the Court finds that factors one and two weigh in favor of finding the settlement is adequate.

The Court finds factor three supports finding the settlement is adequate. Without the settlement, the parties would have to proceed with a long, expensive litigation process, culminating in a trial, and likely followed by an appeal. This Court would be required to issue another scheduling order setting a dispositive motions deadline and a trial date. Due to the extremely complex nature of the case, trial would last approximately a week and would be extremely expensive as a result of attorneys' fees and expert witness expenses. Additionally, after a judgment, the parties would most likely file post-trial motions and appeals which would result in more attorneys' fees and a longer delay for the class members to receive their relief, if any. There

is no certainty for either party that either would prevail in litigation or on appeal. On balance, the risks, delays, and costs associated with further litigation weigh in favor of granting final approval of the settlement.

Therefore, the Court finds that factor three supports finding the settlement is adequate.

The Court finds that the fourth factor is neutral and does not give it much weight in its analysis. Defendants' solvency may be relevant in evaluating the settlement's adequacy if Defendants likely could not satisfy a litigated judgment, "thus making settlement the only means for claimants to recover at all." *Decohen v. Abbasi*, LLC, 299 F.R.D. 469, 480 (2014). There is no indication that Defendants could not afford to pay a higher litigated judgment, however, the risk of obtaining a higher judgment at trial weighs in favor of approving the settlement.

Therefore, the Court finds that the fourth factor does not weigh in favor or against approving the settlement.

The Court finds factor five weighs in favor of finding the settlement is adequate. The Court received six objections to the settlement out of 2,500 class members. Bayley objects to the settlement arguing that it does not consider the legal claims available to her and other similarly situated individuals, the proposed settlement will force her and others to waive these claims, and the financial remuneration that has been agreed upon is prejudicial to her and others who are entitled to 100% of their forfeited Deferral Plan funds. Zack objects on substantially similar grounds. He argues the notice provided to the class members is unfair and inadequate and that this settlement will unfairly prejudice California and North Dakota residents because it does not consider the illegality of the Deferral Plan or the client transition agreement. Additionally, the Court received the "Stoltmann objections" which is comprised of four individuals seeking to object

to the settlement.[2] These individuals are currently involved in arbitration with Defendants and argue that this settlement will unfairly impact their pending arbitration claims. The Court will address Bayley and Zack's objections together because they are substantively similar and then, the Stoltmann objections in turn.

Bayley and Zack's overarching arguments are that the settlement in this case is unfair to class members from California and North Dakota because they have additional strong claims under the laws of those states and under an earlier settlement, *Wakefield v. Wells Fargo & Co.*, No. 3:13-cv-5053-LB (N.D. Cal.).

First, the objectors argue that the requirements of the Deferral Plan for a participant to achieve retirement status and be vested in their Deferral Plan compensation are illegal under California and North Dakota law. Specifically, they assert Defendants require participants to enter into a client transition agreement and sign a release provision. They contend the client transition agreement requires a departing financial advisor to transfer their book of business to another financial advisor employed by Defendants which is an illegal restraint of trade. Next, Deferral Plan participants are required to sign a release of all claims against Defendants which they argue is a violation of California state law which prohibits employers from conditioning the payment of wages upon the signing of a release waiver. Zack and Bayley argue these requirements are illegal under California and North Dakota state law and these claims are not being considered by the current settlement.

[2] The Stoltmann Objections includes Mark F. Scribner, John Biondo, William Peragine, and John L. Perry. Initially, the objections also included John P. Thibault, however, he later agreed to withdraw his objections to the settlement agreement.

The parties[3] respond that these claims do not violate California state law and even if they did, they are without merit because they are preempted by ERISA. "ERISA preempts state law with respect to non-competition clauses." *See Clark v. Laurent Young Tire Center Profit Sharing Trust*, 816 F.2d 480, 481 (9th Cir. 1987). The parties explain that because Bayley and Zack seek Deferral Plan awards under a state law theory, their claims are squarely preempted by ERISA and fail as a matter of law.

Next, Zack and Bayley assert that this settlement breaches the *Wakefield* settlement because in *Wakefield* Defendants promised not to continue its non-compete practices. However, the parties contend that the promise made in *Wakefield* simply meant Defendants would not re-impose the non-compete provision that Defendants exempted California and North Dakota residents from participating in, in 2012. The parties argue this promise did not include the client transition agreement or release provision which were in effect at the time of *Wakefield* but were not alleged to be illegal in that case.

Zack and Bayley argue that the settlement is unfair because it will require them to release the claims they have under California and North Dakota state laws and under *Wakefield*. While the parties argue that Zack and Bayley's claims under *Wakefield* would not be released under this settlement, they do concede that their claims under California and North Dakota state law would be released. But the parties reassert that this release should not bar the approval of the settlement because these claims cannot succeed because they are preempted by ERISA.

Additionally, Bayley and Zack argue that the settlement remuneration to the Class members is inadequate. They point to the settlement in *Wakefield* as evidence that this settlement

[3] Both Plaintiff and Defendants oppose the position taken by the objectors. For ease of reference in discussing the objections, both Plaintiff and Defendants will be referred to as "the parties."

is inadequate because in *Wakefield* the class received 99% of their forfeited Deferral Plan funds and it involved almost identical claims and conduct. While in this settlement, the class members are set to receive approximately 28% or on average $31,000 of their deferred compensation. In sum, they assert the settlement is unfair and unreasonable because they will not be receiving all of their deferred compensation which they are owed under the Deferral Plan.

The parties argue that the settlement in *Wakefield* cannot be compared to the instant settlement because it is materially different. The plaintiffs in *Wakefield* sued in 2013 over deferred compensation they forfeited in 2008 and 2011 when they left Wells Fargo to work for a competitor. In 2012, Defendants changed the release to eliminate the non-compete language for California and North Dakota participants. The *Wakefield* class was comprised of 138 individuals who forfeited their deferred compensation specifically because of the non-compete requirement that was in effect before October 26, 2012.

The objections and their resolution seem to hinge on whether Zack and Bayley's claims are preempted by ERISA. If the claims are not preempted by ERISA, then their claims may have merit. But if they are, then their claims would not be successful even if this Court were to carve them out of this settlement. Regardless, the Court declines to rule on this issue.

The instant motion requires the Court to determine whether the settlement is fair, reasonable, and adequate for the class as a whole. The issues raised by Zack and Bayley do not seem applicable to a large number of the class members, let alone the class as a whole. Significantly, no other class members have objected on this basis, and as such, the Court has no indication if any other class members are similarly situated to Zack and Bayley. Although this result may be dissatisfactory to Zack and Bayley, the Court finds that the alternative would be inequitable to the remaining 2,498 class members.

The alternative would require the Court to sustain the objections and require the parties to consider these claims or carve these claims out of the release language in the settlement agreement. If either of these options occur, Defendants have stated there would no longer be a settlement. The Court should consider the "vagaries of litigation and compare the significance of immediate recovery by way of the compromise to the mere possibility of relief in the future, after protracted and expensive litigation." *In re: Mi Windows and Doors Inc. Products Liability Litigation,* 2015 WL 12850547, at 12 (D.S.C. July 22, 2015) *citing Jenkins v. Trustmark Nat. Bank*, 300 F.R.D. 291, 304 (S.D. Miss. March 25, 2014). The benefits of the instant recovery greatly outweigh the risks to the class members if this case is required to start over. The parties have extensively and vigorously litigated this case for three years and participated in three mediation sessions to reach this point. Rejecting this settlement and requiring the parties to renegotiate would pose substantial risks to the class' recovery and would be costly and time consuming. Further, it is unclear whether Zack and Bayley's additional legal claims have merit. The Court declines to restart this litigation and risk the class' recovery for claims which may or may not be successful.

Additionally, Zack and Bayley argue that the relief provided by the settlement is inadequate. However, their criticism regarding the adequacy of the settlement in comparison to *Wakefield* has no bearing on whether the settlement should be approved: "The test is whether the settlement is adequate and reasonable and not whether a better settlement is conceivable." *In re Vitamins Antitrust Litig.,* 2000 WL 1737867, at 2 (D.D.C. Mar. 31, 2000). Therefore, Zack and Bayley's objections are overruled.[4]

[4] Any comparison to the *Wakefield* Settlement percentage suffers from the fact that the claims asserted in *Wakefield* differ significantly from those asserted here. *Wakefield* involved two plans, the Deferral Plan involved in this litigation and the Contribution Plan. On ruling on the Defendants' motion to dismiss filed early in the litigation, the Court dismissed all claims resulting from the Contribution plan for reasons articulated in that Order. (ECF No. 47). Zack and Bayley's argument

Turning now to the Stoltmann objections, the Court also overrules these objections. The Stolmann objectors contend that this settlement will disparately impact their existing arbitration claims pending against Defendants. They argue that this settlement will "knee-cap" their pending claims which were filed over a year ago. Additionally, they contend that the value of their claims is far greater than the settlement amount.

Similar to Zack and Bayley's objections, the objectors' arguments do not relate to the fairness, adequacy or reasonableness of the settlement to the class as a whole. They argue the settlement will negatively impact them because they may receive less money in the settlement than they would in arbitration alone. Further, they essentially argue that the settlement will cause them to lose bargaining power on their other claims in arbitration. These arguments do not answer the question of whether this settlement is fair, adequate, and reasonable to the class as a whole. On balance, the effect of this settlement on the class as a whole greatly outweighs the effect this settlement will have on these four individuals. Therefore, the Stoltmann objections are overruled.

After considering the opposition to the settlement as required by the fifth factor of the adequacy analysis, the Court finds that this factor weighs in favor of approving the settlement. The number of objections is extremely low when considering the total amount of class members. *In re Cardizem CD Antitrust Litig*., 218 F.R.D. 508, 527 (E.D. Mich. 2003) ("If only a small number of objections are received, that fact can be viewed as indicative of the adequacy of the settlement."). Additionally, Plaintiff's counsel reports communicating with almost 160 class members who have all expressed support for the settlement. On July 13, 2020, this Court held a telephonic fairness

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fails to consider the significant differences between the plan terms and practices that were at issue in *Wakefield* and those that they wish to assert now. Another significant difference is that *Wakefield* was comprised of only 138 individuals which is a stark contrast to the 2,500 class members present in this case. Accordingly, the Court declines to reject the settlement agreement because it differs from *Wakefield*.

hearing and there were many class members in attendance. The Court allowed class members to express any concerns or reservations regarding the settlement agreement on the record and for the Court's consideration in deciding whether to approve the settlement. However, other than the named objectors, no class members chose to speak up against the settlement. The Court finds that there is very little opposition to the settlement, and this is a strong indicator of the majority of the class' support for the settlement. Therefore, the Court finds that the fifth factor supports finding the settlement is adequate.

For the foregoing reasons, the Court finds the settlement meets the requirements posed by Rule 23(e) for fairness, adequacy, and reasonableness. Accordingly, the objections are overruled.

iii. Notice

Before granting final approval of the settlement, the Court must also determine whether class members were given reasonable notice of the settlement. *See Domonoske v. Bank of America*, 790 F.Supp.2d 466, 472 (W.D. Va. 2011). Zack has objected to the notice provided to the class members, and as such, the Court will address it here. However, the Court finds that the class members received reasonable and adequate notice, and therefore, the Court overrules the objection.

Federal Rule of Civil Procedure 23(e)(1)(B) provides that "the court must direct notice in a reasonable manner to all class members who would be bound by the proposal if giving notice is justified by the parties' showing that the court will likely be able to: (1) approve the proposal under Rule 23(e)(2); and (ii) certify the class for purposes of the judgment on the proposal." Fed. R. Civ. P. 23(e)(1)(B). For non-opt out cases, such as the ERISA actions, all that is required for adequate class notice is whatever "appropriate notice the court may direct." *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 448 (S.D.N.Y. 2004). To satisfy due process, class notice should be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency

of the action and afford them an opportunity to present their objections." *In re Prudential Sec. Inc. Ltd. Partnerships Litig.*, 164 F.R.D. 362, 368 (S.D.N.Y.).

Zack objects that the notice is inadequate. He argues that the notice does not provide class members with information regarding their individual payments or provide any way for the class members to calculate their approximate recovery. The Court finds Zack's argument is without merit and that the content of the notice was adequate. The notice sent in this case provided: (1) an explanation of the nature of the class action and the claims asserted; (ii) the definition of the settlement class; (iii) the amount of the settlement; (iv) an explanation of why the parties are proposing the settlement; (v) the attorneys' fees and expenses sought; (vi) a description of class members' right to object to the settlement, the plan of allocation, the requested attorneys' fees or expenses, or the case contribution award; (vii) notice of the binding effect of a judgment on class members.

In this regard, the notice has more than adequately "apprised the prospective members of the class terms of the proposed settlement…" *Maher v. Zapata Corp*., 714 F.2d 436, 451 (5th Cir. 1983).

Additionally, Zack objects that the notice is unfair, unreasonable, and unduly burdensome. He argues that the objection requirements are unduly burdensome because they require class members to obtain local counsel in order to object to the settlement. However, this argument is without merit because class members may appear *pro se*. The requirements do not state that class members must have an attorney. Though the instructions do require out of state counsel to have local counsel, this requirement is in compliance with the local rules and ensures that out of state counsel is advised on the rules in this district. Therefore, this objection is overruled.

Finally, Zack objects that the notice is unfair because it does not provide the class members with an opportunity to opt out. Defendants have previously presented an argument similar to Zack's that certification under Rule 23(b)(1) is improper because this case primarily seeks money damages and does not allow for class members to opt out. This argument is without merit because ERISA cases primarily seeking money damages are commonly certified under Rule 23(b)(1). "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).'" *In re Glob. Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 453 (S.D.N.Y 2004). "Most 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). In fact, in the Court's class certification Order, the Court stated 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…" The same is true now. Therefore, Zack's objection as to the notice being unfair because it does not allow for class members to opt out is overruled.

Although there were no objections to the method of dissemination of the notice, for completeness, the Court finds that the method of the dissemination was tailored to reach as many members of the class as practicable and therefore, meets the requirements of Rule 23. Copies of the notice were mailed directly to the last known address of over 2,500 class members. Additionally, the notice was published on the settlement website. These methods of notice constitute the "best notice practicable under the circumstances…" *Eisen v. Carlisle & Jacquelin* 417 U.S. 156, 175 (1974).

Therefore, the Court finds that the notice in this case meets the requirements of Rule 23.

iv. Plan Allocation

The Court finds that the plan of allocation is reasonable pursuant to Rule 23(e)(2)(C)(ii) and 23(e)(2)(D).

"A court must scrutinize a plan of allocation for settlement proceeds under the same standard of fairness and adequacy as applicable to the settlement on the whole." *In re Genworth Financial Securities Litigation*, 210 F.Supp.2d 837, 843 (E.D. Va. September 26, 2016). Application of these principles to the plan of allocation compels the conclusion that the plan of allocation should be approved as fair, adequate, and reasonable.

The proposed plan of allocation provides that each class member's recovery will be based on the amount they forfeited in their Deferral Plan account and how long they worked for Defendants. The proposed plan of allocation will distribute the net settlement fund on a pro rata basis as determined by dividing the settlement amount by the class' current forfeitures and then multiplying that number by each class member's current forfeited amount based on ERISA's vesting schedule. 203(a)(2)(B)(iii), 29 U.S.C. 1053(a)(2)(B)(iii). The Court notes that there have been no objections to the plan of allocation. The Court finds that the plan treats each class member equitably relative to each other.

Therefore, the Court approves the plan of allocation finding that it is fair, reasonable, and adequate as required by Rule 23.

b. Award of Attorneys' Fees, Costs and Expenses

The Court finds that the requested fees and costs is reasonable. Class counsel requests the Court award attorneys' fees equal to 25% of the settlement, or $19.75 million. Jerry Cross ("Cross"), a class member, has filed an objection to class counsel's request for attorneys' fees. However, this objection is overruled, and class counsel's request is granted.

Attorneys' fees in class action cases are subject to court approval, and the procedure for awarding attorneys' fees and costs in the class action context is controlled by Federal Rule of Civil Procedure 23(h), which provides that "in a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement." Additionally, it is well settled that, "[w]hen a class settlement results in a common fund for the benefit of class members, reasonable attorney's fees may be award from the common fund." *Smith v. Res-Care, Inc.*, No. 3:13-cv-5211, 2015 WL 6479658, at 7 (S.D.W. Va. Oct. 27, 2015); *See also Boeing Co., v. Van Gemert*, 444 U.S. 472, 478 (1980). District courts in the Fourth Circuit routinely look to the factors set forth in *Barber v. Furniture Distributors, Inc.*, 577 F.2d 216, 226 (4th Cir. 1978), to assess the reasonableness of attorneys' fees. Indeed, under Local Civil Rule 54.02(A), "[a]ny petition for attorney's fees shall comply with the requirements set forth in Barber…" including "when a common fund is created, and a percentage fee method is sought in the application." *Id.*

The factors identified by the Fourth Circuit in *Barber* to evaluate an award of attorneys' fees include: (1) the time and labor expended; (2) the novelty and difficulty of the questions raised; (3) the skill required to properly perform the legal services rendered; (4) the attorney's opportunity costs in pressing the instant litigation; (5) the customary fee for like work; (6) the attorney's expectations at the outset of the litigation; (7) the time limitations imposed by the client or circumstances; (8) the amount in controversy and the results obtained; (9) the experience, reputation and ability of the attorney; (10) the undesirability of the case within the legal community in which the suit arose; (11) the nature and length of the professional relationship between the attorney and the client; and (12) attorneys' fees awards in similar cases." *Barber*, 577 F.2d at 226 n. 28.

"There are two methods for assessing awards of attorney's fees in settlements of class action cases: (1) the percentage-of-the-fund method and (2) the lodestar method." *Dewitt v. Darlington Cnty.*, No. 4:11-cv-00740, 2013 WL 6408371, at 6 (D.S.C. Dec. 6, 2013). The percentage-of-the-fund method, also known as the common-fund doctrine, allows attorney's fees to be based on a percentage of the total recovery to the Plaintiff class. *Id.*; *See Boeing*, 444 U.S. at 478. In contrast, the lodestar method multiplies the number of hours attorneys worked by each attorney's individual billing rate, and then applies a risk multiplier. *Savani v. URS Prof'l Sols.*, LLC, No. 1:06-cv-02805-JMC, 2014 WL 172503, at 2 (D.S.C. Jan. 15, 2014).

Within the Fourth Circuit, district courts prefer the percentage method in common fund cases. *Decohen v. Abbasi, LLC*, 299 F.R.D. 469, 481 (D. Md. 2014) ("District Courts in the Fourth Circuit, and the majority of courts in other jurisdictions, use the percentage of recovery method in common fund cases."). It is "overwhelmingly" preferred. *Kelly v. Johns Hopkins University*, No. 1:16-cv-2835, 2020 WL 434473, at 2 (D. Md. Jan. 28, 2020); *Archbold v. Wells Fargo Bank, N.A.*, No. 13-24599, 2015 WL 4276295, at 5 (S.D.W. Va. July 14, 2015)("[T]he Court concludes that there is a clear consensus that the award of attorneys' fees in common fund cases should be based on a percentage of the recovery.").

However, even when the percentage of recovery method is used, "courts often use the lodestar method to 'cross check' the award of attorneys' fees." *In re MI Windows & Doors Inc. Prod. Liab. Litig.*, No. 2:12-MN-00001-DCN, 2015 WL 4487734, at 1 (D.S.C. July 23, 2015). By "using the percentage of fund method and supplementing it with the lodestar cross-check," the court "takes advantage of the benefits of both methods." *In re Mills Corp. Sec. Litig.*, 265 F.R.D. 246, 256 (E.D. Va. 2009). This cross-check will compare the requested contingent fee award against a fee calculated based on hours spent at prevailing market rates. *See Boyd v. Coventry*

Health Care, Inc., 299 F.R.D. 451, 467 (D. Md. 2014) ("The purpose of the lodestar cross-check is to determine whether a proposed fee award is excessive relative to the hours reportedly worked by counsel, or whether the fee is within some reasonable multiplier of the lodestar.").

The Court will consider each of the *Barber* factors in order and conduct a lodestar cross-check to demonstrate the reasonableness of class counsel's request for a fee award. For the reasons discussed below, the Court grants class counsel's motion for attorneys' fees.

i. Class Counsel's Time and Labor

As demonstrated by the record in this case, class counsel dedicated significant time and effort to pursuing litigation on behalf of the class. Class counsel began representing Plaintiff in 2017. Over the course of three years, class counsel has served 128 requests for production, 21 interrogatories, and 77 requests for admission. This case involved extensive discovery which required class counsel to review over 275,000 pages of documents, take eight depositions, and spend substantial time with an expert witness to present a statistical analysis of the applicable data. In total, class counsel reports expending 6,590 hours on prosecuting this case.

Therefore, the Court finds the time and labor expended supports the reasonableness of the requested fee award.

ii. The Novelty and Difficulty of the Questions

This is a highly complex case that involved numerous issues that were vigorously contested. ERISA is a "highly complex and quickly evolving area of the law." *Krispy Kreme*, 2007 WL 119157, at 2 (M.D.N.C. Jan. 10, 2007). Additionally, this case presented a novel question of law under ERISA—what qualifies as a "top hat" plan—on which there was little case law.

Therefore, the Court finds the novelty and difficulty of the questions raised supports the reasonableness of the requested fee award.

iii. The Skill Requisite to Perform the Legal Service Properly

The Court recognizes that "it takes skilled counsel to manage a nationwide class action, carefully analyze the facts and legal claims and defenses under ERISA and bring a complex case to the point at which settlement is a realistic possibility." *Id.* It is "well established that complex ERISA litigation," such as this, requires "special expertise," *Tussey v. ABB, Inc.*, 2012 WL 5386033, at 3 (W.D. Mo. Nov. 2, 2012), and class counsel of the "highest caliber." *Nolte*, 2013 WL 12242015, at 3. Additional skill is required when the opponent is "a sophisticated corporation with sophisticated counsel." *Krispy Kreme*, 2007 WL 119157, at 2.

Therefore, the Court finds this factor supports the reasonableness of the requested fee award.

iv. Class Counsel's Opportunity Costs

As noted, class counsel has spent three years, 6, 590 hours, and $390,053 prosecuting this case. This is a substantial amount of time and financial commitment which represents a significant opportunity cost for the attorneys. It is very likely that the amount of time and financial resources required for this case impacted class counsel's work on their other existing cases and ability to pursue new cases.

Therefore, the Court finds this factor supports the reasonableness of the requested fee award.

v. The Customary Fee

Class counsel requests attorneys' fees in the amount of 25% of the settlement fund. "Recent empirical data on fee awards demonstrates that class action percentage awards for attorneys' fees generally fall between twenty and thirty percent." *Manuel v. Wells Fargo Bank, National Association*, 2016 WL 1070819, at 5 (E.D. Va. March 15, 2016) *citing* Newberg on Class Actions

§ 15:83 (5th ed.). "Fees awarded under the 'the percentage of recovery' method in settlements under $100 million have ranged from 15% to 40%." *Singleton v. Domino's Pizza*, LLC, 976 F. Supp.2d 665, 687 (D. Md. Oct. 2, 2013) citing *Stoner v. CBA Information Services*, 352 F.Supp.2d 549, 553 (E.D. Pa. 2005).

Therefore, the Court finds that an award of 25% falls well within the range of awards deemed fair and reasonable by Courts within the Fourth Circuit and this factor supports the reasonableness of the requested fee award.

vi. Whether the Fee is Fixed or Contingent

Class counsel represented the class on a contingency basis. As such, class counsel undertook to prosecute this action without any assurance of payment for their services. Counsel's entitlement to payment was entirely dependent upon achieving a good result for Plaintiff and the class. Contingency fee arrangements are customary in class action cases and such arrangements are usually one-third or higher. *Temp. Servs., Inc. v. American Intern. Group, Inc.*, 2012 WL 4061537, at 8 (D.S.C. Sept. 14, 2012).

Therefore, this factor supports the reasonableness of the requested fee award.

vii. The Time Limitations Imposed by the Client

Although there is no indication that class counsel worked under any time limitations imposed by Plaintiff or the class, the Court recognizes that class counsel was required to work efficiently in order to reach a settlement such that the class could receive a portion of their deferred compensation in a reasonable amount of time.

Therefore, the Court finds that this factor supports the reasonableness of the requested fee award.

viii. The Amount Involved and Results Obtained

Class counsel recovered $79 million for the class. The Court finds that this settlement is an excellent result for the class when considering the risk of nonpayment. The result obtained is "the most critical factor in determining the reasonableness of a fee award" and further supports finding the requested fee reasonable. *In re Abrams & Abrams, P.A.*, 605 F.3d 238, 247 (4th Cir. 2010). ERISA is a highly complex area of law and the possibility of going to trial presented the risk of nonpayment for the class. Additionally, trial would result in a greater amount in attorneys' fees and potentially less recovery for the class. Most notably, however, is the fact that this settlement is the largest recovery in a "top hat" case in the history of ERISA.

Therefore, the Court finds this factor strongly supports the reasonableness of the requested award.

ix. The Experience, Reputation, and Ability of the Attorneys

Class counsel has provided information demonstrating that they are very experienced in successfully handling class actions, and specifically, class actions related to ERISA. Additionally, class counsel displayed extraordinary skill and determination throughout this litigation which fully supports their well-known reputation and clear ability to handle a case of this magnitude.

Therefore, the Court finds class counsel's experience, reputation, and abilities supports the reasonableness of the requested fee award.

x. The Undesirability of the Case

The Court finds that this was a highly undesirable case. First, the risk of not being paid would be a deterrent to many lawyers. Class counsel represented the class on a contingent fee basis and as such, they devoted substantial time and financial resources with no reassurances that they would ever be paid. Second, ERISA, and specifically, "top hat" plans within ERISA, is an

extremely narrow and complex area of the law which requires experienced lawyers with a background in handling these cases to be equipped to manage such a large class and reach a resolution.

Therefore, the Court finds this factor supports the reasonableness of the requested fee award.

xi. The Nature and Length of the Professional Relationship with the Client

Class counsel has represented to the Court that this is the first matter in which they have represented Plaintiff. Therefore, the Court finds this factor does not apply in the consideration of whether to approve the requested fee award.

xii. Awards in Similar Cases

The attorneys' fees and costs requested by class counsel are line with awards in other ERISA cases. Class counsel has cited to numerous cases in which courts have awarded percentage fees of more than 25%. Additionally, "district courts in this circuit have recognized that a one third fee is the 'market rate'" which means class counsel's fee request is below market rate. *Kelly v. Johns Hopkins University*, 2020 WL 434473 at 3 (D. Md. Jan. 28, 2020) (citing to numerous cases within this circuit which have awarded one-third of the settlement to cover attorneys' fees).

Therefore, the Court finds that this factor supports reasonableness of the requested fee award.

xiii. Lodestar Cross-Check

This Court will cross-check the percentage analysis with the lodestar method to ensure that the requested fee award is reasonable. Courts have recognized that "using the percentage of fund method and supplementing it with the lodestar cross-check…takes advantage of the benefits of

both methods." *Singleton*, 976 F. Supp.2d at 689. "The purpose of a lodestar cross-check is to determine whether the proposed fee award is excessive relative to the hours reportedly worked by counsel, or whether the fee is within some reasonable multiplier of the lodestar." *Boyd v. Coventry Health Care, Inc.,* 299 F.R.D. 451, 467 (D. Md. 2014) To conduct the lodestar cross check, the Court determines that hours reasonably expended and then multiplies that amount by the reasonable hourly rate. "The hourly rate should be in line with the market rate for 'similar services by lawyers of reasonably comparable skill, experience, and reputation.'" *Kruger v. Novant Health, Inc.,* 2016 WL 679066, at 4 (M.D. N.C. Sept. 29, 2016). The Court does not need to "exhaustively scrutinize the hours documented by counsel and the reasonableness of the claimed lodestar can be tested by the court's familiarity with the case." *Id.*

Here, class counsel's lodestar results in an amount of $4,653,666.25. The requested fee for 25% of the settlement fund or $19.75 million which produces a lodestar multiplier of 4.24—well within the range routinely approved in this circuit. "Courts have generally held that lodestar multipliers falling between 2 and 4.5 demonstrate a reasonable attorney's fee." *Singleton*, 976 F. Supp.2d at 689; *See also Deloach v. Philip Morris Co*., 2003 WL 23094907, at 11 (M.D.N.C. De. 19, 2003).

Therefore, the Court finds the lodestar cross-check supports the reasonableness of the requested fee award.

xiv. Objection

The Court received one objection from class member, Jerry Cross, to class counsel's motion for an award of attorneys' fees. Cross argues that class counsel only recovered 28% of the amount that class members forfeited in deferred compensation and class counsel is requesting 30%

in legal fees. Cross requests the court to award legal fees that are commensurate with class counsel's performance.

First, the Court will note that class counsel is requesting 25% of the settlement fund in legal fees, not 30%. Although Cross makes a compelling argument as to the amount of legal fees in comparison to the amount recovered for the class, the Court must overrule the objection because the *Barber* factors as a whole weigh in favor of awarding the requested fee amount. The *Barber* factors assist the Court in evaluating the reasonableness in connection with the class counsel's time expended on the case, the difficulty of the case, and the necessary skill level required to be able to successfully resolve the case. While Cross may contend that the fee award does not equal class counsel's performance, this Court will respectfully disagree as it recognizes that class counsel expended over 6,000 hours on the case, chose to defer attention on their other ongoing cases in order to effectively pursue this litigation, and did so with the risk of potentially never getting paid.

The Court also conducted a lodestar cross-check in order to ensure that the requested fee amount was reasonable, and this check confirmed that is was reasonable because the multiplier was well within the range of commonly accepted multipliers in this circuit. Additionally, the Court has found ample authority of other courts in this circuit awarding fee amounts which are in line with that requested by class counsel.

Therefore, the Court overrules the objection and will award class counsel 25% or $19.75 million of the settlement fund in attorneys' fees.

c. Class Counsel's Request for Expenses and Costs

The Court grants class counsel's request for an award of expenses and costs because the Court finds the expenses to be legitimate and amounts to be reasonable.

Under Rule 23(h), a trial court may award nontaxable costs that are authorized by law or the parties' agreement. Fed. R. Civ. P. 23(h). A cost award is authorized by both the parties' settlement agreement and the common fund doctrine. "Reimbursement of reasonable costs and expenses to counsel who create a common fund doctrine is both necessary and routine." *Savani*, 121 F.Supp.3d at 576. "The prevailing view is that expenses are awarded in addition to the fee percentage." *Smith v. Krispy Kreme Doughnut Corp.*, 2007 WL 119157, at 4 (M.D.N.C. Jan. 10, 2007). Reimbursable expenses include court costs, transcripts, travel, contractual personnel, document duplication, expert witness fees, photocopying, long distance telephone charges, postal fees, and expert witness fees. *In re Mid-Atlantic Toyota Antitrust Litig*., 605 F. Supp. 440, 448 (D. Md. 1984).

Here, class counsel requests $390,053 in expenses incurred to prosecute this case. The requested expenses are for mediation, deposition transcripts, stenographer fees, out of state travel, and fees incurred for hiring an expert witness. The Court finds the requested expenses are all for legitimate costs associated with prosecuting the case and the amounts are reasonable.

Therefore, the Court grants class counsel's request for reimbursement of expenses and costs in the total amount of $390,053.

d. Class Representative Award

The Court grants class counsel's request for the approval of a case contribution award to class representative, Robert Berry.

Case contribution or incentive awards are "intended to compensate class representatives for work done on behalf of the class, to makeup for financial or reputational risk undertaken in bringing the action, and, sometimes, to recognize their willingness to act as a private attorney general." *Berry v. Schulman*, 807 F.3d 600, 613 (4th Cir. 2015). "A substantial incentive award is

appropriate in [a] complex ERISA case given the benefits accruing to the entire class in part resulting from [named plaintiff's] efforts." *Savani v. URS Prof'l Solutions LLC*, 121 F. Supp. 3d 564, 577 (D.S.C. 2015).

Here, Robert Berry was actively involved in the litigation. He regularly communicated with class counsel about the case, gathered and reviewed documents to respond to Defendants' discovery, and prepared and appeared for his deposition. The Court finds that the requested case contribution award for the class representative is reasonable and appropriate given his contributions to this action.

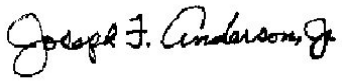
Therefore, the Court grants class counsel's motion as to a case contribution award in the amount of $10,000 to the class representative, Robert Berry.

IV. CONCLUSION

Therefore, the Court grants Plaintiff's motion for final approval of the settlement agreement (ECF No. 135) and approves the settlement upon a finding that the settlement is fair, reasonable, and adequate for purposes of Rule 23(e). The Court grants class counsel's motion for attorneys' fees in the amount of $19.75 million, costs in the amount of $390,053, and a case contribution award to class representative, Robert Berry, in the amount of $10,000. (ECF No. 136). The Court overrules the objections from Vicki L. Bayley (ECF No. 139), Dean Zack (ECF No. 143), Jerry Cross, and the Stoltmann objectors (ECF No. 169).

Accordingly, all remaining motions are hereby terminated, and this action is dismissed with prejudice. This Court retains jurisdiction over this case for purposes of enforcing the settlement agreement only.

IT IS SO ORDERED.



July 29, 2020
Columbia, South Carolina

Joseph F. Anderson, Jr.
United States District Judge