

**IN THE UNITED STATES DISTRICT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

IN RE WHEATON FRANCISCAN
ERISA LITIGATION

Case No. 16-cv-04232

Honorable Gary Feinerman

**PLAINTIFFS' REPLY IN SUPPORT OF UNOPPOSED MOTION FOR FINAL
APPROVAL OF SETTLEMENT AGREEMENT, AWARD OF ATTORNEYS' FEES
AND EXPENSES, AND FOR INCENTIVE AWARDS TO NAMED PLAINTIFFS**

Plaintiffs Bruce Bowen, Diann M. Curtis, and Cheryl Mueller (“Plaintiffs” or “Named Plaintiffs”), by and through their attorneys, respectfully submit this reply memorandum in support of their Unopposed Motion for Final Approval of Settlement Agreement and Certification of Settlement Class (“Final Approval Brief”), ECF No. 99, and their Unopposed Motion for Attorneys’ Fees, Expenses, and for Incentive Awards to Named Plaintiffs (“Fee Brief”), ECF No. 100. Defendants do not oppose the relief sought in Plaintiffs’ Reply Brief, but do not agree with all the averments stated in this Memorandum.

I. DISCUSSION

Named Plaintiffs and Plaintiffs’ Counsel respectfully submit that, for the reasons set forth herein and in their motions and the supporting declaration of class counsel filed December 1, 2017 (ECF Nos. 99, 100), the Settlement is “fair, reasonable, and adequate” under Rule 23(e), and the Court should now grant final approval. Further, the total award of \$2.25 million in attorneys’ fees, reimbursement of expenses, and incentive awards in the amount of \$10,000 each for the Named Plaintiffs should be approved. Only one member of the Class has filed a communication with the Court that could be construed as an objection to the terms of the Settlement, yet in subsequent communications with Class Counsel, she has explained she

intended to highlight what she viewed as unfair practices by Defendants rather than to object to the Settlement. Indeed, her letter begins by saying she would like to remain a member of the Settlement Class. *See* discussion *infra* §§ I.A.1-2. There have been no objections at all to the request for the award of fees, expenses and incentive awards. *See* discussion *infra* § I.B.

A. The Settlement Agreement Should Be Approved

The Parties went to great lengths to notify the Settlement Class about the terms of the Settlement, and to educate the Settlement Class about the effects of the Settlement on the Class. Plaintiffs and Class Counsel are pleased to report that these efforts were extremely successful, as evinced by the fact that only one Class member filed a document that could be construed as an objection to the Settlement. This is a remarkable result given that more than 28,000 class members are covered by this Settlement, all of whom were mailed Notice of the Settlement terms, including their right to object. Supplemental Affidavit of Jose Fraga (“Fraga Aff.”) ¶¶ 6, 8-9, 12-13 (of 28,442 notices sent, only 1,385 were returned as undeliverable).

To date, Garden City Group, LLC (“GCG”) has received 99 telephone calls to the toll-free number that was provided in the Class Notice and 5 written communications Fraga Aff. ¶¶ 14-16. To date, GCG has received zero objections to the Settlement. *Id.* ¶ 16. Since informing the Court of the Parties’ intention to settle this case on October 13, 2017, Class Counsel have received and responded to approximately 195 phone, 43 e-mails, and 2 fax inquiries from Settlement Class members. Declaration of Julie Reiser (“Reiser Decl.”) ¶ 8. Most of these inquiries have been calls requesting information about the Settlement’s terms and relief. *Id.* ¶ 10. Moreover, many class members expressed satisfaction with the Settlement and appreciation for Plaintiffs’ and Class Counsel’s efforts to protect their pension benefits. *Id.* ¶ 13.

Out of the 28,442 Settlement Class members who received the class notice and the more than 260 people with whom GCG and Class Counsel have communicated, only two Class members have filed letters expressing concerns about the Settlement. Reiser Decl. ¶ 11. Significantly, both of these Class members filed letters prior to discussing their concerns with attorneys for the Plaintiffs. After discussing their concerns with Class Counsel at length, both of these Class Members indicated that they supported Class Counsel's efforts in achieving this Settlement. *Id.* ¶¶ 11-12; *also compare* October 31, 2017 Letter from Diane L. Walter, ECF No. 92 *with* November 12, 2017 Letter from Diane L. Walter, ECF No. 93.

1. Diane L. Walter

As Class Counsel previously explained in the Declaration of Class Counsel accompanying Plaintiffs' Final Approval Brief ("Joint Decl."), ECF 99-11, Ms. Walter wrote to the Court within 24 hours of receiving her notice. Joint Decl. ¶ 45. On November 7, 2017, Julie Reiser spoke to Ms. Walter for approximately 40 minutes. By the end of the call, Ms. Walter said to Ms. Reiser, "Knowing what you have told me, I now understand and don't have any concerns." She reiterated, "My concerns are satisfied." Ms. Walter later mailed Class Counsel a letter confirming that her concerns were satisfied and that she did not object to the settlement. ECF No. 93 (*filed* Nov. 20, 2017); Joint Decl. ¶ 45.

2. Mary Jane Good

On December 11, 2017, Class Counsel received via facsimile a letter from Mary Jane Good, dated December 9, 2017. The letter was also addressed to Counsel for Defendants and to the Court. In her letter, Ms. Good indicated that she "wish[ed] to remain a member of the

Settlement Class,”¹ but that she had concerns about the scope of the settlement agreement. ECF No. 102. Specifically, she expressed concern about the funded status of the Plan and the Plan’s backloading provisions. *Id.* Upon receiving the letter, Class Counsel attempted to contact Ms. Good several times by email, phone, and certified mail, in order to discuss her concerns. Reiser Decl. ¶ 12. An attorney for Plaintiffs spoke to Ms. Good by phone on December 18, 2017 for more than an hour. *Id.* Ms. Reiser then contacted Ms. Good again on January 5, 2018 to confirm that Ms. Good’s letter was not written to formally object to the Settlement Agreement. Class Counsel reiterated the provisions of the Settlement and the benefits that will inure to the Class as well as the risks of ongoing litigation that motivated the Settlement Agreement. *Id.* At the end of their call, Ms. Good expressed her support for Class Counsel’s efforts on behalf of the Class, her understanding that the Settlement Agreement was in the best interest of the class, and her desire to be part of the Settlement. *Id.* Ms. Good stated that she neither planned to attend nor speak at the Final Fairness Hearing, nevertheless, she felt strongly that the Court be aware of her grievances about certain of Wheaton Franciscan’s practices. *Id.*

“The Seventh Circuit has instructed district courts to evaluate the amount of opposition to a settlement among affected parties in deciding whether to approve a class-action settlement.” *Schulte v. Fifth Third Bank*, 805 F. Supp. 2d 560, 586 (N.D. Ill. 2011). Where, as here, more than “99.9% of class members have neither opted out nor filed objections to the proposed settlements[, t]his acceptance rate is strong circumstantial evidence in favor of the settlements.” *In re Mexico Money Transfer Litig. (W. Union & Valuta)*, 164 F. Supp. 2d 1002, 1021 (N.D. Ill. 2000), *aff’d sub nom. In re Mexico Money Transfer Litig.*, 267 F.3d 743 (7th Cir. 2001); *Schulte*,

¹ Both Class Counsel and Ms. Good understand that no class member can opt out from the Settlement because certification is sought only under Rules 23(a) and 23(b)(1) and (2). Nevertheless, Ms. Good’s stated desire to remain a Class member confirms that she does not intend to oppose approval of the Settlement.

805 F. Supp. 2d at 586 (citing same). Out of over 28,000 Class members who received a notice, only one “submitted [a] document that could be considered [as] objection.” *Schulte*, 805 F. Supp. 2d at 586. This acceptance rate is over 99.9%, and therefore should be construed as “strong circumstantial evidence in favor of the settlement[.]” Moreover, Ms. Good stated her wish to “remain a member of the settlement class” in her letter to the Court, and in two subsequent communications with Class Counsel. Ms. Good’s letter therefore should not impede final approval of the Settlement.

As set forth more fully in Plaintiffs’ Final Approval Brief, the Settlement is “fair, reasonable, and adequate.” *See* Fed. R. Civ. P. 23(e)(2); *Williams v. Rohm & Haas Pension Plan*, 658 F.3d 629, 634 (7th Cir. 2011); *Isby v. Bayh*, 75 F.3d 1191, 1196 (7th Cir. 1996). This is confirmed by the overall lack of objection to the Settlement, which indicates class-wide support for the Settlement. *See also Goldsmith v. Tech. Sols. Co.*, No. 92 C 4374, 1995 WL 17009594, at *5 (N.D. Ill., Oct. 10, 1995) (“a positive response to the Settlement by the Class is strong evidence that the settlement is fair, reasonable, and adequate and should be approved.”); *Swift v. Direct Buy, Inc.*, No. 2:11-CV-401-TLS, 2013 WL 5770633, at *6 (N.D. Ind. Oct. 24, 2013) (citing “limited opposition to the Settlement Agreement” in granting final approval). Plaintiffs and Class Counsel therefore submit that this Settlement should be fully and finally approved.

B. The Requested Attorneys’ Fees, Expenses, and Incentive Awards for the Named Plaintiffs Should Be Approved.

With respect to Class Counsel’s motion for an award of attorneys’ fees, litigation expenses, and incentive payments to Named Plaintiffs, the fact that there have been no objections to Class Counsel’s request for this award is also a very strong indication that the request is fair and reasonable. As set forth in detail in Plaintiffs’ Final Approval Brief, the Class Notice informed Class Members that Class Counsel would seek fees and expenses. In addition, the Fee

Brief explained why the request of \$2.25 million, separate and apart from the relief to the Class, is fair and reasonable, and supported by, among other factors, the result achieved in the face of significant risks and the contingent nature of the litigation. Moreover, the Fee Brief was supported by a detailed explanation of fees and costs and the reasons for them in the Declaration of Class Counsel attached to Plaintiffs' Final Approval Brief, ECF No. 99-11. The Fee Motion is also supported by the three Named Plaintiffs, all of whom were active participants in this litigation, and all of whom participated in the settlement process by assessing and debating with Class Counsel the strengths and weaknesses of further litigation. Equipped with this knowledge, not one member of the Class objected to the fees, expenses, or incentive awards that Named Plaintiffs and Class Counsel seek.

Courts in this District have consistently found that the lack of objection to a request for attorneys' fees and expenses indicates that the request is fair and reasonable. *See, e.g., Standard Iron Works v. ArcelorMittal*, No. 08 C 5214, 2014 WL 7781572, at *2 (N.D. Ill. Oct. 22, 2014) ("The absence of objections indicates that [a] fee is fair and reasonable and consistent with prevailing market rates."); *Wong v. Accretive Health, Inc.*, No. 1:12-CV-03102, 2014 WL 7717579, at *1 (N.D. Ill. Apr. 30, 2014) (noting that "the reaction of the Class to the fee request supports the fee awarded" where there was a single objection); *In re Lithotripsy Antitrust Litig.*, No. 98 C 8394, 2000 WL 765086, at *2 (N.D. Ill. June 12, 2000) (noting that the lack of objection to the attorneys' fee request was a factor considered in approving the request). Accordingly, the approval of Class Members in this action supports approval of the request for attorneys' fees and reimbursement of expenses.

II. CONCLUSION

For the foregoing reasons, the Settlement should be approved, and Class Counsel's request for attorneys' fees, reimbursement of expenses, and incentive awards for Plaintiffs Bruce Bowen, Diann Curtis, and Cheryl Mueller should be granted, together with such other and further relief as the Court may deem just and proper.

Dated: January 9, 2018

By: /s/ Carol V. Gilden

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Plaintiffs' Counsel

CERTIFICATE OF SERVICE

I hereby certify that on January 9, 2018, I electronically filed the foregoing with the Clerk of the Court using ECF, who in turn sent notice to all counsel of record.

Dated: January 9, 2018

/s/ Julia Horwitz
Julia Horwitz