UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 9:20-cv-80102-CANNON/Reinhart

TING PENG and LIN FU, on behalf of themselves individually and all others similarly situated, and derivatively on behalf of HARBOURSIDE FUNDING, LP, a Florida limited partnership,

Plaintiffs,

vs.

NICHOLAS A. MASTROIANNI II; HARBOURSIDE FUNDING GP, LLC, a Florida limited liability company; and HARBOURSIDE PLACE, LLC, a Delaware limited liability company,

Defendants,

and

HARBOURSIDE FUNDING, LP, a Florida limited partnership,

Nominal Defendant.

PLAINTIFFS' RENEWED UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT

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Pursuant to the Court's instructions, as discussed during the hearing of Plaintiffs' Unopposed Motion for Preliminary Approval of Settlement (ECF Nos. 246-247) on February 1, 2023, and as set forth in the Order Following Hearing (ECF No. 257), Plaintiffs hereby submit this Renewed Unopposed Motion for Preliminary Approval of Settlement.

I. INTRODUCTION

In late January 2020, Plaintiffs Ting Peng and Lin Fu filed their initial derivative and class-action complaint in this action in which they sought the return of the $500,000 that they and a proposed class of similarly-situated immigrant investors had paid to become Limited Partners in Nominal Defendant Harbourside Funding, LP (the "Funding Partnership"), which had used those investments to fund a construction loan for Defendant Harbourside Place, LLC (the "Developer"). Plaintiffs alleged that the Developer had breached the construction loan agreement with the Funding Partnership, and that Defendants Nicholas A. Mastroianni II ("Mastroianni") and Harbourside Funding GP, LLC (the "General Partner") had breached their fiduciary duties to the Limited Partners and the Funding Partnership.[1]

After nearly three years of hard-fought litigation that involved extensive discovery and multiple discovery motions; successive motions to dismiss Plaintiffs' initial and amended complaints; successive motions to dismiss Defendants' counterclaims and amended counterclaims; a motion for class certification; dueling motions for summary judgment; extensive preparation for trial while engaging in additional motion practice; and hotly-contested, arm's-length negotiations over the course of nearly a year with the assistance of two experienced mediators (including a

[1] Capitalized terms used here have the same meaning as the terms defined in the proposed Settlement Agreement, which is attached as **Exhibit 2** to the Declaration of Jeffrey L. Fazio ("Fazio Decl.") filed herewith.

retired U.S. Magistrate Judge), the Parties and their counsel hammered out the terms of a Settlement Agreement by which they resolved all claims and counterclaims alleged in this action—quite literally on the eve of trial.

As one court has observed, "[a] settlement can be satisfying even if it amounts to a hundredth or even a thousandth of a single percent of the potential recovery." *Behrens v. Wometco Enters., Inc.*, 118 F.R.D. 534, 542 (S.D. Fla. 1988). The settlement the Parties have reached in the present case goes well beyond this standard.

Here, the Settlement Agreement provides each Settlement Class Member [redacted] In addition, Defendants will bear the cost of a comprehensive notice program, and Class Counsel will request an award of attorney fees that amounts to no more than 25% of the common fund created by the settlement, which will be paid over the course of the same four installments in which payments are made to Settlement Class Members.

By any measure, the Settlement Agreement the Parties have negotiated is fair, adequate, and reasonable. Accordingly, Plaintiffs respectfully request that the Court grant preliminary approval of the Settlement and permit the Notice Administrator to distribute the Notice of Proposed Settlement to all interested parties.

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II. BACKGROUND FACTS AND PROCEDURAL HISTORY[2]

A. THE NATURE OF PLAINTIFFS' CLAIMS

To fund the construction of Harbourside Place, a mixed-use commercial development in Jupiter, Florida, Mastroianni used the U.S. Citizenship and Immigration Services' EB-5 Immigrant Investor Program (the "EB-5 Program"). ECF 77 ¶ 1. Specifically, Mastroianni would sell 200 units of membership in Harbourside Funding, LP (the "Funding Partnership") to immigrant investors who applied for permanent residence in the United States through the EB-5 program and paid $500,000 per unit plus a $40,000 administration fee, and use the proceeds to fund a $100 million construction loan to Defendant Harbourside Place, LLC, a Florida limited liability company that would develop Harbourside Place (the "Developer"). *See id.* ¶¶23-25.

As provided by the contract between the Funding Partnership and the Developer (the "Loan Agreement"), the loan would mature on November 30, 2017 (the "Maturity Date"), at which time the Developer would repay the loan principal to the Funding Partnership (with interest) unless **(a)** the Developer was unable to repay the loan and **(b)** no Event of Default had occurred under the Loan Agreement. *Id.* ¶ 28. If the Developer was unable to repay the loan principal and not engaged in an Event of Default, the Developer would have the right to convert the loan principal to equity in its LLC; that is, the Funding Partnership would receive common units of interest in the LLC that would be distributed to the members of the Funding Partnership (*i.e.*, the Limited Partners). *Id.*

[2] While Defendants do not oppose this motion or the relief sought herein, for the reasons set forth in the pleadings in this action, Defendants do not agree with Plaintiffs' characterization of the facts.

Prospective EB-5 investors were assured that their investments would be secured by **(a)** a first-priority lien on the real property and improvements comprising Harbourside Place, **(b)** a first-priority lien on all fixtures, chattels, building material and all personal property of Developer necessary to the maintenance or operation of Harbourside Place, and **(c)** a first-ranking conditional assignment of contracts, leases, rents, profits, permits, deposits, approvals, licenses, warranties, and other agreements in connection with Harbourside Place. *See, e.g.*, ECF No. 78 at 28. Prospective investors were also assured that the Developer could not borrow from another lender unless the Funding Partnership provided the Developer with less than the entire $100 million for the construction loan, at which point the Developer would be "entitled to obtain additional funding from one or more additional lenders." *Id.* at 149.

Mastroianni began selling units of membership in the Funding Partnership in or about June 2011 and continued selling them through June 2013. ECF 77 ¶ 30. Plaintiffs contended that the first Events of Default occurred in mid-2012, however, when Mastroianni subordinated the Funding Partnership's first-priority security interests to that of a third-party lender—Putnam Bridge Funding, LLC ("Putnam")—from which he arranged for the Developer to take tens of millions of dollars in loans and credit lines, which were secured by the same first-priority security interests that the Funding Partnership had been promised. *Id.* ¶¶ 33-34.

Another Event of Default occurred in December 2012 when, despite the Loan Agreement's express prohibition of using construction loan funds for any purpose other than building Harbourside Place, Mastroianni used those funds to make partial repayments to Putnam. *Id.* ¶ 35.

Moreover, Mastroianni waited until April 15, 2013, to draft a memorandum to the Limited Partners—*i.e.*, those who had already paid $500,000 each for a unit of membership. *Id.* ¶ 36. In that memorandum, Mastroianni advised Limited Partners that, among other things,

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- the Funding Partnership had "made an initial $26.0 million disbursement of the Loan to fund construction of Harbourside Place. As a result, the initial Maturity Date of the Loan will be November 30, 2017[,]" Fazio Decl., Ex. 1 at LF0002515;

- the date on which the Funding Partnership would cease the sale of membership units had been extended from "November 15, 2012 to May 15, 2013[,]" *id.*;

- that "in December 2012 the Developer obtained an Additional Loan of up to $18 million from Putnam Bridge Funding Ill, LLC as Senior Lender, to provide the Developer with additional construction funds[,]" *id.*; and

- that "in order to obtain the Additional Loan, in December 2012, the Partnership entered into an intercreditor agreement subordinating its security and payment rights to the rights of the Senior Lender. Among other things, the intercreditor agreement prohibits the Developer from making interest payments to the Partnership as long as any portion of the Additional Loan remains outstanding[,]" *id.* at LF0002515-16.

Before April 15, 2013, not a single prospective investor had been given the information described above until they received the memorandum and, by that time, all but four units that were offered for sale had already been sold. ECF No. 77 ¶ 36. And although Mastroianni had told the Limited Partners that the sale of membership units would cease on May 15, 2013, he continued selling them until early June 2013. *Id.* ¶ 34.

Yet, on December 18, 2012, Mastroianni had represented to Putnam that all 200 units had been sold. *See* ECF No. 138-33 at 1. During the first day of his deposition, Mastroianni testified that he stopped short of selling all 200 units of membership "[b]ecause we had enough capital otherwise now to complete the project." ECF No. 138-7 at 49:9-25. During the second day of his deposition, Mastroianni admitted that what he told Putnam about selling 200 units was incorrect, stating that "we didn't countersign 199 investors. We countersigned 199 investors" before explaining that "[o]ne different investor doesn't really make a difference." ECF No. 138-9 at 90:7-91:6.

At the time Mastroianni took the loans and credit lines from Putnam in mid-2012, the Funding Partnership continued to raise funds for the construction loan through the sale of

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membership units through June 2013, and the ***only*** reason the Funding Partnership did not loan the Developer a total of $100 million was that Mastroianni made a conscious decision to stop selling membership units after selling 199 of the 200 available, despite the fundamental obligation to borrow from the Funding Partnership. *See* ECF No. 78 at 147 § 3 ("the Lender shall lend to the Borrower and the Borrower shall borrow from the Lender the Loan"); *Shibata v. Lim*, 133 F. Supp. 2d 1311, 1319 (M.D. Fla.2000) (breach of the covenant of good faith and fair dealing occurs when there is "a failure or refusal to discharge contractual responsibilities, prompted not by an honest mistake, bad judgment or negligence; but, rather by a conscious and deliberate act, which unfairly frustrates the agreed common purpose and disappoints the reasonable expectations of the other party thereby depriving that party of the benefits of the agreement") (citing *Cox v. CSX Intermodal, Inc.*, 732 So.2d 1092, 1097 (Fla. 1st DCA 1999)).

Moreover, Mastroianni and the General Partner were fiduciaries of the Limited Partners and the Funding Partnership, and they breached their fiduciary duties when they subordinated the Funding Partnership's first-priority security interests to Putnam. *In re Dollar Time Grp., Inc.*, 223 B.R. 237, 245 (Bankr. S.D. Fla. 1998) ("A fiduciary duty is the responsibility to act for the benefit of another while subordinating one's personal interests to that of the other person and is the highest standard of duty implied by law") (citing BLACK'S LAW DICTIONARY 625 (6th ed. 1990)). *See also United States v. De La Mata*, 266 F.3d 1275, 1293 (11th Cir. 2001) ("the fiduciary duty, or duty of loyalty, obligates officers and directors to avoid fraud, bad faith, usurpation of corporate opportunities, and self-dealing") (footnote omitted).

Nor did the cessation of the sale of membership units prevent the Developer from engaging in Events of Default by agreeing to obtain additional funding from Putnam while continuing to receive funding from the Funding Partnership and using those funds to partially repay the Putnam

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loans. *See* ECF No. 78 at 146 § 1(1) (Developer's use of construction loan funds limited "to finance the development and construction of a mixed use commercial development known as Harbourside Place . . ."); *id.* at 147 § 3 ("The purpose of the Loan is to provide funds for certain Lender-approved hard and soft construction costs (together with an interest reserve) for the purchase of the Property and the construction of the Improvements within the Project").

Despite the existence of multiple Events of Default, Mastroianni and the Developer exercised the conversion clause of the Loan Agreement, then engaged in additional Events of Default by converting the loan principal to a single "preferred" unit of membership in the Developer's LLC after it had been converted from a Florida LLC to a Delaware LLC, in flagrant breach of the Loan Agreement's conversion provisions, which called for conversion into common units of interest in the Florida LLC. *See* ECF No. 78 at 147 § 5; *see also id.* § 5(6) ("Any failure by the Borrower to comply with its obligations under this Section following delivery of a Conversion Notice shall constitute a Default"). And, because the Limited Partnership Agreement required the Limited Partners' unanimous consent before the Funding Partnership could invest in an "Other Investment," which is defined as "any real estate-related investment of the Partnership in or with an entity with operations within the geographic area of the Florida Regional Center and Temporary Investments, but excluding the proposed investment in Harbourside Place[,]" ECF No. 78 at 64 § 1.1.33, proceeding with the conversion without even notifying the Limited Partners constituted yet another breach of fiduciary duty to them and to the Funding Partnership by Mastroianni and the General Partner.

B. INITIATING AND PROSECUTING THIS ACTION

Plaintiffs filed their initial complaint in this action on January 27, 2020. *See* ECF No. 1. Plaintiffs sought declaratory relief on behalf of themselves, on behalf of a proposed class

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composed of all Limited Partners who had not entered into a valid agreement with Defendants to settle the claims alleged in the present action, and derivatively on behalf of the Funding Partnership. *See id.* ¶¶ 97-172. Plaintiffs also sought damages derivatively and on behalf of the proposed class for breaches of contract and fiduciary duty, for aiding and abetting those breaches, and for conversion and violations of Florida's civil theft statute. *See id.*[3]

Approximately two weeks after filing their initial Complaint, Plaintiffs served Defendants with their first sets of interrogatories and requests for production of documents. Fazio Decl. ¶ 2. Over the course of nearly two years, Plaintiffs served Defendants with several more sets of interrogatories and requests for production as well as requests for admissions, and Defendants ultimately produced approximately 116,000 pages of documents before Plaintiffs deposed Mastroianni on September 8 and November 17, 2021, and Ashley Flucas (General Counsel of former Defendant Florida Regional Center, LLC) on November 18, 2021. *Id.*

Class Counsel reviewed those documents and conducted additional research for the purpose of understanding the EB-5 Program and the transactions underlying this litigation. *Id.* ¶ 3. Moreover, Plaintiffs responded to written discovery propounded by Defendants, and they sat for depositions on March 1 and March 8, 2021. *Id.*

The parties also engaged in fairly extensive law-and-motion practice, which included, *inter alia*, three motions to dismiss Plaintiffs' initial, First Amended, and Second Amended Complaints (ECF Nos. 19, 30, and 84, respectively); a motion for judgment on the pleadings (ECF No. 22); cross-motions for reconsideration of Order on Motion to Dismiss (ECF Nos. 56 & 58); a motion

[3] The Court ultimately dismissed the claims for declaratory relief, aiding and abetting, conversion, and civil theft. *See* ECF No. 54 at 14. The now operative Second Amended Complaint includes derivative claims for breaches of contract and fiduciary duty, and a claim of breach of fiduciary duty on behalf of the Class. *See* ECF No. 77 ¶¶ 79-142.

to dismiss Defendants' Counterclaims (ECF No. 57); a motion for class certification (ECF No. 70); and motions for summary judgment (ECF Nos. 137-138). And on June 25, 2021, the Court certified a Class composed as follows:

> All persons who invested in the Funding Partnership (i.e., all Limited Partners). Excluded from this Class are Defendants, their affiliates, subsidiaries, agents, board members, directors, officers, and/or employees; the Court and its staff; any Limited Partner who has entered into an agreement to settle, waive, or otherwise resolve their claims against Defendants, whether in the State Court Action or through private resolution, arising from the same underlying subject matter in the instant case.

ECF No. 113 at 18.

Following the distribution of Notice to all Class Members, 32 Limited Partners who were pursuing individual claims in a parallel action they filed in Florida state court in late 2018 (*Fu v. Mastroianni*, No. 50-2018-CA-012883-XXXX-MB (Palm Beach Cty.) (the "State Action")) opted out of the Class. *See* ECF No. 142. Thereafter, six (6) Class Members entered into individual settlements with Defendants. Fazio Decl. ¶ 4.

C. ARMS'-LENGTH SETTLEMENT NEGOTIATIONS

In July 2020, the Parties proceeded to mediation before Bruce Edwards of Judicial Arbitration and Mediation Services ("JAMS"), but were unable to reach a settlement. *See* ECF No. 47. The Parties attempted mediation once again before another JAMS mediator, former U.S. Magistrate Judge Elizabeth LaPorte, in January 2022. *See* ECF Nos. 133 & 136. Again, however, the Parties were unable to reach a settlement. *See* ECF No. 152; Fazio Decl. ¶5.

The Parties continued to discuss settlement on their own and, although they were unable to reach an agreement on terms that were acceptable to the named Plaintiffs/Class Representatives, Class Counsel decided that Defendants' proposal was substantial enough to present to the Class as a whole for the purpose of allowing Class Members to decide whether they wished to accept the terms on an individual basis. *Id.* ¶ 6.

After working together with Defendants' counsel to ensure that the proposal was accurate, Class Counsel arranged for Settlement Services, Inc. ("SSI"), the service that Plaintiffs had retained to administer Notice to the Class that the Court had certified the action, to distribute a memorandum describing Defendants' settlement proposal to all Class Members. *Id.* ¶ 7. Accordingly, SSI distributed the memorandum to the entire Class, at the DeHeng firm's expense, in early May 2022. *Id.*

When only seven Class Members expressed an interest in Defendants' settlement proposal, Defendants sought to communicate directly with individual Class Members, advising the Court that they wished to explain the terms to them personally. *See* ECF No. 168 at 9:9-12:19. During the same conference, Defendants' counsel advised the Court that he was scheduled to appear at a hearing of a motion for summary judgment in the State Action, so trial was scheduled to begin on June 14, 2022. *See* Fazio Decl. ¶ 8.

After Plaintiffs' motion to preclude Defendants from communicating *ex parte* with Class Members was denied, *see* ECF No. 183, Defendants contacted them directly to discuss the terms of their proposal with individual Class Members. *Id*. When the parties appeared for trial on June 14, 2022, Defendants' counsel advised the Court that a majority of Class Members had expressed an interest in Defendants' settlement proposal and requested that the trial be postponed to enable them to settle their claims. Fazio Decl. ¶ 8.

If a majority of Class Members had actually expressed interest in settlement, the Class may have been subject to decertification. *See, e.g.*, *Herman v. Seaworld Parks & Entm't, Inc.*, 320 F.R.D. 271, 289 (M.D. Fla. 2017) ("generally, joinder of fewer than twenty-one plaintiffs is considered practicable and joinder of more than forty impracticable") (citing *Cox v. Am. Cast Iron Pipe Co.*, 784 F.2d 1546, 1553 (11th Cir. 1986)). Consequently, Class Counsel had no

choice but to agree with Defendants' request for a continuance. Fazio Decl. ¶ 9. The Court granted the continuance, rescheduled the trial for July 12, 2022, and advised the parties that no further continuance would be granted. *See* ECF No. 189.

In actuality, fewer than 10 Class Members expressed interest in settlement and even fewer entered into individual settlement agreements with Defendants. Fazio Decl. ¶ 9.

On July 11, 2022, Defendants made a new proposal on terms that both Class Representatives found acceptable. Fazio Decl. ¶ 10. That evening, the Parties notified the Court that they had reached a settlement. *See* ECF No. 207. The Court established a schedule for the approval proceedings, beginning with the motion for preliminary approval, which was to have been filed no later than August 26, 2022. ECF No. 209 at 1. When it became evident that meeting the August 26 deadline would not be possible, however, Class Counsel notified the Court that Defendants had refused to proceed with the settlement, which resulted in Plaintiffs moving to enforce. Fazio Decl. ¶ 10.

Defendants opposed the motion to enforce the settlement, ECF No. 216, and, on September 12, 2022, they filed a motion to disqualify Class Counsel for disclosing settlement communications and sought an award of attorneys' fees as a sanction, ECF No. 217. On September 14, 2022, the Court denied the motion to enforce the settlement and the motion to disqualify, but instructed Defendants to submit an application for an award of attorneys' fees and scheduled trial to begin on January 17, 2023. ECF Nos. 222, 225, 229.

On December 12, 2022, Defendants' counsel sought to resume settlement discussions. Fazio Decl. ¶ 11. Amid those discussions, counsel for plaintiffs in the State Action expressed concern that resolving the derivative claims in the present action without recovering on behalf of all Limited Partners, regardless of whether they were Class Members, could interfere with the

State Action plaintiffs' ability to recover on their derivative claims. *Id.* Class Counsel explained that only the claims of Settlement Class Members would be resolved by the settlement of this action, and nothing in the Release or any other aspect of the Settlement Agreement will adversely affect valid claims by Limited Partners who are not Settlement Class Members ("Other Limited Partners"). *Id.* ¶ 12. Defendants are in accord. *See id.*; *see also* ECF No. 237 at 2.

The Parties executed the Settlement Agreement on January 3, 2023. *Id.* ¶ 14 & Ex. 2 at 37-39. The principal terms of the Settlement Agreement are as follows:

[redacted]

- Upon Settlement Class Members' receipt of the [redacted] the Settlement Class Members shall be deemed to have assigned and transferred their interest in the Funding Partnership to HSP or its designee and shall be deemed to have withdrawn from the Funding Partnership. *See id.* § II.B.1. If Defendants miss any subsequent payment that remains unpaid for thirty (30) days, Defendants shall ensure that the units of membership and proportionate interests in the Funding Partnership are returned to Settlement Class Members. *See id.* § II.B.2.

- No admissions of liability as a result of the Parties' agreement to settle their respective claims and counterclaims. *See id.* § IX.A.-B.

- The Parties agree to refrain from disparaging one another. *See id.* § VIII.C.

- A mutual general release of all claims and causes of action (including a provision in compliance with California Civil Code section 1542) and covenants not to sue, and the dismissal of all claims and counterclaims with prejudice. *See id.* § V. Neither the release, the dismissal of claims asserted on behalf of the Funding Partnership, nor any other provision of the Settlement Agreement is intended to preclude valid claims or causes of

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action asserted by members of the Funding Partnership who are not Settlement Class Members. *See id.*

- The Parties and their respective counsel shall maintain the confidentiality of the economic terms of the Settlement Agreement to the extent allowed by applicable law. *See id.* § X.D.

- In accordance with *Johnson v. NPAS Sols., LLC*, 975 F.3d 1244 (11th Cir. 2020), the Class Representatives shall not receive service awards. *See id.* § III.A.2.(b).

- Plaintiffs will move for an order awarding their counsel attorneys' fees and litigation expenses amounting to not more than 25% of the aggregate Settlement Payments and the amounts paid to Class Members who entered into individual settlement agreements with Defendants. *See id.*, Ex. C at 4. The portion of the award of attorneys' fees and litigation expenses attributable to Settlement Payments will be paid with each Installment Payment to Settlement Class Members. *See id*. at 4-5.

- The Court will be asked to retain jurisdiction until the Parties satisfy and properly discharge all the respective terms and conditions of the Settlement Agreement. *See id.* § IX.K.

In short, the benefits that the Settlement Agreement confers on Class Members and the Funding Partnership are substantial, and the Settlement has no preclusive effect on valid claims or causes of action of Other Limited Partners.

III. ARGUMENT

A. THE PROPOSED SETTLEMENT WARRANTS PRELIMINARY APPROVAL

Federal Rule of Civil Procedure 23(e) requires judicial approval of the settlement of claims brought on a classwide basis. "[S]uch approval is committed to the sound discretion of the district court." *In re U.S. Oil & Gas Litig*., 967 F.2d 489, 493 (11th Cir. 1992). In exercising that discretion, courts are mindful of the "strong judicial policy favoring settlement as well as by the realization that compromise is the essence of settlement." *Bennett v. Behring Corp*., 737 F.2d 982, 986 (11th Cir. 1984). The policy favoring settlement is especially relevant in class actions, where the inherent costs, delays, and risks of continued litigation might otherwise overwhelm any potential benefit the class could hope to obtain. *See, e.g., Florida Educ. Ass'n v. Dep't of Educ.*, 447 F. Supp. 3d 1269, 1275–76 (N.D. Fla. 2020) ("Settlement has special importance in class actions with their notable

uncertainty, difficulties of proof, and length. Settlements of complex cases contribute greatly to the efficient use of judicial resources, and achieve the speedy resolution of justice") (cleaned up); *In re Sunbeam*, 176 F. Supp. 2d at 1329 ("Settlements of complex cases contribute greatly to the efficient utilization of scarce judicial resources and achieve the speedy resolution of justice, for a just result is often no more than an arbitrary point between competing notions of reasonableness").

Because the Court has certified the Class, *see* ECF 113, the focus of this motion is to determine whether the proposed settlement is "fair, reasonable, and adequate . . . ," Fed. R. Civ. P. 23(e)(2).[4] Toward that end, the Eleventh Circuit requires district courts to ensure that the settlement is fair, reasonable, and adequate, and that it is not a product of fraud or collusion. *Bennett,* 737 F.2d at 986. "In evaluating these considerations, the district court should not try the case on the merits, nor should it make a proponent of a proposed settlement justify each term of a settlement against the hypothetical or speculative measure of what concessions might have been gained." *In re*

[4] The Court need not certify the Class for settlement purposes. *See, e.g., Burrow v. Forjas Taurus S.A.*, No. 16-21606-CIV, 2019 WL 13034869, at *4 (S.D. Fla. Mar. 15, 2019) ("If the court has already certified a class, the only information ordinarily necessary is whether the proposed settlement calls for any change in the class certified, or of the claims, defenses, or issues regarding which certification was granted") (cleaned up); *Saccoccio v. JP Morgan Chase Bank, N.A.*, 297 F.R.D. 683, 698 (S.D. Fla. 2014) (overruling objection that previously-certified class required certification for settlement: "this Court has already found that certification of the class is warranted and appropriate"). Here, all that has changed since the Court granted class certification (ECF No. 113) is that six Class Members entered into individual settlement agreements with Defendants, which leaves 60 Class Members and, therefore, has no impact on numerosity. *See Cox.,* 784 F.2d at 1553 ("while there is no fixed numerosity rule, generally less than twenty-one is inadequate, more than forty adequate, with numbers between varying according to other factors") (cleaned up). Thus, unless the present motion is granted, the action is scheduled to proceed to trial on a classwide basis on January 17, 2023. *See* ECF No. 225.

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Sunbeam Sec. Litig., 176 F. Supp. 2d 1323, 1330 (S.D. Fla. 2001) (cleaned up) (citing *Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977)).[5]

"At this preliminary approval stage, the court again need only 'determine whether the proposed settlement is within the range of possible approval.'" *Alberto v. GMRI, Inc.*, 252 F.R.D. 652, 666 (E.D. Cal. 2008) (quoting *Gautreaux v. Pierce*, 690 F.2d 616, 621 n. 3 (7th Cir.1982)). *Accord Braynen v. Nationstar Mortg., LLC*, No. 14-CV-20726, 2015 WL 4043012, at *1 (S.D. Fla. Jan. 30, 2015).

1. *The Proposed Settlement Provides Substantial Benefits to Each Settlement Class Member as a Result of Good-Faith, Arm's-Length Negotiations by Experienced Class Counsel*

When considering whether a proposed settlement meets the applicable standards, "the trial court is entitled to rely upon the judgment of experienced counsel for the parties." *Cotton*, 559 F.2d at 1330; *see also Greco v. Ginn Dev. Co., LLC*, 635 F. App'x 628, 632 (11th Cir. 2015) (same). Thus, in determining whether to grant preliminary approval, "courts should give weight to the parties' consensual decision to settle class action cases, because they and their counsel are in unique positions to assess the potential risks." *Shaw v. Set Enterprises, Inc.*, No. 15-62152-CIV, 2017 WL 2954675, at *1 (S.D. Fla. June 30, 2017). Indeed, "a strong initial presumption of fairness attaches to any class action settlement reached by experienced counsel following arms-length negotiations." *In re United States Sugar Corp. Litig.*, No. 08-80101-CIV, 2011 WL 13173854, at *2 (S.D. Fla. Jan. 24, 2011). *See also Desue v. 20/20 Eye Care Network, Inc.*, No. 21-CIV-61275-RAR, 2022 WL 17477004, at *6 (S.D. Fla. Dec. 5, 2022) ("'A presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arm's-length negotiations between

[5] "Decisions of the Fifth Circuit rendered on or before September 30, 1981, are binding precedent in the Eleventh Circuit." *United States v. Brown*, 364 F.3d 1266, 1271 (11th Cir. 2004) (citing *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (*en banc*)).

experienced, capable counsel after meaningful discovery'") (quoting MANUAL FOR COMPLEX LITIGATION § 30.42 (3d ed. 1995)); *In re Takata Airbag Prod. Liab. Litig.*, No. 14-24009-CV, 2017 WL 11680208, at *4 (S.D. Fla. Sept. 19, 2017) (same); *In re Checking Account Overdraft Litig.*, 830 F. Supp. 2d 1330, 1345 (S.D. Fla. 2011) (same).

Plaintiffs believe that the strength of their claims make the likelihood of success at trial quite good, but as the Court's order regarding the parties' cross-motions for summary judgment makes plain, victory is not a forgone conclusion. *See, e.g.*, ECF 163 at 14-25. Plaintiffs and their counsel are also aware of the complexity of those issues, the expense of continuing the litigation, and the risk of loss at trial or on appeal. Fazio Decl. ¶ 16.

Despite the extreme disagreements between the Parties and their counsel over the course of this litigation, the Parties' counsel—who have extensive experience with class actions and other forms of complex litigation—managed to forge the terms of a settlement that reflects the strengths of Plaintiffs' case as well as the attendant uncertainties on the eve of trial. This alone augurs in favor of approval. *Morgan v. Pub. Storage*, 301 F. Supp. 3d 1237, 1260-61 (S.D. Fla. 2016).

Moreover, as mentioned above, "[a] settlement can be satisfying even if it amounts to a hundredth or even a thousandth of a single percent of the potential recovery." *Behrens*, 118 F.R.D. at 542. *See also Williams v. Reckitt Benckiser LLC*, No. 20-23564-CIV, 2021 WL 8129371, at *34 (S.D. Fla. Dec. 15, 2021) (discussing same), *report and recommendation adopted*, No. 20-23564-CIV, 2022 WL 1176959 (S.D. Fla. Mar. 17, 2022); *Mahoney v. TT of Pine Ridge, Inc.*, No. 17-80029-CIV, 2017 WL 9472860, at *7 (S.D. Fla. Nov. 20, 2017) ("even though the total cash recovery for each class remember reflects a maximum of eight-tenths of a percent of the statutory recovery for a single violation, the Court still finds that the recovery here is fair, reasonable, and adequate").

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Here, Settlement Class Members will receive [redacted] without so much as having to submit a claim form or satisfy other administrative criteria involved in most class actions. By any measure, the Settlement is fair, reasonable, and adequate. *See, e.g.*, *Gevaerts v. TD Bank*, No. 1:14-CV-20744-RLR, 2015 WL 6751061, at *7 (S.D. Fla. Nov. 5, 2015) ("Approximately ten percent (10%) of the most probable sum Plaintiffs anticipated recovering at trial, which is being paid by one defendant on aiding and abetting claims and who did not initiate the scheme, constitutes a very fair settlement").[6]

Also, "in this circuit we have identified twenty to thirty percent of the common fund as a 'benchmark' for an attorney's fee award." *Carter v. Forjas Taurus, S.A.*, 701 F. App'x 759, 767 (11th Cir. 2017). Plaintiffs will seek an award of ***both*** attorneys' fees and litigation expenses that amount to no more than 25% of Class Members' recovery. Fazio Decl., Ex. 2 & Ex. C thereto at 4.

2. *The Proposed Settlement Complies with Due Process Requirements and Federal Rules of Civil Procedure 23 and 23.1*

Rule 23 provides that "the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B); *see also* Fed. R. Civ. P. 23(e)(1) & (h)(1); *Morgan*, 301 F. Supp. 3d at 1261. Similarly, Rule 23.1 provides that "[n]otice of a

[6] *See also Swift v. BancorpSouth Bank*, No. 1:10-CV-00090-GRJ, 2016 WL 11529613, at *1 (N.D. Fla. July 15, 2016) ("the Settlement provides a fair, reasonable and adequate recovery for Settlement Class Members, representing approximately fifty-seven percent (57%) of the maximum possible recoverable damages . . ."); *Parsons v. Brighthouse Networks, LLC*, No. 2:09-cv-267, 2015 WL 13629647, at *3 (N.D. Ala. Feb. 5, 2015) (class settlement recovery of between 13% to 20% is "frequently found ... to be fair and adequate"); *In re Checking Acct. Overdraft Litig.*, 830 F. Supp. 2d 1330, 1346, 1350 (S.D. Fla. 2011) (settlement producing "between 45 percent and 9 percent of [class members'] anticipated total recovery" was an "exemplary result"); *In re Newbridge Networks Sec. Litig.*, No. 94-cv-1678, 1998 WL 765724, at *2 (D.D.C. 1998) ("an agreement that secures roughly six to twelve percent of a potential trial recovery, while preventing further expenditures and delays and eliminating the risk that no recovery at all will be won, seems to be within the targeted range of reasonableness).

proposed settlement, voluntary dismissal, or compromise must be given to shareholders or members in the manner that the court orders." Fed. R. Civ. P. 23.1(c); *see also Cannon v. Texas Gulf Sulphur Co.*, 55 F.R.D. 308, 313 (S.D.N.Y. 1972) (function of notice in class action and derivative action under Rule 23.1(c) "is to describe the Settlement"). "To satisfy due process requirements, the notice must be the best practicable, 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." *Morgan*, 301 F. Supp. 3d at 1261 (quoting *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985)) (cleaned up).

Notice programs that entail distribution by direct mail and by electronic means satisfy these standards. *Janicijevic v. Classica Cruise Operator, Ltd*., No. 20-CV-23223, 2021 WL 2012366, at *2 (S.D. Fla. May 20, 2021); *Morgan*, 301 F. Supp. 3d at 1262; *In re Checking Account Overdraft Litig*., 275 F.R.D. 654, 662-63 (S.D. Fla. 2011); *Perez v. Asurion Corp*., 501 F. Supp. 2d 1360, 1377 (S.D. Fla. 2007).

Here, the Parties have agreed to distribute the Notice of Proposed Settlement with the assistance of Settlement Services, Inc. ("SSI"), which distributed the Class Notice in November 2021. Fazio Decl. ¶ 17 & Ex. 2 §§ I.A.16., III.A.1. SSI will distribute the Notice of Proposed Settlement in English, Chinese, and Korean languages to each Settlement Class Member and Other Limited Partner by electronic means and/or by first-class mail, and will include a copy of the Settlement Agreement (which will be provided to Other Limited Partners in redacted form). Fazio Decl., Ex. 2 § II.D.1. & Ex. B thereto at ¶ 3. The Notice of Proposed Settlement also informs Settlement Class Members and Other Limited Partners of their right to object and the procedures for doing so; of the time and place of the Final Approval Hearing; and of their rights to enter an

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appearance through their own counsel. *See* Fazio Decl., Ex. 2 §§ III.-IV. Thus, the proposed manner and forms of notice satisfy Rule 23(c)(2)(B), Rule 23.1(c), and due process.

IV. CONCLUSION

After litigating this case vigorously from its inception to the eve of trial, the Parties have negotiated a proposed Settlement Agreement that is fair, reasonable, and adequate by any measure. Accordingly, Plaintiffs respectfully request that the Court grant preliminary approval of the Settlement and order the distribution of the Notice of Proposed Settlement to Settlement Class Members and Other Limited Partners.

Dated: February 13, 2023

Respectfully Submitted,

by /s/ *Robert C.L. Vaughan*

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