UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF GEORGIA

ATLANTA DIVISION

MONROE COUNTY EMPLOYEES' RETIREMENT SYSTEM and ROOFERS LOCAL NO. 149 PENSION FUND, Individually and on Behalf of All Others Similarly Situated, Plaintiffs, vs. THE SOUTHERN COMPANY, THOMAS A. FANNING, ART P. BEATTIE, EDWARD DAY, VI, G. EDISON HOLLAND, JR., JOHN C. HUGGINS and THOMAS O. ANDERSON, Defendants.	Civil Action No. 1:17-cv-00241-WMR CLASS ACTION PLAINTIFFS' MEMORANDUM IN SUPPORT OF UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

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Plaintiffs Roofers Local No. 149 Pension Fund and Monroe County Employees' Retirement System submit this memorandum in support of their unopposed motion for preliminary approval of a proposed Settlement of this class action brought on behalf of purchasers or acquirors of The Southern Company ("Southern Company" or the "Company") common stock during the period from April 25, 2012 through October 30, 2013 (the "Class Period"), alleging claims under the Securities Exchange Act of 1934 against defendants Southern Company and certain executives of the Company and/or its wholly owned subsidiary, Mississippi Power Company ("Defendants").[1] The terms of the Settlement are set out in the Stipulation of Settlement dated September 8, 2020 (the "Stipulation"), submitted herewith.[2]

I. INTRODUCTION

The Settlement provides that Defendants will cause their insurers to pay $87,500,000.00 in cash (the "Settlement Amount") to resolve Plaintiffs' claims against Defendants. This outstanding Settlement is the result of extensive arm's-

[1] All capitalized terms used in this memorandum that are not otherwise defined herein shall have the meanings provided in the Stipulation of Settlement, submitted herewith.

[2] Lead Counsel has conferred with Defendants' Counsel concerning this motion. While Defendants do not adopt all of the arguments or characterizations set forth herein, they do not oppose the relief sought. A proposed order granting the relief requested herein (the "Notice Order") is attached to the Stipulation as Exhibit A and is also attached to the Motion for Preliminary Approval of Class Action Settlement as Exhibit 1.

length negotiations over many months between counsel for Plaintiffs and Defendants, assisted by an experienced mediator, following more than three years of hard-fought litigation. Plaintiffs and their counsel believe that the Settlement is an excellent result for the Class, and that the Court should preliminarily approve it and permit notice of its terms to be disseminated to Class Members.

In determining whether preliminary approval is warranted, the issue before the Court is whether the Court will likely be able to approve the Settlement under Rule 23(e)(2), and certify the Class for purposes of settlement and entering a judgment. Fed. R. Civ. P. 23(e)(1).[3] The Settlement satisfies each of the elements of Rule 23(e)(2) as well as the approval factors set forth in *In re CP Ships Ltd. Sec. Litig.*, 578 F.3d 1306, 1315 (11th Cir. 2009). Accordingly, notice of the Settlement should be given to Class Members, and a hearing scheduled to consider final settlement approval. The Court is not required at this point to make a final determination as to the fairness of the Settlement.

Because the Settlement meets the foregoing criteria and is well within the range of what might be approved as fair, reasonable, and adequate, Plaintiffs ask this Court to enter an Order: (1) granting preliminary approval of the Settlement; and (2)

[3] This Court has already certified a litigation class; there are no changes between the class previously certified and the class which this Settlement, if approved, will bind.

directing that the Class be given notice of the pendency of this Litigation and the Settlement, in the form and manner proposed by the parties.[4]

II. BACKGROUND OF THE LITIGATION

A. Summary of Plaintiffs' Claims, Litigation History and Settlement Negotiations

The initial complaint in this action was filed on January 20, 2017. Plaintiffs' Consolidated Complaint for Violation of the Federal Securities Laws (the "Complaint"), filed on June 12, 2017, alleges that Defendants violated §§10(b) and 20(a) of the Securities Exchange Act of 1934. More specifically, the Complaint alleges that throughout the Class Period, Defendants made materially false and misleading statements and/or failed to disclose adverse information regarding the progress of a clean coal power plant in Kemper County, Mississippi (the "Kemper Plant"), which caused the price of Southern Company common stock to trade at artificially inflated prices, until the market learned of the purported false and misleading statements or omissions, and the Company's stock price declined. Defendants deny each and all of Plaintiffs' allegations. Defendants contend that they

[4] At the final Settlement Hearing, the Court will consider the motion for final approval of the Settlement and entry of the parties' proposed final order and judgment and Lead Counsel's application for an award of attorneys' fees and expenses, including awards to Plaintiffs pursuant to 15 U.S.C. §78u-4(a)(4).

did not make any false or misleading statements and that they disclosed all information required to be disclosed by the federal securities laws.

On July 27, 2017, Defendants moved to dismiss the Complaint. Plaintiffs opposed the motion on September 11, 2017, and Defendants filed their reply on October 11, 2017. On March 29, 2018, the Court granted in part, and denied in part, Defendants' motion to dismiss.

On April 26, 2018, Defendants moved for reconsideration of the Court's March 29, 2018 Order on the motion to dismiss, and on May 23, 2018, moved the Court for an order seeking leave to file an immediate appeal to the Eleventh Circuit in the event the Court denied Defendants' motion for reconsideration. Plaintiffs opposed both motions. On July 31, 2018, the Court heard oral argument on Defendants' motions, and on August 10, 2018, the Court denied both motions in their entirety.

On September 24, 2018, Plaintiffs filed their motion to certify the class. Defendants opposed the motion, and moved to exclude Plaintiffs' expert's opinions in support of the motion. Plaintiffs opposed Defendants' motion to exclude, and moved to exclude Defendants' expert's opinions submitted in opposition to the class certification motion. Reply briefs were filed to each motion, and on May 21 and 22, 2019, the Court held an evidentiary hearing on the motions. On June 12, 2019, the Court denied the motions to exclude the experts' opinions, and on August 22, 2019,

granted Plaintiffs' motion for class certification. Defendants filed a Rule 23(f) petition with the Eleventh Circuit on September 5, 2019, which was opposed by Plaintiffs on September 16, 2019. On August 28, 2020, the Eleventh Circuit granted the parties' joint motion to hold Defendants' petition in abeyance pending finalization of the Settlement.

In December 2019, the Settling Parties requested that the Court stay the case through March 2020 to permit mediation efforts, which request was granted. On February 20, 2020, the Settling Parties attended an in-person mediation with David M. Murphy, Esq. of Phillips ADR. In advance of the mediation, the Settling Parties exchanged and provided to Mr. Murphy detailed mediation statements and replies, which addressed the strengths and weaknesses of each side's case. Although the Settling Parties negotiated in good faith, no settlement was reached, and litigation efforts continued. While litigation was ongoing, the Settling Parties continued settlement discussions through Mr. Murphy. On August 15, 2020, the Settling Parties reached an agreement-in-principle to resolve the Litigation, and executed a Term Sheet memorializing their agreement. The Term Sheet included, among other things, an agreement to settle the Litigation in return for a cash payment of $87,500,000 for the benefit of the Class, subject to the negotiation of the terms of a Stipulation of

Settlement and approval by the Court. The Stipulation (together with the Exhibits thereto) reflects the final and binding agreement between the Settling Parties.

III. PRELIMINARY SETTLEMENT APPROVAL

A. The Standard for Judicial Approval of Class Action Settlements

Rule 23(e) of the Federal Rules of Civil Procedure requires judicial approval of any class action settlement. *Poertner v. Gillette Co.*, No. 6:12-cv-803-Orl-31DAB, 2014 U.S. Dist. LEXIS 116616, at *5 (M.D. Fla. Aug. 21, 2014), *aff'd*, 618 F. App'x 624 (11th Cir. 2015). There is a "strong judicial policy favoring settlement." *Bennett v. Behring Corp.*, 737 F.2d 982, 986 (11th Cir. 1984); *Amason v. Pantry, Inc.*, No. 7:09-CV-02117-RDP, 2014 U.S. Dist. LEXIS 90537, at *23 (N.D. Ala. July 3, 2014). "[S]ettlements [of class actions] are 'highly favored in the law and will be upheld whenever possible.'" *Bennett v. Behring Corp.*, 96 F.R.D. 343, 348 (S.D. Fla. 1982), *aff'd*, 737 F.2d 982 (11th Cir. 1984); *accord In re U.S. Oil & Gas Litig.*, 967 F.2d 489, 493 (11th Cir. 1992); *Cifuentes v. Regions Bank*, No. 11 CV 23455 FAM, 2014 U.S. Dist. LEXIS 37458, at *11 (S.D. Fla. Mar. 20, 2014).[5] As the court in *U.S. Oil & Gas* noted, "[c]omplex litigation – like the instant [class action] case – can occupy a court's docket for years on end, depleting the resources of the parties and the

[5] All citations are omitted and emphasis is added unless otherwise noted.

taxpayers while rendering meaningful relief increasingly elusive. Accordingly, the Federal Rules of Civil Procedure authorize district courts to facilitate settlements . . . ." 967 F.2d at 493.

Preliminary approval of a class action settlement lies within the sound discretion of the court. *See In re Motorsports Merch. Antitrust Litig.*, 112 F. Supp. 2d 1329, 1333 (N.D. Ga. 2000); *Bennett*, 737 F.2d at 986. When considering the proposed settlement, the court must "make a preliminary determination on the fairness, reasonableness, and adequacy of the settlement terms." David F. Herr, *Manual for Complex Litigation* at §21.632 (4th ed. 2019); *cf. Sterling v. Stewart*, 158 F.3d 1199, 1203-04 (11th Cir. 1998); *In re NASDAQ Market-Makers Antitrust Litig.*, 176 F.R.D. 99, 102 (S.D.N.Y. 1997). It is well-settled that a settlement should be approved if it is "fair, adequate, reasonable, and free of fraud or collusion." *Motorsports Merch.*, 112 F. Supp. 2d at 1333 (citing *Bennett*, 737 F.2d at 986).

As set forth below, the proposed Settlement merits preliminary approval and warrants notice to the Class and the scheduling of a final fairness hearing.

B. The Relevant Factors Governing for Preliminary Approval

Pursuant to Rule 23(e)(1), as recently amended, the issue at preliminary approval is whether the Court "will likely be able to: (i) approve the proposal under Rule 23(e)(2); and (ii) certify the class for purposes of judgment on the proposal."

Fed. R. Civ. P. 23(e)(1). In addition, the Eleventh Circuit has held that in determining whether a proposed settlement is "fair, adequate and reasonable," a court should look to the following factors:

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

CP Ships, 578 F.3d at 1318 (quoting *Bennett*, 737 F.2d at 986); *see also Behrens v. Wometco Enters., Inc.*, 118 F.R.D. 534, 537 (S.D. Fla. 1988), *aff'd*, 899 F.2d 21 (11th Cir. 1990). Approval of a class action settlement, including application of the foregoing factors, "is committed to the sound discretion of the district court." *U.S. Oil & Gas*, 967 F.2d at 493; *Bennett*, 737 F.2d at 987 (same).

C. The Proposed Settlement Meets Each of the Rule 23(e)(2) Factors

1. Plaintiffs and Their Counsel Have Adequately Represented the Class

Plaintiffs and their counsel have satisfied Rule 23(e)(2)(A) by diligently prosecuting this action for more than three years. Among other things, Plaintiffs investigated the relevant factual events, analyzed Southern Company's U.S. Securities and Exchange Commission filings, and other public statements and analyst reports concerning the Company and the Kemper Plant. Lead Counsel also researched the

legal issues underlying Plaintiffs' claims; drafted a detailed complaint and amended complaint; prevailed in part against Defendants' motion to dismiss the Complaint; obtained class certification over Defendants' vigorous opposition, and opposed Defendants' Rule 23(f) petition; conducted document and deposition discovery; retained experts and consultants, and participated in lengthy, mediator-assisted settlement negotiations with Defendants' Counsel. The result of these efforts is an impressive settlement of $87,500,000.00 in cash for the benefit of the Class.

2. The Settlement Was Negotiated at Arm's Length

There can be no question that the Settlement is the result of arm's-length negotiations, devoid of even a hint of collusion. As discussed above, the Settling Parties engaged an experienced mediator to assist them, and attended a full-day in person mediation, which was ultimately unsuccessful. After months of post-mediation negotiations through the mediator, the Settling Parties reached an agreement-in-principle to resolve the Litigation, subject to Court approval. The fact that the Settlement was negotiated at arm's length strongly supports preliminary approval.

3. The Settlement Is Adequate in Light of the Costs, Risks, and Delay of Trial and Appeal

In assessing the proposed Settlement, the Court should balance the benefits afforded to the Class – including the immediacy and certainty of a recovery – against the significant costs, risks and delay of proceeding with the Litigation. Indeed,

securities class actions present numerous hurdles to proving liability that are difficult for plaintiffs to meet. Although Plaintiffs and Lead Counsel believe that the claims asserted in the Litigation are meritorious, continued litigation against Defendants poses substantial risks that make any recovery uncertain.

Indeed, the Court partially granted Defendants' motion to dismiss, and Defendants' Rule 23(f) petition on the Court's class certification order was under submission by the Eleventh Circuit when the agreement to settle was reached. Even if the Eleventh Circuit rejected Defendants' petition, Plaintiffs faced considerable risks and expenses in litigating the case.

To prove their claims, Plaintiffs would need to rely extensively on adverse witnesses affiliated with the Company and expert analysis of key issues. Each expert's testimony would be critical to demonstrating Defendants' liability and damages, and the conclusions of each expert would be hotly contested at trial. If the Court determined that even one of Plaintiffs' experts should be excluded from testifying at trial, Plaintiffs' case would become more difficult (if not impossible) to prove.[6]

[6] The Settling Parties have already moved to exclude their opponents' damages experts at the class certification stage. Although those motions were denied, they would likely be refiled at the summary judgment stage, following the close of fact and expert discovery.

Furthermore, if litigation continued, there would remain significant hurdles to proving liability with respect to events that happened a decade ago, or even proceeding to trial. Defendants have strenuously disputed that they did anything wrong and have maintained that they were adequately transparent with the market and regulators with respect to the progress of construction at the Kemper Plant. At minimum, Defendants may have been able to raise serious issues of fact that would have rendered a favorable verdict for Plaintiffs highly uncertain.

In complex cases such as this one, "'[t]he risks surrounding a trial on the merits are always considerable.'" *Beneli v. BCA Fin. Servs.*, 324 F.R.D. 89, 103-04 (D.N.J. 2018). Here, in the absence of a settlement, there is a very real risk that the Class would recover an amount significantly less than the total amount of the Settlement – or nothing at all. Thus, the $87,500,000.00 in cash recovery now, particularly when viewed in the context of the risks, costs, delay, and uncertainties of further proceedings, weighs in favor of preliminary approval of the Settlement.

4. The Proposed Method of Distributing Relief to the Class Is Effective

The method of the proposed notice and claims administration process (Rule 23(e)(2)(C)(ii)) is effective. The notice plan includes direct mail notice to all those who can be identified with reasonable effort, as well as publication in a newspaper

directed towards investors and over the Internet. In addition, toll-free telephone and email support will be provided, and a Settlement-specific website will be created where key documents will be posted, including the Stipulation, Notice, Proof of Claim form and Notice Order.

The distribution of the Settlement proceeds to the Class is also effective, as it includes a standard claim form which requests the information necessary to calculate a claimant's claim pursuant to the Plan of Allocation. The Plan of Allocation will govern how Class Members' claims will be calculated and, ultimately, how money will be distributed to Authorized Claimants. The Plan of Allocation was prepared by Plaintiffs' damages expert and is based on an analysis of the artificial inflation in the price of Southern Company common stock during the Class Period. The Claims Administrator will conduct a thorough claims process and address claim deficiencies before any funds are distributed.

5. Attorneys' Fees

Rule 23(e)(2)(C)(iii) addresses the terms of any proposed award of attorneys' fees. As stated in the Notice, Lead Counsel intends to seek an award of attorneys' fees in an amount up to 30% of the Settlement Amount and expenses in an amount not to exceed $1,000,000.00, plus interest on both amounts. This fee request is in line with other fee awards approved in similar class action cases. *See, e.g.*, *Cervantes v.*

Invesco Holding Co. (US), Inc., et al., No. 1:18-cv-02551-AT, slip op. at 2 (N.D. Ga. Aug. 13, 2020) (awarding 33% of settlement); *In re Netbank, Inc. Sec. Litig.*, No. l:07-cv-02298-TCB, slip op. at 5 (N.D. Ga. Nov. 9, 2011) (awarding 34% of settlement); *In re Theragenics Corp. Sec. Litig.*, No. 1:99-cv-0141-TWT, slip op. at 12 (N.D. Ga. Sept. 29, 2004) (awarding 33-1/3% of settlement). The Stipulation provides that any attorneys' fees and expenses awarded by the Court shall be paid to Lead Counsel upon entry of the Judgment and an order awarding such fees and expenses. *See* Stipulation, ¶6.2; *see also In re Genworth Fin. Sec. Litig.*, No. 3:14-cv-682-JAG, 2016 WL 7187290, at *2 (E.D. Va. Sept. 26, 2016) (ordering that "attorneys' fees and Litigation Expenses awarded above may be paid to Lead Counsel immediately upon entry of this Order"). Indeed, such "provisions are common." *Pelzer v. Vassalle*, 655 F. App'x 352, 365 (6th Cir. 2016).[7]

6. The Parties Have No Other Agreements Besides the Supplemental Agreement Concerning Opt-Outs

Rule 23(e)(2)(C)(iv) requires the disclosure of any other agreement between the parties. The Settling Parties have entered into a standard supplemental agreement, which provides that if Class Members opt out of the Settlement such that the number of shares of Southern Company common stock represented by such opt outs equals or

[7] Further, as explained in the Notice, Plaintiffs intend to request an amount not to exceed $10,000.00 in the aggregate in connection with their representation of the Class.

exceeds a certain amount, Defendants shall have the option to terminate the Settlement. *See* Stipulation, ¶7.4.[8]

7. Class Members Are Treated Equitably

The final Rule 23(e)(2) factor is whether Class Members are treated equitably. Fed. R. Civ. P. 23(e)(2)(D). As reflected in the Plan of Allocation set forth in the Notice, the Settlement treats Class Members equitably relative to each other by providing that each Class Member shall receive his, her or its *pro rata* share of the Net Settlement Amount based on their purchases or acquisitions and any sales of Southern Company common stock during the Class Period.

* * *

Thus, each factor identified under Rule 23(e)(2) is satisfied. Given the litigation risks involved, the complexity of the underlying issues and the skill of defense counsel, the $87,500,000.00 recovery is excellent. Such a result could not have been achieved without the full commitment of Plaintiffs and Lead Counsel.

[8] There are "compelling reasons" for keeping the Supplemental Agreement confidential. *See Kamakana v. City & Cty. of Honolulu*, 447 F.3d 1172, 1178 (9th Cir. 2006). Keeping confidential the threshold number of exclusions which give Defendants the option to terminate the Settlement is necessary to avoid enabling one or more stockholders to selfishly use this knowledge to insist on a higher payout for themselves while threatening to eviscerate the Settlement, which would be detrimental to the interest of the Class.

D. The Settlement Is Fair, Adequate and Reasonable Under the *Bennett* Factors

1. The Potential Obstacles to Success at Trial Support Approval of the Settlement

The first *Bennett* factor is "the likelihood of success at trial." 737 F.2d at 986. "In assessing plaintiffs' likelihood of success at trial for purposes of determining whether the Settlement is fair, adequate and reasonable, the Court should make only a 'limited inquiry into whether the possible rewards of continued litigation with its risks and costs are outweighed by the benefits of the settlement.'" *Garst v. Franklin Life Ins. Co.*, No. 97-C-0074-S, 1999 U.S. Dist. LEXIS 22666, at *62 (N.D. Ala. June 28, 1999); *accord Strube v. Am. Equity Inv. Life Ins. Co.*, 226 F.R.D. 688, 697-98 (M.D. Fla. 2005).

Although Plaintiffs believe that their claims are meritorious and their counsel's investigation and litigation efforts support the claims, Plaintiffs also acknowledge that they faced significant obstacles to continued litigation and, ultimately, success at trial. In general, there is a risk "inherent in taking any litigation to completion." *See Turner v. Murphy Oil USA, Inc.*, 472 F. Supp. 2d 830, 849 (E.D. La. 2007). Defendants have asserted formidable defenses to liability, loss causation, and damages which they would likely have continued to press throughout the duration of the Litigation. For example, Defendants argued that many of the alleged misstatements are not attributed

to any individual whom Plaintiffs alleged had scienter, and that a majority of the alleged misstatements are opinions, protected from liability under the securities laws.

Defendants also contend that Plaintiffs could not establish loss causation, and therefore damages with respect to any of the alleged corrective disclosures because: they did not correct any prior statements; Plaintiffs could not disaggregate any confounding information on the disclosure dates; and there were no statistically significant price drops in response to several corrective disclosures.

Although Plaintiffs do not concede that Defendants would prevail on their arguments, Defendants raised plausible defenses that, if recognized by the Court or jury, could significantly diminish or even defeat recovery. As the court held in *Garst*, "[t]he existence of these (and other) potential obstacles to plaintiffs' success on the merits argues in favor of approving the settlement." 1999 U.S. Dist. LEXIS 22666, at *64; *accord Behrens*, 118 F.R.D. at 540 (approving class action settlement because "[i]f the plaintiff pursued this cause through trial, the likelihood of achieving any success would be at risk"); *see also Cifuentes*, 2014 U.S. Dist. LEXIS 37458, at *12 ("At the time the Parties agreed to terms, there was great risk facing Plaintiffs and the Class that could have resulted in Plaintiffs and the Class recovering far less than the common fund created *vis-a-vis* the Settlement or, far worse, nothing at all."); *Beavers v. Am. Cast Iron Pipe Co.*, 164 F. Supp. 2d 1290, 1298 (N.D. Ala. 2001) ("there are

both strengths and weaknesses in each party's position[;] [t]his uncertainty of outcome is another factor favoring approval of the settlement").

Because of the risks associated with continuing to litigate, including overcoming Defendants' summary judgment and *Daubert* motions, there was a danger that Plaintiffs would not have prevailed against Defendants on their claims and that the Class would have received nothing. Therefore, Lead Counsel believes that the Settlement is in the best interests of the Class.

2. The Settlement Amount Is Within the Range of Reasonableness

"The second and third factors in the Eleventh Circuit's *Bennett* analysis call for the Court to determine 'the possible range of recovery' and then ascertain where within that range 'fair, adequate, and reasonable settlements lie.'" *Garst*, 1999 U.S. Dist. LEXIS 22666, at *64; *see also In re Sunbeam Sec. Litig.*, 176 F. Supp. 2d 1323, 1331 (S.D. Fla. 2001) ("'the second and third considerations of the *Bennett* test are easily combined'"); *accord Behrens*, 118 F.R.D. at 541.

"'[T]he Court must determine "whether [the settlement amount] falls within the 'range of reasonableness,' not whether it is the most favorable possible result in the litigation."'" *Garst*, 1999 U.S. Dist. LEXIS 22666, at *68 (quoting *In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. 297, 319 (N.D. Ga. 1993)). As *Garst* observed:

> [T]he fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is inadequate; there is no reason why a satisfactory settlement could not amount to a hundredth or even a thousandth part of a single percent of the potential recovery.

1999 U.S. Dist. LEXIS 22666, at *64-*65; *accord Sunbeam*, 176 F. Supp. 2d at 1332.

An all cash payment of $87,500,000.00 represents an excellent recovery. Indeed, Defendants advanced arguments suggesting that Plaintiffs would not be able to collect any damages. Moreover, the Settlement Amount represents between 15% and 20% of maximum recoverable damages under Plaintiffs' best case damages model, as calculated by Plaintiffs' damages expert, assuming that Plaintiffs prevailed on all issues at summary judgment and trial. Given this range of possible recovery, including the possibility that the class certification order could have been reversed or that Defendants succeeded at summary judgment or trial resulting in no recovery whatsoever, the $87,500,000.00 Settlement is an extremely favorable result.

Therefore, given the risks of proceeding with the Litigation, "the proposed Settlement provides relief that is fair and adequate and within the 'range of reasonableness,'" and this factor strongly favors approval of the Settlement. *Garst*, 1999 U.S. Dist. LEXIS 22666, at *68; *see also Bennett*, 737 F.2d at 986 (affirming holding that class action settlement was fair, adequate, and reasonable, because "compromise is the essence of settlement").

3. The Complexity, Expense, and Likely Duration of Continued Litigation Support Approval of the Settlement

Further litigation against Defendants would necessarily involve significant additional time and money for additional merits depositions, expert depositions, *Daubert* motions, summary judgment proceedings, trial, and possible appeals. In light of the costs and delays inherent in litigating this case to trial, the "unpredictability of a lengthy and complex . . . trial" – as well as the likelihood of further appellate activity if Plaintiffs were to prevail at trial – "the benefits to the class of the present settlement become all the more apparent." *Ressler v. Jacobson*, 822 F. Supp. 1551, 1555 (M.D. Fla. 1992); *see also In re WorldCom, Inc. Sec. Litig.*, 388 F. Supp. 2d 319, 337 (S.D.N.Y. 2005) (approving class action settlement after finding that although the litigation prior to the settlement "was a costly undertaking for all parties . . . [n]evertheless, further litigation would have resulted in considerable additional expense"); *Cifuentes*, 2014 U.S. Dist. LEXIS 37458, at *14-*15. A settlement at this juncture results in a present, certain recovery without the considerable risk, expense, and delay of further litigation.

4. The Stage of Proceedings Supports Approval of the Settlement

The purpose of considering the stage of the proceedings is to ensure that Plaintiffs had sufficient information to evaluate the case and to determine the adequacy of the Settlement against further litigation. *Behrens*, 118 F.R.D. at 544.

As discussed above, this case has been zealously litigated since its filing in 2017. Merits discovery was ongoing, with over two million pages of documents produced by Defendants and third parties, and the completion of nine depositions. Accordingly, Plaintiffs and Lead Counsel believe that they had a sufficient understanding of the facts of the case, including its strengths and weaknesses, when negotiating the Settlement such that this factor favors approval of the Settlement. *See Sunbeam*, 176 F. Supp. 2d at 1332 (because the "case had progressed to a point where each side was well aware of the other side's position and the merits thereof[,] [t]his factor weighs in favor of the Court finding the proposed settlement to be fair, adequate, and reasonable"); *Behrens*, 118 F.R.D. at 544.

E. The Recommendation of Experienced Counsel Favors Approval of the Settlement

The Court is entitled to rely on the judgment of counsel, and, indeed, "'should be hesitant to substitute its own judgment for that of counsel.'" *Behrens*, 118 F.R.D. at 539 (quoting *Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977)); *accord In re*

Smith, 926 F.2d 1027, 1028 (11th Cir. 1991); *Strube*, 226 F.R.D. at 703. Class Counsel strongly endorses the Settlement. As the court held in *Strube*, "[class] counsel's informed recommendation of the agreement is persuasive that approval is appropriate." 226 F.R.D. at 703. Lead Counsel, highly experienced in cases of this type, strongly recommends approval of this Settlement.

IV. NOTICE TO THE CLASS

Rule 23(c)(2)(A) states, "[f]or any class certified under Rule 23(b)(1) or (b)(2), the court may direct appropriate notice to the class." Fed. R. Civ. P. 23(c)(2)(A). The due process clause requires that in a class action, notice of the settlement and an opportunity to be heard must be given to absent class members. *Cf. Mashburn v. Nat'l Healthcare, Inc.*, 684 F. Supp. 660, 667 (M.D. Ala. 1988) ("This Court is of the opinion that the notice given to members of the plaintiff class by publication and by mail, as aforesaid, complied with all requirements of due process, all requirements of Rule 23 of the Federal Rules of Civil Procedure, and constituted the best notice practicable under the circumstances."). Thus, the proposed method of notice comports with Rule 23 and the requirements of due process. *See, e.g., In re Domestic Air Transp. Antitrust Litig.*, 141 F.R.D. 534, 550-51 (N.D. Ga. 1992) (providing that notice by mail to those class members who could be identified and by publication only to those who could not be identified satisfies due process requirements).

Here, the parties have negotiated the form of a Notice to be disseminated to all persons who fall within the definition of the Class and whose names and addresses can be identified by the Company's transfer agent or other nominees. The Settling Parties further propose to publish a summary form of notice of an investor-focused newspaper and over the Internet, establish a Settlement website to post Settlement-related information, and a toll-free telephone number to answer Class Member inquiries.

Where notice is being sent in connection with a proposed settlement, the notice must also inform class members of the terms of the settlement and their options with respect thereto. *See Domestic Air*, 141 F.R.D. at 553-55; *In re Nissan Motor Corp. Antitrust Litig.*, 552 F.2d 1088, 1103-05 (5th Cir. 1997). The proposed form of the Notice describes the nature, history, and status of the Litigation; sets forth the definition of the Class; states the Class's claims and issues; discloses the right of people who fall within the definition of the Class to object or seek exclusion from the Class, as well as the deadlines and procedures for doing so and warns of the binding effect of the Settlement approval proceedings. In addition, the Notice describes the Settlement and sets forth the $87,500,000.00 amount of the Settlement; explains the proposed Plan of Allocation and the procedure and deadline for submitting a Proof of Claim and Release form; describes the maximum amount of attorneys' fees and expenses that Lead Counsel intends to seek in connection with final settlement

approval; provides contact information for Lead Counsel; and summarizes the reasons the parties are proposing the Settlement. The Notice also discloses the date, time, and place of the formal Settlement Hearing, and the procedures for commenting on the Settlement and appearing at the hearing. The manner and content of the Notice, Proof of Claim and Release form and Summary Notice proposed here fulfill all applicable requirements of Federal Rule 23, the PSLRA, and due process.

V. PROPOSED SCHEDULE

In connection with the final approval of the Settlement, the Settling Parties propose the following schedule:

EVENT	TIME FOR PERFORMANCE OR COMPLIANCE
Deadline for commencing mailing of the Notice and Proof of Claim and Release form to Class Members (the "Notice Date")	21 calendar days after entry of the Notice Order
Deadline for publication of the Summary Notice	7 calendar days after the Notice Date
Deadline for filing initial papers in support of final approval of the Settlement, Plan of Allocation, and application for an award of attorneys' fees and expenses	35 calendar days prior to the Settlement Hearing
Deadline for submitting objections and requests for exclusion	21 calendar days prior to the Settlement Hearing
Deadline for filing reply in response to any objections and in further support of approval of the Settlement and Plan of Allocation, or in support of application for an award of attorneys' fees and	7 calendar days prior to the Settlement Hearing

EVENT	TIME FOR PERFORMANCE OR COMPLIANCE
expenses	
Settlement Hearing	Approximately 100 calendar days from entry of the Notice Order, at the Court's convenience
Deadline for submitting Proof of Claim and Release forms	120 calendar days after the Notice Date

VI. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant preliminary approval of the proposed Settlement and enter the proposed Notice Order, submitted herewith.

DATED: September 8, 2020

Respectfully submitted,

ROBBINS GELLER RUDMAN
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CERTIFICATION OF COMPLIANCE

The undersigned certifies, pursuant to Local Rule 5.1(C), that this document has been prepared in Times New Roman, 14 point, as approved by the Court.

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CERTIFICATE OF SERVICE

I hereby certify on September 8, 2020, I electronically filed the above document with the Clerk of the Court using CM/ECF, which will send electronic notification of such filing to all registered counsel.

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