UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

STEPHANIE WOZNICKI, on behalf of herself and all others similarly situated, Plaintiff, vs. RAYDON CORPORATION, DONALD K. ARIEL, DAVID P. DONOVAN, THE ESOP COMMITTEE OF THE RAYDON CORPORATION EMPLOYEE STOCK OWNERSHIP PLAN, LUBBOCK NATIONAL BANK, DAVID P. DONOVAN 2012 TRUST, ARIEL FAMILY TRUST DATED DECEMBER 18, 2012, PAMELA W. ARIEL, VERNA L. DONOVAN 2012 TRUST, DAVID P. DONOVAN, JR., IRREVOCABLE TRUST DATED JULY 25, 2008, LORI L. WEISS IRREVOCABLE TRUST DATED JULY 25, 2008, NIKI J. DUNCAN IRREVOCABLE TRUST DATED JULY 25, 2008, Defendants.	Civil Action No. 6:18-cv-02090-Orl-78GJK

JOINT MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT AND MOTION TO MODIFY CLASS AND MEMORANDUM OF LAW IN SUPPORT THEREOF

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Plaintiff Stephanie Woznicki, individually and on behalf of the Class, hereby moves for an order preliminarily approving a class action settlement agreement between Plaintiff and Defendants Raydon Corporation, Donald K. Ariel, David P. Donovan, The ESOP Committee of the Raydon Corporation Employee Stock Ownership Plan, David P. Donovan, Jr., Irrevocable Trust dated July 25, 2008, Lori L. Weiss Irrevocable Trust dated July 25, 2008, Niki J. Duncan Irrevocable Trust dated July 25, 2008, Pamela W. Ariel, Ariel Family Trust dated December 18, 2012, David P. Donovan 2012 Trust, Verna L. Donovan 2012 Trust Plan (collectively "Raydon Defendants") and Lubbock National Bank ("Lubbock"), approving a modified class definition for purposes of settlement, approving notice to the Class, approving the Plan of Allocation, and setting a date for a Fairness Hearing.[1]

I. INTRODUCTION

Subject to the Court's approval, the Parties have settled this Employee Retirement Income Security Act, 29 U.S.C. § 1001 *et seq.,* ("ERISA") class action for a payment of $2,400,000.00. Should the Court ultimately grant final approval, eligible Class Members will receive their portion of the Net Proceeds according to a Plan of Allocation, discussed below.

The proposed Settlement Agreement ("Settlement") satisfies all the criteria for preliminary approval and provides an excellent result for the Class. For these reasons, discussed in more detail below, the Parties request that the Court grant this motion.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Background

This is an ERISA class action alleging fiduciary breaches and other violations arising out of a September 30, 2015 transaction in which the then shareholders of Raydon Corporation

[1] Unless otherwise defined, all capitalized terms herein shall have the same meaning as set forth in the Parties' Settlement Agreement.

("Raydon") sold 100% of the stock of Raydon to Raydon which concomitantly, as part of a single integrated transaction, sold 100% of the stock to the Raydon Corporation Employee Stock Ownership Plan ("ESOP" or the "Plan") for $60.5 million (the "ESOP Transaction"), and Lubbock National Bank acted as the Plan's trustee. The Amended Complaint, ECF No. 67, alleges that the ESOP Transaction was for more than fair market value, the ESOP fiduciaries breached their fiduciary duties in connection with the Transaction, and ESOP fiduciaries and other parties-in-interest (i.e., the relatives and family trusts) engaged in prohibited transactions.

Plaintiff alleges that Defendants violated ERISA § 406, 29 U.S.C. § 1106, by engaging in a prohibited transaction under ERISA by, *inter alia*: approving a purchase price for Raydon stock that exceeded its fair market value; allowing parties in interest to sell their interests in Raydon at more than fair market value; and causing the Plan to borrow millions of dollars from parties in interest to finance the ESOP Transaction. Plaintiff further alleges that Defendants violated ERISA § 404, 29 U.S.C. § 1104 by breaching their duties of loyalty and prudence to the Plan by failing to undertake an appropriate investigation into the value of Raydon stock. Finally, Plaintiff alleges that Defendants Lubbock and Donald K. Ariel and David P. Donovan (the "Director Defendants") violated ERISA § 410, 29 U.S.C. § 1110, by including indemnification provisions in the ESOP Trust Agreement that are void against public policy.

Defendants deny these allegations; deny any wrongdoing or liability; and have vigorously defended themselves in this Action. Defendants do not admit wrongdoing of any kind regarding the ESOP Transaction or this Action by settling this Action.

B. Discovery

The Parties have vigorously prosecuted this Action and undertaken comprehensive discovery. Declaration of Daniel Feinberg ("Feinberg Decl.") ¶ 3. They propounded and

responded to written discovery. *Id.* Co-Lead Class Counsel received and reviewed thousands of pages of documents, including more than 30,000 produced by Defendants and more than 12,000 produced by relevant non-parties. *Id.* Plaintiff also took several depositions, including that of Raydon's Rule 30(b)(6) witness. *Id.* Co-Lead Class Counsel retained and consulted with an expert who prepared detailed reports and analyses on valuation and damages. *Id.* Therefore, Co-Lead Class Counsel had more than sufficient information to thoroughly evaluate both the merits of Plaintiff's claims and the potential recovery for the Class prior to negotiating the proposed Settlement.

C. Motion Practice

Plaintiff filed her Amended Complaint, ECF No. 67, on April 23, 2019. Defendants moved to dismiss the Amended Complaint, ECF Nos. 88, 89. On November 4, 2019, the Court granted in part and denied in part Defendants' motions to dismiss, dismissing Count IV of Plaintiff's Amended Complaint. ECF No. 131. On May 18, 2020, Plaintiff moved to amend the complaint and add factual allegations related to the dismissed Count IV for purposes of repleading Count IV, ECF No. 175, which Defendants opposed, ECF Nos. 179, 180. On June 3, 2020, the Court denied Plaintiff's motion. ECF No. 182.

Plaintiff moved for class certification, ECF No. 96, which Defendants opposed, ECF Nos. 98, 102, 133. The Court granted Plaintiff's motion for class certification, ECF No. 163. The Class is defined as:

> All participants in the Raydon Corporation Employee Stock Ownership Plan from September 30, 2015, or any time thereafter, who vested under the terms of the Plan and those participants' beneficiaries. Excluded from the Class are Defendants and their immediate family (including any person defined as a relative under 20 U.S.C. § 1002(15)); any fiduciary of the Plan; the officers and directors of Raydon Corporation or of any entity in which any Defendant has a controlling interest; and legal representatives, successors, and assigns of any such excluded persons.

ECF No. 163. The parties engaged in extensive motion practice related to discovery. Plaintiff sought to compel the production of documents by Lubbock, ECF No. 168, which was granted in part, ECF No. 176, by the Raydon Defendants, ECF No. 177, by the Selling Shareholder Defendants, ECF No. 184, and by non-party ButcherJoseph & Co. ECF No. 196-06. Defendants sought the imposition of protective orders relating to privileged and confidential material, ECF Nos. 178, 188, over Plaintiff's objections. ECF Nos. 189, 195.

D. The Parties' Settlement Efforts

On May 13, 2019, the Parties engaged in a mediation with Magistrate Judge Morton Denlow (Ret.). Feinberg Decl. ¶ 4. The Parties vigorously engaged in the mediation process, during which all counsel made presentations to Judge Denlow and all attendees. *Id*. The full-day mediation ended in impasse, but Judge Denlow continued to work with the Parties over the course of more than a year. *Id*. While the Parties vigorously litigated this Action, they continued settlement discussions facilitated by Judge Denlow. *Id*. While the parties made progress with the assistance of Judge Denlow, settlement discussions eventually foundered again. *Id*. Class Counsel conducted negotiations directly with counsel for each of Lubbock and the Raydon Defendants and reached separate agreements in principle to settle this case with each group of Defendants. *Id*. The Parties ultimately executed the Settlement Agreement currently before the Court for preliminary approval on August 25, 2020. *Id*.

III. SUMMARY OF THE PROPOSED SETTLEMENT TERMS

The material terms of the Settlement Agreement (Feinberg Decl., Ex. A) are summarized below.

A. Benefits to the Class

Defendants have agreed to pay $2.4 million ("Settlement Amount") into the Settlement Fund. Settlement, ¶ III.1. Co-Lead Class Counsel will seek a maximum award of attorneys' fees of thirty-three percent (33%), a maximum award for expenses of $100,000, and maximum Service Awards of $10,000.00 each for Ms. Woznicki and Ms. Briana Tatum. The amount remaining after deduction from the Settlement Fund for (i) taxes (or reserves to pay taxes), (ii) settlement administration fees, (iii) Court-approved attorneys' fees or expenses, and (iv) any Service Award, shall constitute the "Net Settlement Amount." The Net Settlement Amount will be distributed to the Class Members pursuant to the Plan of Allocation, which will provide for a pro rata allocation to Class Members based on the shares allocated to their ESOP accounts, with forfeited unvested shares allocated to former ESOP participants' accounts receiving 20% of the value allocated to vested shares.

B. Administration

The Settlement Administrator, CPT Group, Inc., shall be responsible for disseminating Class Notice, establishing a website for case documents, staffing a toll-free telephone number to respond to inquiries, and processing objections. The Settlement Administrator shall also implement the Plan of Allocation.

Subject to Court approval, Eagle Bank shall serve as Escrow Agent and shall be responsible for establishing and maintaining a qualified settlement trust to hold the Settlement Amount and Settlement Fund. The Escrow Agent shall manage the assets of the qualified settlement trust pursuant to the agreement with Eagle Bank and Co-Lead Class Counsel.

C. Attorneys' Fees and Costs and Service Awards

Subject to Court approval, Class Counsel's fees, costs and expenses, and Service Award

to Ms. Woznicki and Ms. Tatum shall be paid from the Settlement Amount. Settlement ¶¶ VII.1, VII.3. Plaintiff shall petition the Court for a Service Award not to exceed $10,000 for herself and Ms. Tatum in recognition of their service to the Class. *Id*. ¶ VII.2. Class Counsel will also petition the Court for an award of attorneys' fees and reimbursement of litigation expenses, including the cost and expense of any service company, expert, or consultant retained by Co-Lead Class Counsel. *Id.* ¶ VII.1. Class Counsel's petition for an award of attorneys' fees shall not exceed thirty-three percent (33%) of the Settlement Amount, and the petition for expenses and costs shall not exceed $100,000.00. *Id.* ¶ VII.2.

D. Release of Claims

In exchange for payment of the Settlement Amount by Defendants and satisfaction of the conditions required by the Settlement Agreement, Plaintiff and the Class will release any claims which were or could have been asserted in the Litigation, either individually or on behalf of the ESOP. Lubbock and the Raydon Defendants are also exchanging releases in the Settlement Agreement. The released parties, released claims, and the covenant not to sue are set forth in full in the Settlement Agreement. *Id*. ¶ XIII.1.

E. Notice to the Class

The Settlement Agreement provides that the Raydon Defendants will, to the extent not already disclosed, provide Co-Lead Class Counsel and the Settlement Administrator with Class data for notice and settlement administration. *Id.* ¶ XII.7.

The proposed Class Notice, Exhibit B to the Feinberg Declaration, describes in plain English: (i) the Settlement's terms and operations; (ii) the nature and extent of the released claims; (iii) the procedure and timing for objecting to the Settlement; and (iv) the date and place for the Fairness Hearing. The Class Notice will be provided electronically, if available and

approved by the Court, or via First Class mail. For returned mail, the Settlement Administrator will make reasonable efforts to obtain a valid mailing address and promptly resend the Class Notice to the Class Member by U.S. Mail. In addition, key court documents, including the operative Complaint, the Settlement Agreement, preliminary approval papers, Plaintiff's Motion for Award of Attorneys' Fees, and Plaintiff's Motion for Final Approval will be posted on the settlement website.

IV. ARGUMENT

A. The Court Should Approve a Modified Class Definition For Purposes of Settlement

The Eleventh Circuit has recognized that "class definitions may undergo modification, possibly several times, during the course of a class action." *Cliff v. Payco Gen. Am. Credits, Inc.,* 363 F.3d 1113, 1133 n.16 (11th Cir. 2004); *In re Monumental Life Ins. Co.*, 365 F.3d 408, 414 (5th Cir. 2004) (recognizing the same). Among other things, courts generally agree that at some point, a class definition should have an end date although there is no set rule as to what the end date should be. *Guidry v. Wilmington Tr.*, 333 F.R.D. 324, 329 (D. Del. 2019) (surveying law and setting end date as of the court's decision). The Parties have agreed to settle on behalf of the Class certified by the Court with one minor modification and one clarification.

First, while an open-ended date made sense in the class definition while the litigation was ongoing, the Parties agree that an end date of December 31, 2019 makes sense for purposes of settlement. Second, the Parties believe that all ESOP participants should be included as part of the Settlement. Plaintiff argued in this case that there was a partial termination of the Plan, which caused former employees' unvested shares to vest. While Defendants dispute this, given Plaintiff's arguments, the Parties agree that all ESOP participants should be included as part of the class for purposes of settlement with a discount given to the unvested shares to reflect the

uncertain outcome of the dispute regarding partial termination. As such, the Parties propose the following definition for the Settlement Class:

> All participants in the Raydon Corporation Employee Stock Ownership Plan who at any time from September 30, 2015 through December 31, 2019, received an allocation of Raydon shares to their ESOP accounts, whether such accounts were vested, partially vested or non-vested, including all beneficiaries of those participants.
>
> Excluded from the Class are Defendants and their immediate family (including any person defined as a relative under 20 U.S.C. § 1002(15)); any fiduciary of the Plan; the officers and directors of Raydon Corporation or of any entity in which any Defendant has a controlling interest; and legal representatives, successors, and assigns of any such excluded persons.

See ECF No. 163. These changes also match Plaintiff's proposed Plan of Allocation which contemplates allocating a portion of the Net Settlement Amount to certain participants who forfeited shares in their ESOP accounts due to those shares not being vested at the time of the termination of their Raydon employment.

B. The Proposed Settlement Merits Preliminary Approval.

"Public policy strongly favors the pretrial settlement of class action lawsuits." *In re U.S. Oil & Gas Litig.*, 967 F.2d 489, 493 (11th Cir. 1992). To protect the interests of the Class, Federal Rule of Civil Procedure 23(e) provides that a class action cannot be settled without court approval. Fed. R. Civ. P. 23(e). Approval under Rule 23(e) involves "a two-step process that includes (1) preliminary approval and (2) a subsequent fairness hearing." *O'Connor v. Worthington PJ, Inc.*, No. 216CV608FTM99MRM, 2017 WL 6762436, at *3 (M.D. Fla. Dec. 13, 2017), *report and recommendation adopted*, No. 216CV608FTM38MRM, 2018 WL 264382 (M.D. Fla. Jan. 2, 2018). First, at preliminary approval, the Court must "make a preliminary evaluation of the fairness of the settlement before directing that notice be given to the settlement class." *Id*. The request for preliminary approval only requires an "initial evaluation" of the

fairness of the proposed settlement. *Manual for Complex Litigation* § 21.632 (4th ed. 2004). "The purpose of preliminary evaluation of proposed class action settlements is to determine whether the settlement is within the range of reasonableness." *Gevaerts v. TD Bank, N.A.*, No. 11:14-CV-20744-RLR, 2015 WL 12533121, at *6 (S.D. Fla. Aug. 4, 2015). Because the approval is only preliminary, courts generally undertake a limited review of the proposed settlement. 4 William B. Rubenstein et al., *Newberg on Class Actions* § 13:10 (5th ed. 2013). "The general rule is that a court will grant preliminary approval where the proposed settlement is neither illegal nor collusive and is within the range of possible approval." *Id.*

Rule 23, as amended in 2018, provides direction to federal courts considering whether to grant preliminary approval of a class action settlement. Rule 23(e) provides that Court should look to the following factors:

> (A) the class representatives and 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 distributing relief to the class, including the 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 required to be identified under Rule 23(e)(3); and
>
> (D) the proposal treats class members equitably relative to each other.

Fed. R. Civ. P. 23(e)(2).

In addition to the requirements of Rule 23(e)(2), courts within the Eleventh Circuit apply two different standards when considering whether to preliminarily approve a proposed class action settlement. Some courts find "[p]reliminary approval is appropriate where the proposed

settlement is the result of the parties' good faith negotiations, there are no obvious deficiencies and the settlement falls within the range of reason." *Picton v. Greenway Chrysler-Jeep-Dodge, Inc.*, No. 619CV00196ORL31DCI, 2019 WL 8014504, at *4 (M.D. Fla. Dec. 27, 2019). Other courts apply the factors used at the final approval stage, known as the *Bennett* factors:

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

Stewart v. Fla. Cmty. Law Grp., P.L., No. 618CV2111ORLCEMDCI, 2019 WL 4248075, at *7 (M.D. Fla. Aug. 26, 2019), *report and recommendation adopted*, No. 618CV2111ORL41DCI, 2019 WL 4246843 (M.D. Fla. Sept. 6, 2019) (quoting *Faught v. Am. Home Shield Corp.*, 668 F.3d 1233, 1240 (11th Cir. 2011)). Under either standard, as well as the requirements of Rule 23(e)(2), the proposed Settlement warrants preliminary approval.

C. The Proposed Settlement is the Result of Good Faith Negotiations, Is Not Obviously Deficient, and Falls Within the Range of Reasonableness.

Under Rule 23(e)(2)(B), the Court must consider whether a proposed settlement was negotiated at arm's length. "[A] presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arms-length negotiations between experienced, capable counsel after meaningful discovery." *Hanley v. Tampa Bay Sports & Entm't LLC*, No. 819CV00550CEHCPT, 2020 WL 357002, at *3 (M.D. Fla. Jan. 7, 2020). A court is "entitled to rely on the judgment of experienced counsel for the parties" in evaluating settlement. *Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977). A settlement is the result of good faith negotiations where it is reached after arms-length negotiations. *See Nelson v. Mead Johnson & Johnson Co.*, 484 F.App'x 429, 435 (11th Cir. 2012) (finding no collusion in a settlement agreement that was

reached as a "result of extensive arms-length negotiations"). Likewise, that experienced counsel has been actively engaged in the litigation and diligently pursued the necessary discovery evidences the non-collusive nature of the settlement. *Atkinson v. Wal-Mart Stores, Inc.*, No. 8:08-CV-691-T-30TBM, 2011 WL 6846747, at *2 (M.D. Fla. Dec. 29, 2011) (approving settlement and finding it was reached "after extensive discovery and intensive arms-length negotiations").

Here, the Settlement resulted from arms-lengths negotiations and the assistance of an experienced mediator, former Magistrate Judge Morton Denlow. Feinberg Decl. ¶ 5. After Co-Lead Class Counsel received preliminary discovery, the parties mediated on May 13, 2019. *Id.* The Parties did not agree to settlement terms at that time, but the Mediator continued to have follow-up discussions with the Parties over the course of more than a year. *Id.* In the intervening time, the Parties continued to diligently litigate the case, including filing several motions to compel discovery, both from the Defendants and from third parties. *Id*. The Parties executed a formal Settlement Agreement on August 25, 2020. *Id*.

Thus, the proposed Settlement is the result of good faith, arm's-length negotiations by well-informed and experienced counsel. As discussed below, the Settlement confers significant monetary benefits to Class Members and is within the range of reasonableness.

D. Preliminary Approval is Appropriate Under the *Bennett* Factors.

1. The Settlement Should be Preliminarily Approved Given the Uncertainty of Success.

Settlement is favored where "success at trial is not certain for Plaintiff." *Burrows v. Purchasing Power, LLC*, No. 1:12cv228800, 2013 WL 10167232, at *6 (S.D. Fla. Oct. 7, 2013). Courts, including the Eleventh Circuit, recognize that ERISA actions present complex issues, which makes settlement a favorable option given the risk of trying such cases. *See Gilley v.*

Monsanto Co., 490 F.3d 848, 852 (11th Cir. 2007) (remarking that ERISA cases present a level of complexity and challenge that Justice Holmes would have enjoyed); *In re Delphi Corp. Sec., Derivative & "ERISA" Litig.*, 248 F.R.D. 483, 496 (E.D. Mich. 2008) (granting settlement and reasoning the risk of litigation "is even more acute in the complex areas of ERISA law"); *In re Marsh ERISA Litig.*, 265 F.R.D. 128, 138 (S.D.N.Y. 2010) ("many courts have recognized the complexity of ERISA breach of fiduciary duty [cases]").

While Plaintiff is confident in the merits of her claims, the risks involved in prosecuting a class action through trial cannot be ignored. This is a complex ERISA class action that alleges multiple violations of ERISA. Defendants dispute many of the allegations in the Amended Complaint and deny any wrongdoing or liability. Settlement at 2. The Court dismissed one claim, that Defendants engaged in a prohibited transaction by causing the ESOP to engage in a transfer of assets to parties in interest, and Plaintiff recognizes that while she believes her remaining claims are strong, they are all subject to potential defenses and arguments. Given these uncertainties and the risks inherent in proceeding with litigation, the Settlement should be preliminarily approved. *See Stewart*, 2019 WL 4248075 at *8 (holding recital in settlement agreement that Defendants denied allegations weighed in favor of fairness of settlement).

2. The Settlement Is Within the Range of Possible Recoveries.

"The Court must [] establish the range of possible damages that could be recovered at trial and then combine this assessment with plaintiffs' likelihood of prevailing at trial and other relevant factors to determine whether the settlement falls at a point in the range that is fair to the class." *In re Motorsports Merch. Antitrust Litig.*, 112 F. Supp. 2d 1329, 1334 (N.D. Ga. 2000).

In cases, such as this one, alleging that the trustee violated ERISA by causing an employee stock ownership plan to pay too much for the stock of a privately-held company, Plaintiff maintains that the measure of loss is the difference between what the plan paid for the

stock and what the stock was worth at the time of the transaction. *See Perez v. Bruister*, 823 F.3d 250, 270-72 (5th Cir. 2016); *Chao v. Hall Holding Co, Inc.*, 285 F.3d 415, 423, 444 (6th Cir. 2002); *Perez v. First Bankers Tr. Servs., Inc.*, No. 12-4450, 2017 WL 1232527, at *81 (D.N.J. Mar. 31, 2017); *Neil v. Zell*, 767 F.Supp.2d 933, 944-45 (N.D. Ill., 2011); *Reich v. Valley Nat'l Bank of Ariz.*, 837 F.Supp. 1259, 1289 (S.D.N.Y. 1993).

Applying that theory, Plaintiff's valuation expert opined that the Plan overpaid by an amount between approximately $4.6 million and $8.9 million. Feinberg Decl. ¶ 5. Based on that opinion, the Settlement amount of $2.4 million amounts to between approximately 27% and 52% of the range of potential recovery for the ESOP. *Id*. Thus, this case falls within the same range of reasonableness that other courts found in cases where there was a specific comparison of settlement value with the "best possible recovery." In the instant case, the Class Members will receive approximately 27% of the "best possible recovery." This estimate of possible relief takes into account that Defendants holding promissory notes issued as part of the ESOP transaction returned $10 million in a claw-back in 2018. *Id*.[2] Based on Class Counsel's discussions with a consulting expert, the claw-back substantially reduced the potential recovery for the Class in this case. *Id*.

Comparison to other ERISA class settlements demonstrates the reasonableness of the amount obtained. Plaintiff estimates that there are approximately 185 participant Class Members. Feinberg Decl. ¶ 6. Thus, each participant Class Member will receive an average gross recovery of approximately $13,000.00 before fees, costs and other settlement expenses are deducted, which is greater than recoveries in other ERISA class actions:

[2] In addition, the Selling Shareholder Defendants wrote down the outstanding principal of those notes by approximately $27.8 million on December 31, 2019. *Id*.

Case	Recovery	Class Member Avg. Gross Recovery
Bilewicz v. FMR Co., Nos. 13-cv-10636 and 14-cv-10035 (D. Mass.)	$12,000,000	$129.73
Dennard v. Transamerica Corp., No. 15-cv-30 (N.D. Iowa)	$3,800,000	$148.55
Figas v. Wells Fargo, No. 08-cv-4546 (D. Minn.)	$17,500,000	$75.99
Gordan v. Mass. Mutual Life Ins., No. 13-cv-30184 (D. Mass.)	$30,900,000	$965.63
Kanawi v. Bechtel Corp., No. 06-cv-5566 (N.D. Cal.)	$18,500,000	$432.92
Krueger v. Ameriprise Fin., No. 11-cv-2781 (D. Minn.)	$27,500,000	$591.91
Leber v. Citigroup 401(k) Plan Inv. Comm., No. 07-cv-9329 (S.D.N.Y.)	$6,900,000	$27.34
Main v. American Airlines, Inc., No. 16-cv-473 (N.D. Tex.)	$22,000,000	$212.65
Moreno v. Deutsche Bank Am. Holding Corp., No. 15-cv-9936 (S.D.N.Y.)	$14,000,000	$388.02
Nolte v. Cigna Corp., No. 07-cv-2046 (C.D. Ill.)	$35,000,000	$172.87
Richards-Donald v. Teachers Ins. and Annuity Ass'n of Am., No. 15-cv-8040 (S.D.N.Y.)	$5,000,000	$189.09
Sims v. BB&T Corp., No. 15-cv-732 (M.D.N.C.)	$24,000,000	$330.43
Urakhchin v. Allianz Asset Mgmt. of Am., LP, No. 15-cv-1614 (C.D. Cal.)	$12,000,000	$2,065.40
Will v. General Dynamics Corp., No. 06-cv-698 (S.D. Ill.)	$15,150,000	$96.62
Velazquez v. Mass. Fin. Servs. Co., No. 17-cv-11249 (D. Mass.)	$6,875,000	$2,291.67
Price v. Eaton Vance Corp., No. 18-cv-12098 (D. Mass.)	$3,450,000	$1,326.92
Pease v. Jackson Nat'l Life Ins. Co., No. 17-cv-284 (W.D. Mich.)	$4,500,000	$392.88
Schapker v. Waddell & Reed Fin. Inc., No. 17-cv-2365 (D. Kan.)	$4,875,000	$1,064.41

Given the delays and risks of litigation, a settlement of $2.4 million is within the range of reasonable recovery. Further, given that "had the parties not reached the settlement[], tremendous resources of the parties and the Court would have been expended in an attempt to

obtain a judgment," the proposed Settlement should be approved. *In re Motorsports Merch.*, 112 F. Supp. 2d at 1334; *see also Columbus Drywall & Insulation, Inc. v. Masco Corp.*, 258 F.R.D. 545, 559 (N.D. Ga. 2007) (approving $37.5 million settlement as within range of possibility though defendants faced over $250-$270 million in liability because of "the contingencies involved with continued litigation").

3. The Settlement is Above the Range of Possible Recovery at Which Settlement is Fair, Adequate, and Reasonable.

The Court must determine whether the Settlement "falls within th[e] range of reasonableness, [and] not whether it is the most favorable possible result of litigation." *Grant v. Ocwen Loan Servicing, LLC*, No. 315CV01376J34PDB, 2019 WL 367648, at *6 (M.D. Fla. Jan. 30, 2019) (quoting *Lazy Oil, Co. v. Witco Corp.,* 95 F.Supp.2d 290, 338 (W.D. Pa. 1997), *aff'd,* 166 F.3d 581 (3d Cir. 1999) (insertions in original)). If the settlement "is reasonable in light of the costs and risks hindering a Plaintiff's recovery, then it is likely fair, adequate and reasonable." *In re Motorsports Merch.*, 112 F. Supp. 2d at 1335. This factor should consider "that compromise is the essence of a settlement." *In re Domestic Air Transp. Litig.*, 148 F.R.D. 297, 320 (N.D. Ga. 1993).

Considering the costs, risks and delay of trial and appeal, the immediate and certain recovery of $2.4 million outweighs the uncertain possibility of a greater amount in the future, particularly given the amount of time it would take—including summary judgment, trial, post-trial and post-judgment briefing, and appeals—for any judgment to be reduced to actual payment to Plan participants. Feinberg Decl. ¶ 7. Class Counsel would also need to pursue discovery to equitably trace the proceeds of the ESOP Transaction, *see* ECF No. 184 at 21-24, likely with the assistance of a forensic accountant, raising the prospect of difficult-to-evaluate collection risks and further expenses and delay. *Id*.

"Because the Plaintiff[] face[s] a real risk of no recovery without the settlement[], the proposal provides an immediate and substantial benefit to class members." *In re Motorsports Merch.*, 112 F. Supp. 2d at 1334. Given the potential defenses and uncertainty inherent in a potential battle of the experts as to Plaintiff's valuation of the ESOP's overpayment, Plaintiff and Class Counsel concluded that the Settlement represents a good value for the Class. Recognizing that settlement is the essence of compromise, this settlement falls well within the range of possible recoveries and "is reasonable in light of the costs and risks hindering [Plaintiffs'] recovery," making it "fair, adequate, and reasonable." *Id.* at 1335.

4. The Settlement Should be Approved Given the Complexity, Expense, and Duration of Further Litigation.

Under the fourth *Bennett* factor and Rule 23(e)(2)(C)(i), the Court considers the costs, risks, and delay of trial and appeal. A "[s]ettlement [that] will alleviate the need for judicial exploration of . . . complex subjects, reduce litigation costs, and eliminate the significant risk that individual claimants might recover nothing" merits preliminary approval. *Lipuma v. Am. Express Co.*, 406 F. Supp. 2d 1298, 1324 (S.D. Fla. 2005). The Court should also consider whether the Class will "obtain[] a significant benefit from the relatively rapid litigation and settlement of this case." *Ingram v. The Coca-Cola Co.*, 200 F.R.D. 685, 690 (N.D. Ga. 2001).

Here, the Parties had vastly different views about Defendants' actions, their potential liability and the likely outcome of the litigation. Plaintiff's core allegations regarding the Raydon ESOP transaction rested on facts that were strongly contested by Defendants, including the accuracy of Raydon's projections, whether the valuation methods employed by Lubbock National Bank's advisors were proper, and whether there were negative facts that were ignored by or not sufficiently investigated by Lubbock National Bank during the due diligence and negotiation process.

Defendants vigorously denied the allegations, asserted affirmative defenses and otherwise defended their actions with respect to the purchase. If the Action were to proceed through summary judgment and trial, Plaintiff would have to overcome these and other defenses and arguments. These fact-intensive inquiries would have led to a battle of experts and conflicting evidence and testimony, which would have placed the ultimate outcome of the litigation in doubt, because no party could reasonably be certain that its expert or evidence would carry the day.

Furthermore, at the time the Parties reached the proposed Settlement, this case was still proceeding through discovery. Plaintiff would have needed to continue with discovery, including enforcement of third-party subpoenas, several depositions, and expert disclosures. Given the number of discovery motions already filed in this Action, *see* ECF Nos. 168, 177, 184, the "expenses associated with this action [would] only grow if litigation proceeds." *Columbus Drywall*, 258 F.R.D. at 559; *In re Motorsports Merch.*, 112 F. Supp. 2d. at 1338 (approving settlement in which the Parties still faced summary judgment motions, trial, and possible appeals). Plaintiff would have surely faced and/or brought summary judgment motions. Even if Plaintiff succeeded on summary judgment or trial, she would have faced the prospect of an appeal.

Having exchanged mediation statements regarding the merits of the case, each party had sufficient opportunity to assess its strengths and weaknesses. *Ingram*, 200 F.R.D. at 691 (finding the current stage of that litigation supported settlement where mediation presentations informed each side of the merits of the case). As "the settlement offers plaintiffs the opportunity to obtain an immediate, certain recovery" the Settlement warrants preliminary approval. *Columbus Drywall*, 258 F.R.D. at 559; *In re Domestic Air Transp. Litig.*, 148 F.R.D. at 326 (approving

settlement of complex matter that faced trial and potential appeal and reasoning it was "proper to take the bird in the hand instead of a prospective flock in the bush").

5. There Is No Opposition to the Settlement.

Some courts do not consider this factor until notice has been provided to settlement class members. *See Columbus Drywall*, 258 F.R.D. at 560 (concluding the court could not address this factor "because no notice has . . . been provided to the class members"); *Melanie K. v. Horton*, Case No. 1:14-cv-710-WSD, 2015 WL 1799808, at *3 (N.D. Ga. April 15, 2015) (granting preliminary approval of class settlement where there was no apparent opposition to the settlement). Here, if the Court grants preliminary approval, Notice will be sent to the Class Members and will inform them of the opportunity to object.

6. The Stage of Proceedings Allowed Plaintiff to Evaluate the Merits of the Case and the Settlement Relief.

This Circuit has long encouraged settlements to be reached in early stages of litigation. *See, e.g., Cotton*, 559 F.2d at 1332 (approving settlement reached before summary judgement and though "very little formal discovery was conducted" and reasoning that too often cases are "over discovered," which "wast[es] the time of [the] Court, the parties and their attorneys, [and] … adds unnecessarily to the financial burden of litigation and may often serve as a vehicle to harass a party."). Here, thousands of documents had been produced in discovery and several depositions had already taken place by the time the Court stayed proceedings pending settlement. Feinberg Decl. ¶ 3. "The litigation had therefore reached the stage where '[d]iscovery is fairly advanced and the parties certainly have a clear view of the strengths and weaknesses of their cases.'" *Ressler v. Jacobson*, 822 F.Supp. 1551, 1555 (M.D. Fla. 1992).

This Settlement warrants preliminary approval as it was reached after the parties were well informed of the merits of the case through discovery, the exchange of mediation statements

and hours of intensive negotiations conducted through Judge Denlow. Further, it provides the Class an added benefit of avoiding what was sure to be costly additional motion practice and expert discovery.

E. The Plaintiff and Co-Lead Class Counsel Have Adequately Represented the Class.

In addition to the *Bennett* factors outlined above, Rule 23(e)(2)(A) directs the Court to consider the adequacy of representation provided to the Class. "Traditionally, adequacy of representation has been considered in connection with class certification." *In re Equifax Inc. Customer Data Sec. Breach Litig.*, No. 1:17-MD-2800-TWT, 2020 WL 256132, at *5 (N.D. Ga. Mar. 17, 2020) (quoting *Columbus Drywall*, 258 F.R.D. at 555).

This Court has already found that both Plaintiff and Class Counsel would adequately represent the interests of the Class. ECF No. 163 (adopting ECF No. 156). Since this Court certified the Class and appointed class counsel, Plaintiff and Class Counsel have continued to diligently represent the Class, including through a vigorous discovery process that has included several motions to compel discovery. *See* ECF Nos. 168, 177, 184. Plaintiff was also involved in the settlement negotiations and approved the settlement in the interests of the Class. Feinberg Decl. ¶ 4.

F. The Proposed Method of Distributing Relief to the Class is Appropriate.

Rule 23(e)(2)(C)(ii) examines the effectiveness of any proposed method of distributing relief to the class, including the method of processing class member claims. Here, the Settlement Agreement contemplates Raydon updating the names and last known addresses of the Settlement Class Members, as well as the number of shares held by Class Members during the Class Period. Settlement ¶ II.7.a. The Settlement Administrator will use that information to make distributions in accordance with the Plan of Allocation. No claim form is required – Class Members'

settlement payments will be allocated to their ESOP accounts and then spun out to their 401(k) Plan accounts. Class Members who are eligible for a distribution will have the option to receive a cash distribution or rollover their settlement payments to an IRA or another qualified plan. Class Members who are not eligible to receive a distribution or do elect not to receive a distribution can choose to investment their settlement payment in the investments offered by the 401(k) Plan. This method of distributing relief is both effective and efficient.

G. The Terms of the Proposed Attorneys' Fees

Rule 23(e)(2)(C)(iii) looks at the terms of any proposed award of attorneys' fees, including timing of payment. As described above in Section III.C, Plaintiff's counsel will file an application seeking an award of attorneys' fees (not to exceed 33% of the Settlement Amount) and reimbursement of litigation expenses, not to exceed $100,000.00. Settlement ¶ VII.2.

H. The Proposal Treats Class Members Equitably Relative to Each Other.

Under Rule 23(e)(2)(D), the Court must consider whether the proposal treats class members equitably relative to each other. As noted in Section IV.I below, distributions to Class Members will follow the Plan of Allocation. According to that process, individual Class Members will not receive preferential treatment but instead will receive pro rata distributions based on each Class Member's percentage of the Raydon shares accrued by all Class Members, adjusted by valuing the unvested shares forfeited by Class Members who are former Raydon ESOP participants at 20% of value allocated to vested shares.

I. The Proposed Plan of Allocation is Fair and Reasonable and Should be Preliminarily Approved.

Courts apply the same standard of review "to the review of the allocation agreement as it does to the review of the overall settlement between plaintiffs and defendants." *In re Chicken Antitrust Litig. Am. Poultry*, 669 F.2d 228, 238 (5th Cir. 1982). That is, a plan of allocation will

be approved when it "provides a fair and reasonable basis upon which to allocate the fund." *Carpenters Health & Welfare Fund v. Coca-Cola Co.*, 587 F. Supp. 2d 1266, 1275 (N.D. Ga. 2008). A plan of allocation is "reasonable" if it reimburses class members based on the type and extent of their damages. *In re Ikon Office Sols., Inc., Sec. Litig.*, 194 F.R.D. 166, 184 (E.D. Pa. 2000). A class action settlement need not "benefit all class members equally." *Holmes v. Cont'l Can Co.*, 706 F.2d 1144, 1148 (11th Cir. 1983) (upholding settlement that provided for "higher allocations to certain parties" because they were "rationally based on legitimate considerations").

Here, the proposed Plan of Allocation allocates the Settlement on a pro rata basis based on each Class Member's percentage of the Raydon shares accrued by all Class Members, adjusted by valuing the unvested shares forfeited by Class Members who are former Raydon ESOP participants at 20% of the value allocated to vested shares. The proposed Plan of Allocation reimburses Class Members based on the extent of their losses. Accordingly, it provides a fair and reasonable basis by which to allocate the Settlement and should be approved.

J. The Court Should Approve the Notice Plan and Schedule Dates for a Fairness Hearing and Final Approval of the Settlement.

Pursuant to Federal Rule of Civil Procedure 23(e)(1), the Court "must direct notice in a reasonable manner to all class members who would be bound by [a proposed settlement, voluntary dismissal, or compromise]." Additionally, Rule 23(c) gives the district court discretion as to "appropriate notice" for a class certified under Rule 23(b)(1) or (b)(2). Fed. R. Civ. P. 23(c)(2)(A). To satisfy due process concerns, "notice must 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." *Burrow v. Forjas Taurus S.A.*, No. 16-21606-CIV, 2019 WL 4247284, at *6 (S.D. Fla. Sept. 6, 2019) (citing *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 174 (1974)).

Furthermore, Rule 23 requires that "class members be given information reasonably necessary to make a decision [whether] to remain a class member and be bound by the final judgment or opt out of the action, though the notice need not include every material fact or be overly detailed." *Faught,* 668 F.3d at 1239.

> "The notice must clearly and concisely include the following information in plain, easily understood language: 1) the nature of the action; 2) the definition of the class certified; 3) the class claims, issues, or defenses; 4) that a class member may enter an appearance through an attorney if the member so desires; 5) that the court will exclude from the class any member who requests exclusion; 6) the time and manner for requesting exclusion; and 7) the binding effect of a class judgment on members under Rule 23(c)(3)."

Parker v. Universal Pictures, No. 616CV1193, 2019 WL 1521708, at *10 (M.D. Fla. Feb. 28, 2019). As described in Section III.E above, the Parties have agreed, subject to Court approval, to a notice plan, which calls for notice to be provided electronically, if available, or via First Class mail. For returned mail, the Settlement Administrator will make reasonable efforts to obtain a valid mailing address and promptly resend the Class Notice to the Class Member by U.S. Mail. The proposed Notice describes: (i) the Settlement's terms and operations; (ii) the nature and extent of the released claims; (iii) the procedure and timing for objecting to the Settlement; and (iv) the date and place for the Fairness Hearing. This notice and the manner in which it will be disseminated to Class Members satisfy Rule 23(e)(1) and due process, and it should be approved by the Court.

Finally, the Parties request a date for the Final Approval Hearing to provide for a sufficient amount of time for the mailing of the Class Notice for Class Members to file any objections to or, if applicable, requests for exclusion from the Settlement, and for Co-Lead Class Counsel to respond to any objections. As such, Co-Lead Class Counsel request that the Court enter the proposed Order filed herewith and establish the dates set forth below:

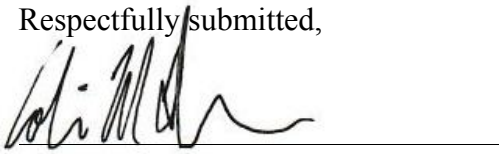
Event	Timing
Deadline for Settlement Administrator to provide Notice to the Class	21 days after Preliminary Approval Order
Deadline for Class Counsel to file motion for award of attorneys' fees and costs & motion for service award(s)	15 days before the deadline for objections
Deadline for Class Members to file objections to the Settlement or submit Challenges to Defendants' Data	45 days after Notice to Class is provided
Deadline for Class Counsel to file Motion for Final Approval of Settlement	14 days before Fairness Hearing
Fairness Hearing	At least 90 days from date Motion for Preliminary Approval filed

V. CONCLUSION

The proposed Settlement meets the standard for preliminary approval. Accordingly, the Parties respectfully request that the Court issue an Order: (a) granting preliminary approval of the Settlement Agreement, attached as Exhibit A to the Feinberg Declaration; (b) approving of a modified definition of the Class for purposes of settlement; (c) approving the proposed Class Notice, attached as Exhibit B to the Feinberg Declaration; (d) appointing CPT Group, Inc. as the Settlement Administrator; (e) preliminary approving the Plan of Allocation; and (f) setting a date for a Fairness Hearing.

DATED: August 26, 2020

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on August 26, 2020, I electronically filed the foregoing JOINT MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT AND TO MODIFY CLASS with the Clerk of the Court using the CM/ECF system, which served it on all counsel of record in this case.

Colin M. Downes