UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

GREGORY GODFREY, et al.,	**Case No. 1:18-cv-07918**
Plaintiffs,	**Judge Matthew F. Kennelly**
v.	**Magistrate Judge Michael T. Mason**
GREATBANC TRUST COMPANY, et al.,	
Defendants.	

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF UNOPPOSED MOTION FOR FINAL APPROVAL OF SETTLEMENT

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I. INTRODUCTION

Subject to the Court's approval, the Parties have settled this Employee Retirement Income Security Act, 29 U.S.C. § 1000, *et seq.*, ("ERISA") class action (the "Action"). The Action was vigorously litigated for over three years with extensive fact discovery, expert discovery, and motion practice, including multiple motions to dismiss Plaintiffs' complaints, discovery motions, class certification, Rule 37 motions to exclude evidence, full and partial summary judgment motions, and Daubert motions. One attempt to mediate the dispute failed to reach a resolution, while a second attempt, following briefing on summary judgment, ultimately led to the Settlement here. The terms of the proposed settlement, which has already been preliminarily approved by the Court (the "Settlement"), provides substantial monetary recovery to Class members.

The Settlement provides a significant recovery for the Class. Defendants[1] will pay a total of $16.5 million into a Settlement Fund Account (the "Fund"). The Fund, net of attorneys' fees and expenses, administrative costs, and case contribution awards, will be distributed to the 207 individuals who held vested shares in the McBride & Son Employee Stock Ownership Plan (the "Plan" or the "ESOP") during the Class Period. Defendants, some of whom participated in the ESOP, are excluded from settlement distributions. Should the Court grant final approval, every eligible Class Member will receive their portion of the common fund according to the Plan of Allocation. The Settlement satisfies all the criteria for final approval, as discussed in more detail below.

The Court granted Plaintiffs' Motion for Preliminary Approval and approved Class Notice in two orders, one on May 24, 2022 granting Plaintiffs' unopposed motion for preliminary

[1] The term "Defendants" as referred to herein means Defendants McBride & Son Capital, Inc. ("MS Capital"), McBride & Son Management Company, LLC ("MS Management"), John F. Eilermann, Jr.("Eilermann"), Michael D. Arri ("Arri")(collectively "McBride Defendants"), and Defendant GreatBanc Trust Company ("GreatBanc").

approval of the class settlement (Dkt. 311) and one on May 27, 2022, approving the parties' revised proposed Class Notice (Dkt. 313).[2] The Parties and Settlement Administrator have satisfied the conditions of those Orders, and Plaintiffs now ask the Court to: (1) grant final approval of the Settlement Agreement; (2) find that the Class Notice satisfied the requirements of due process and Rule 23(e)(1); (3) find that the Settlement Agreement is fair, reasonable, and adequate; (4) certify the class for settlement purposes and confirm the prior appointments of Plaintiffs Gregory Godfrey ("Godfrey"), Jeffery Sheldon ("Sheldon"), and Debra Ann Kopinski ("Kopinski") as Class Representatives, and attorneys at the law firms of Bailey & Glasser LLP and The Wagner Law Group, PC as Class Counsel; (5) dismiss on the merits and with prejudice all claims asserted against Defendants; (6) approve the release provisions as contained and incorporated in Section 3 of the Settlement Agreement; (7) retain jurisdiction of all matters relating to the interpretation, administration, implementation, effectuation, and enforcement of the Settlement Agreement; (8) award Plaintiffs' counsel attorneys' fees and expenses in accordance with their separately filed application for attorneys' fees; and (9) award $25,000 to Plaintiffs Godfrey, Sheldon, and Kopinski as Case Contribution Awards.

A proposed Final Judgment and Order Approving Class Settlement and Dismissal with Prejudice is attached hereto.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Background

This is a class action brought on behalf of participants and beneficiaries of the Plan that alleges McBride Defendants and GreatBanc violated ERISA in connection with three transactions: (1) a

[2] In connection with Plaintiffs' Motion for Preliminary Approval of the Settlement, Plaintiffs submitted to the Court, the Settlement Agreement (*see* Dkt. 308-1, the "Settlement Agreement") and the Plan of Allocation and Distribution of Settlement Proceeds to Settlement Class Members. *See* Dkt. 308-2 (the "Plan of Allocation").

Recapitalization in late 2013 of MS Companies, Inc. to a limited liability company (the "2013 Recapitalization"); (2) the payment of excessive compensation to executives, including the distribution of Class B and Class C Units of MS Companies, LLC from 2013–2017, thereby diluting the value of the Plan (the "Compensation Decisions"); and (3) the purchase of all the shares of MS Capital stock held by the Plan at a below fair market price of $187 for a total of consideration of $16,493,664, which consisted of 80,094.3643 shares for $14,977,646 in cash and 8,107.0476 shares worth $1,516,018 transferred to MS Capital in payment of an outstanding loan from the company to the ESOP (the "2017 Transaction").

Plaintiffs allege that in these three main concerns, Defendants violated their various obligations under ERISA § 404 and engaged in prohibited transactions in violation of ERISA § 406. Defendants deny all of these allegations; deny liability; and have strongly defended themselves in the Action. Defendants do not admit wrongdoing of any kind regarding the 2013 Recapitalization, the Compensation Decisions, or the 2017 Transaction.

B. Discovery

The Parties vigorously litigated this Action and engaged in robust discovery. Declaration of Mark G. Boyko in support of this Motion ("Boyko Decl.") ¶¶12–13. Both sides propounded and responded to extensive written discovery demands. *Id*. ¶13. Among other things, the Parties engaged in extensive discovery including exchanging and responding to dozens of Interrogatories and Requests for Documents that were supplemented throughout the duration of fact discovery. *Id*. In connection with the Parties' Requests for Documents, counsel for Plaintiffs and Defendants received and reviewed approximately 100,000 pages of discovery produced by the Parties in addition to various third parties. *Id*.

Class Counsel retained and consulted with four experts, who prepared detailed reports and analyses on valuation, due diligence, and compensation. *Id*. ¶¶13, 19, 31. Defendants' counsel

likewise retained and consulted with five experts, who prepared reports on similar topics. *Id*. Each side deposed all experts on the other side. *Id*. ¶13. The Parties also took fourteen fact depositions of eleven different witnesses. *Id*. Plaintiffs took the depositions of four current or former McBride executives, one non-executive McBride employee, one GreatBanc executive, McBride's investment banker, and GreatBanc's financial advisor. *Id*. All these depositions were attended by Defendants' counsel, who examined some of those witnesses. *Id*. Defendants took the deposition of the three Plaintiffs. *Id.*

C. Motions Practice

During this litigation, the Parties engaged in extensive motions practice. Plaintiffs filed their first Complaint on November 30, 2018 (*see* Dkt. 1), First Amended Complaint ("FAC") on March 29, 2019 (*see* Dkt. 36), and the Second Amended Complaint ("SAC") on February 26, 2020 (*see* Dkt. 127). McBride Defendants filed motions to dismiss the Complaint, the FAC, and the SAC (*see* Dkts. 23, 48, 111) and GreatBanc filed motions to dismiss the Complaint and the SAC (*see* Dkts. 26, 114). The Court issued an opinion on September 26, 2019 that granted in part and denied in part McBride Defendants' motion to dismiss the FAC (*see* Dkt. 74) and issued an opinion on August 19, 2020 that granted in part and denied in part McBride Defendants' motion to dismiss the SAC and denied GreatBanc's motion to dismiss the SAC (*see* Dkt. 154). The Parties also litigated several discovery-related motions. *See* Dkts. 30, 82, 85, 180, 191, 215. Plaintiffs filed a Motion for Class Certification on September 16, 2020. Dkt. 158. Defendants filed a joint opposition to this Motion on October 7, 2020. Dkt. 166. The Court granted Plaintiffs' Motion and certified the Class. Dkts. 205, 207.

The Parties filed motions to exclude certain evidence in advance of summary judgment briefing. On June 18, 2021, Defendants filed a Motion to Strike portions of Plaintiffs' expert Daniel VanVleet's testimony. Dkt. 223. Plaintiffs filed an opposition to this Motion on June 28, 2021.

Dkt. 231. The Court granted Defendants' Motion on August 30, 2021. Dkt. 248. On June 24, 2021, Plaintiffs filed a Motion to Exclude Evidence Pursuant to Rule 37(c)(1). Dkt. 227. Defendants filed an opposition to this Motion on July 6, 2021. Dkt. 242. On August 30, 2021, the Court denied Plaintiffs' Motion but permitted additional discovery. Dkt. 248. Defendants filed Motions for Summary Judgment on November 12, 2021. Dkts. 257, 260. Plaintiffs filed a Partial Motion for Summary Judgment against McBride Defendants and GreatBanc on January 14, 2022. Dkts. 265, 266. The Parties submitted extensive oppositions and replies to the Summary Judgment Motions and Partial Summary Judgment Motions, which were fully briefed as of April 4, 2022.

D. The Parties' Settlement Efforts

The Settlement resulted from extensive, arm's-length negotiation mediated by Robert A. Meyer, Esq. of JAMS, a nationally recognized private mediator who has facilitated the settlement of other ESOP cases of this kind. Boyko Decl. ¶14. The Parties submitted mediation statements to Mr. Meyer. *Id*. Counsel for the Parties attended a one-day in-person and partly virtual mediation at the JAMS offices in New York on July 28, 2021. *Id*. The attendees vigorously engaged in the mediation process, during which the Parties' counsel each gave presentations to Mr. Meyer. *Id*. Despite much deliberation, discussion, and compromise, the Parties were not able to reach a resolution at that time. *Id*. Consequently, after summary judgment briefing was submitted by all sides, the Parties engaged in another all-day virtual mediation on April 7, 2022 with the same mediator. *Id*. Following the all-day mediation, negotiations continued between the Parties, facilitated by the continued involvement of the mediator, resulting in the execution by the Parties of a settlement Term Sheet on April 18, 2022. *Id.*

III. SUMMARY OF THE PROPOSED SETTLEMENT TERMS

The material terms of the Settlement Agreement include the following:

A. Settlement Class

The Court has already certified the Class as follows:

> All participants in the McBride & Son Employee Stock Ownership Plan, and the beneficiaries of such participants, at any time between December 31, 2013 and December 15, 2017. Excluded from the proposed Class are (1) Defendants Eilermann and Arri, their immediate families, and their legal representatives, successors, and assigns, and (2) any owners of Class B and Class C Units of McBride & Son Companies, LLC ("MS Companies, LLC") during the class period including Jeffrey Berger, Jeffrey Schindler, and Jeffrey Todt.

Dkts. 205, 207.

B. Benefits to the Settlement Class

Monetary relief. Defendants will pay a total of $16,500,000.00 ("Settlement Amount") into the Settlement Fund Account. The Settlement Amount, less all (i) taxes (or reserves to pay taxes), (ii) settlement administration fees, (iii) Court-approved attorneys' fees and expenses, and (iv) Service Awards to the Plaintiffs, shall constitute the Net Settlement Fund. The Net Settlement Fund will be distributed to members of the Settlement Class pursuant to the Plan of Allocation. On average, the benefit to each ESOP investor in the Class will be approximately $48,000 after Court approved deductions requested by Plaintiffs. Dkt. 310 at 3. There will be no claims process and no reversion to Defendants. The Settlement Administrator has all the information necessary to calculate and distribute class member distributions, either in the form of a check to the Class Member or as a contribution into a tax-deferred qualified retirement account.

C. Notice and Administration

The notice procedures and schedule of events set forth in the Preliminary Motion (*see* Dkt. 308 at 11–12) and Class Notice (*see* Dkt. 312), approved by the Court on May 24 and 27, have been implemented by the Parties. On June 21, 2022, the Settlement Administrator, ILYM Group, Inc. ("ILYM"), mailed the Class Notice to 265 Settlement Class Members by U.S. mail, first class, in accordance with the schedule submitted to the Court on May 16, 2022, and approved by the

Court on May 24, 2022. *See* Dkt. 313; Declaration of Makenna Snow of ILYM Group, Inc. ("ILYM Decl.") ¶7. As of August 19, 2022, only two Class Notices were returned as undeliverable due to the Class Members being deceased. *Id*. ¶9. Neither were entitled to a recovery under the terms of the Settlement Agreement. *Id*. The Class Notice is clear and straightforward, was approved by the Court on May 27, 2022 (Dkt. 313) and provided Class Members with enough information to inform them about the nature of the Action, the terms of the Settlement, and the procedures for entering an appearance to be heard or to object to the Settlement.

As set forth in the Class Notice, ILYM established a settlement website with detailed information about the Settlement. ILYM Decl. ¶3. The website address, www.McBrideESOPSettlement.com, was printed on all Notices. *Id*. at Exhibit A, attached thereto. The website provides links to key documents, lists important dates and deadlines, explains Class Members' rights and options, and provides the contact information for ILYM and Class Counsel. *Id.* Plaintiffs' Motion for Award of Attorneys' Fees and Case Contribution Award and this Motion will be posted on the settlement website once filed. ILYM will also process any objections by Class Members.

Following final approval of the Settlement, ILYM will implement the Plan of Allocation, subject to oversight of Class Counsel, and determine the amounts to be allocated to members of the Settlement Class in accordance with the Plan of Allocation. ILYM shall determinate each Class Member's share of the Net Settlement Fund ("Class Member Benefit") through the following processes:

a. McBride shall report to the Settlement Administrator the number of vested Shares[3] held by each Class Member as of the following dates: December

[3] Shares is defined as shares of McBride & Son Capital, Inc. stock held inside the ESOP from December 31, 2013 through November 30, 2017.

31, 2013; December 31, 2014; December 31, 2015; December 31, 2016; and November 30, 2017. The total of each participants' vested Shares as of December 31, 2013, December 31, 2014, December 31, 2015, December 31, 2016, and November 30, 2017, shall be called the Class Member's "Yearly Vested Shares." For purposes of the November 30, 2017 Yearly Vested Shares determination, participants who were cashed out of their ESOP accounts in October or November 2017 at the share price used in the 2017 Transaction will be deemed to have held on November 30, 2017, the greatest number of shares they held at any point from October 31, 2017, through November 30, 2017.

b. ILYM will then calculate for each Class Member, the sum of that Class Member's Yearly Vested Shares. This sum shall be that Class Member's "Cumulative Vested Shares."

c. ILYM will then calculate the grand total of all Class Members' Cumulative Vested Shares. This sum shall be called the "Total Class Shares."

d. For each Class Member, ILYM will then divide the Class Member's Cumulated Vested Shares by the Total Class Shares. The resulting number shall be called that Class Member's "Class Member Percentage."

e. Finally, for each Class Member, ILYM will multiply that Class Member's Class Member Percentage by the Net Settlement Fund amount. This resulting number shall constitute that Class Member's Class Member Benefit.

ILYM shall be responsible for establishing and maintaining a qualified settlement trust to hold

the Settlement Amount. Pending the distribution of the Net Settlement Fund to the Class Members, ILYM shall invest the assets of the qualified settlement trust pursuant to the agreement between ILYM and Class Counsel.

ILYM is also serving as Escrow Agent and has established and is maintaining a qualified settlement trust in accordance with the terms of the Settlement Agreement. ILYM's fees and expenses are expected to be approximately $25,000 through the end of the settlement process. ILYM Decl. ¶13.

D. Case Contribution Awards to Plaintiffs and Attorneys' Fees and Costs

Subject to Court approval, Class Counsel's fees, costs and expenses, and Case Contribution Awards to Plaintiffs shall be paid from the Settlement Amount prior to distribution to the Class Members of the Net Settlement Fund as described in the Settlement Agreement. Plaintiffs are seeking $25,000 each in recognition of each of the three Plaintiffs' services as class representatives, as detailed more fully in Plaintiffs' accompanying fee petition. Each Plaintiff shall also be entitled to an allocation under this settlement as a Class Member. Class Counsel has also petitioned the Court for an award of attorneys' fees of $5,000,000[4] and expenses of $954,069.47 for expenses.

E. Release of Claims

Upon satisfaction of the conditions required by the Settlement Agreement, the Parties will release each other from claims related to the Action. The releases are set forth in greater detail in Article III of the Settlement Agreement.

[4] The maximum fee to be sought by Class Counsel has been calculated under the standard set by *In re Synthroid Mktg. Litig.*, 325 F.3d 974, 978–80 (7th Cir. 1992), which this Court has applied in several prior orders.

IV. THE SETTLEMENT IS FAIR, REASONABLE, AND ADEQUATE AND SHOULD BE APPROVED

Rule 23(e) provides that a class action cannot be settled without court approval. To be approved, a settlement must be fair, reasonable, and adequate. Rule 23(e)(2); *Kaufman v. Am. Express Travel Related Servs. Co.*, 877 F.3d 276, 283 (7th Cir. 2017). The 2018 Amendments to Rule 23 provide direction to courts considering whether to approve such a settlement. Rule 23(e)(2) provides that the court should consider whether:

> (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: the costs, risks, and delay of trial and appeal; the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims the terms of any proposed award of attorney's fees, including timing of payment; an 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, the Seventh Circuit has traditionally considered several factors when evaluating a class settlement: (1) the strength of the case for plaintiffs on the merits, balanced against the extent of settlement offer; (2) the complexity, length, and expense of further litigation; (3) the amount of opposition to the settlement; (4) the reaction of members of the class to the settlement; (5) the opinion of competent counsel; and (6) the stage of the proceedings and the amount of discovery completed. *Wong v. Accretive Health, Inc.*, 773 F.3d 859, 863–64 (7th Cir. 2014)(additional citations omitted). As the court noted, "[t]he most important factor relevant to the fairness of a class action settlement is the strength of plaintiff's case on the merits balanced against the amount offered in the settlement." *Id.* The 2018 Committee Notes to Rule 23 recognized that each Circuit had developed its own list of factors, similar to those employed in the Seventh Circuit, to be considered in determining whether a proposed class action was fair and explained that the

goal of the amendment is not to displace those factors, but rather to focus the parties on the "core concerns" that motivate the fairness determination. *See* Advisory Committee Notes to 2018 Amendments, 324 F.R.D. 904, 918 (Apr. 26, 2018); *Christine Asia Co. v. Yun Ma*, No. 15-2631, 2019 WL 5257534, at *9 (S.D.N.Y. Oct. 16, 2019). Below, Plaintiffs will address each of the relevant factors, many of which overlap.[5]

Finally, this analysis takes place with the understanding that federal courts favor the settlement of class action litigation (*see Isby v. Bayh*, 75 F.3d 1191, 1196 (7th Cir 1996)) and that class settlements are presumed fair following sufficient discovery and genuine arm's length negotiation. *See Moreno v. Beacon Roofing Supply, Inc.*, No. 19-185, 2020 WL 1139672, at *5 (S.D. Cal. Mar. 9, 2020); *Udeen v. Subaru of Am., Inc.*, No. 18-17334, 2019 WL 4894568, at *2 (D.N.J. Oct. 4, 2019).

A. The Class is Adequately Represented.

Rule 23(e)(2)(A), requiring adequate representation by the Plaintiffs and their counsel, was addressed in Plaintiffs' Unopposed Motion and Incorporated Memorandum of Law for Preliminary Approval of Settlement, (Dkt. 308 at 13–14), Plaintiffs' Memorandum in Support of Motion for Class Certification (Dkt. 159 at 9–10), and also in the concurrently-filed Memorandum in Support of Motion for Attorneys' Fees, Costs, and Case Contribution Awards. In sum, both Plaintiffs and Class Counsel have effectively and diligently served the Class. The Plaintiffs are exemplary representatives. They have loyally and vigorously represented the Class over three years of hard-fought litigation, and this Court has already found them to be adequate. (Dkt. 205 at 12–14). If Plaintiffs had not been willing to act as class representatives, there would be no settlement benefits at all for the Class. They have spent significant time on behalf of the Class, including responding

[5] Here, there is no agreement to be identified under Rule 23(e)(3)(C)(iv).

to counsel's requests, reviewing documents, traveling to provide deposition testimony, submitting declarations, and consulting with counsel on settlement terms. Boyko Decl. ¶34. They have no interests that are antagonistic to or in conflict with the Settlement Class.

In addition, Class Counsel are well-qualified and have zealously prosecuted this class action. They have engaged in substantial and comprehensive discovery efforts, filed or responded to the numerous motions listed above, successfully moved for class certification, attended two separate mediation sessions, obtained multiple experts to support their allegations, and partially moved for summary judgment on the evidentiary record. Boyko Decl. ¶¶12–13. Class Counsel are active class action practitioners with years of experience in ERISA litigation generally and ESOP litigation specifically. Boyko Decl. ¶¶5–11; Declaration of Thomas E. Clark filed in support of this Motion ("Clark Decl.") ¶¶4–8. Further, the Court has already ruled that Class Counsel is adequate in certifying this Action as a class action. Dkt. 205 at 16. The "adequacy of representation" factor of Rule 23(e)(2)(A) is met.

B. The Proposed Settlement was Negotiated at Arm's Length.

Rule 23(e)(2)(B) instructs the court to consider whether the proposed settlement was negotiated at arm's length. There is a presumption that a settlement is fair and reasonable when it was the result of arm's length negotiations between experienced, capable counsel after meaningful discovery. *See, e.g.*, *Moreno,* 2020 WL 1139672, at *5; *Udeen*, 2019 WL 4894568, at *2. That presumption applies here. The Parties completed fact and expert discovery and summary judgment briefings and have therefore had a full opportunity to test their claims and defenses and understand the strengths and weaknesses of their positions. *See Armstrong v. Bd. of Sch. Dirs. of Milwaukee*, 616 F.2d 305, 325 (7th Cir. 1980), *overruled on other grounds by Felzen v. Andreas*, 134 F.3d 873 (7th Cir. 1998)("The stage of the proceedings at which settlement is reached is important because it indicates how fully the district court and counsel are able to evaluate the merits of plaintiffs'

claims.").

And the Settlement here was achieved through extensive, arm's length settlement negotiations under the guidance of a mediator, Robert A. Meyer, Esq., and continued discussion between the Parties. Mr. Meyer has extensive experience mediating complex class actions and commercial disputes including ERISA litigation.[6] His understanding of the legal nuances, practical realities of continued litigation, and parameters of a fair and reasonable settlement informed the Parties' agreement. The arm's length nature of the negotiations is highlighted by the fact that, despite extensive efforts in a full first day of mediation, the Parties were unwilling to compromise sufficiently to reach an agreement. Once the case had developed further, the Parties again engaged in the mediation process with Mr. Meyer, which was ultimately successful. In addition to the in-person mediation sessions, Mr. Meyer communicated with the Parties by phone and e-mail on numerous occasions to assist in achieving a settlement. With his assistance, the Parties ultimately reached agreement on key settlement terms on April 18, 2022. Boyko Decl. ¶14.

In sum, the robust discovery process, the pre-mediation discussions, the mediation briefing, the sharing of information during mediation, and the involvement of Mr. Meyer during and after multiple mediations sessions support a finding that the Settlement was reached after a thorough investigation and was fairly and honestly negotiated. The "arm's length negotiation" factor of Rule 23(e)(2)(B) weighs in favor of approval.

C. The Proposed Settlement's Relief to the Class is Adequate Taking Into Account the Complexity, Costs, Risks, and Delay of Trial and Appeal.

Rule 23(e)(2)(C)(i) and several of the Seventh Circuit factors[7] address the complexity, cost,

[6] Mr. Meyer's experience and qualifications are detailed at http://www.jamsadr.com/meyer/. (Last viewed August 19, 2022).

[7] These factors include the strength of a plaintiff's case compared to the terms of the proposed settlement and the likely complexity, length, and expense of continued litigation. *See Wong*, 773 F.3d at 863–64.

risks, and likely duration of the litigation. "The most important factor relevant to the fairness of a class action settlement is ... the strength of plaintiff's case on the merits balanced against the amount offered in the settlement." *Synfuel Techs., Inc. v. DHL Express (USA), Inc.*, 463 F.3d 646, 653 (7th Cir. 2006)(internal quotation marks omitted).

1. The Risk of Loss

Plaintiffs faced substantial risk of losing this case as well as additional protracted litigation at trial and the appeals thereafter, no matter how the Court ruled, as Plaintiffs and Defendants had vastly different views about Defendants' liability and the likely outcome of the litigation. Plaintiffs' core allegations rested on facts and law that Defendants strongly contested, on all three buckets of alleged wrongdoing (i.e., 2013 Recapitalization, Compensation Decisions, and 2017 Transaction.) Indeed, regarding alleged facts, Defendants only fully admitted, without any objection or clarification, 12 out of the 189 separate facts Plaintiffs set forth as part of their Rule 56 Statement of Material Facts in support of their Motion for Partial Summary Judgment. *See* Dkt. 290-1. And, Plaintiffs only fully admitted, without any objection or clarification, to 28 out of the 150 separate facts set forth in Defendants' Rule 56 Joint Statement of Material Facts. *See* Dkt. 267-1. Factual disputes between the parties, mixed with competing expert opinions and testimony, relating to Plaintiffs' allegations on all claims were therefore hotly contested, extensive, and would likely have to be resolved at trial through evidence and fact and expert testimony.[8]

[8] *See e.g.*, Dkt No. 258 at 4 ("Mr. Risius opined that the financial framework Stern Brothers used for its fairness opinion was reasonable from a financial point of view, and allowed GreatBanc to more clearly weigh the cost-benefit analysis of proceeding with the 2013 Reorganization versus maintaining the status quo"); 5 ("Mr. Brown opined that GreatBanc's process and procedures for evaluating the fairness of the 2013 Reorganization to the ESOP were consistent with the usual and customary practices of an ESOP trustee evaluating the fairness of corporate reorganizations substantially similar to the 2013 Reorganization"); 14 ("Mr. Brown opined that GreatBanc acted consistent with the usual and customary practices of an independent ESOP Trustee regarding management compensation between 2013-2017"); 19 ("Mr. Brown opined that measured against the hundreds of ESOP redemption transactions he has assisted in negotiating

2. The Risk of Trial

While it is true that ESOP litigation of this nature is rarely, if ever, resolved at the Summary Judgment stage, substantial risks continue for the Plaintiffs. Disposition of similar cases often boils down to a battle of completing experts, and it is not uncommon for courts to side with defendants at trial on issues of ESOP valuation, even where the plan is represented by the United States Department of Labor. *See, e.g., Walsh v. Bowers*, 561 F. Supp. 3d 973 (D. Haw. 2021)(ruling for defendants after finding credible the trial testimony of the same defense expert Defendants utilized here); *see also Fish v. GreatBanc Tr. Co.*, No. 09-1668, 2016 WL 5923448, at *52, 66–68 (N.D. Ill. Sep. 1, 2016)(holding after 34 day bench trial that defendants breached no fiduciary duties, that adequate consideration was paid and plaintiffs suffered no damages, and that GreatBanc conducted a thorough and vigorous review of the transaction at issue and worked diligently to protect the ESOP's interests); *Keach v. U.S. Trust Co., N.A.*, 313 F. Supp. 2d 818 (C.D. Ill. 2004)(holding after bench trial that defendants had no liability related to an ESOP transaction as, among other things, they did not breach their fiduciary duties in connection with the appointment of a trustee and the ESOP paid adequate consideration for the employer's stock). Courts have also found the existence of independent trustees persuasive in rulings against ERISA claims brought by ESOP investors. *Burke v. Boeing Co.*, No. 20-3389, 2022 WL 3030835 (7th Cir. Aug. 1, 2022).

The parties also strongly disagreed on the proper measure of damages. In this regard, if Plaintiffs survived summary judgment, Defendants had presented vigorous arguments they intended to pursue for the exclusion of the damages opinions from Plaintiffs' valuation expert

on behalf of independent ESOP trustees or sponsor company management, GreatBanc's negotiation of the 2017 Redemption was arms length, informed and robust") and at 20 ("Defendants' valuation expert Jeff Risius also performed an independent valuation of McBride as of November 30, 2017, and like Stern Brothers, concluded that the price the ESOP received as consideration for its shares exceeded fair market value").

(Dkts. 278, 279), who had previously had opinions excluded (Dkt. 248). Plaintiffs strongly disputed and planned to oppose all of these forthcoming arguments, but, even if Plaintiffs were successful, Defendants were likely to appeal.

Defendants further were prepared to present fact and expert evidence that the Plan and its participants were not harmed at all in the 2013 Recapitalization or 2017 Transaction, because, among other reasons, the Plan received adequate consideration in those transactions. Dkts. 258, 262. Plaintiffs strongly disagreed and as part of their summary judgment briefing identified a host of disputed material facts and conflicting expert opinions on whether the Plan sold its stock for less than fair market value. *See e.g.*, Dkt. 267 at 49–51 (identifying disputes with Stern Brothers' Valuation Reports). Defendants presented detailed arguments to these points, including the motivations behind the transactions and evidence that the transactions not only did not harm but actually helped the ESOP participants, in their combined opposition and reply briefs and response to statement of facts. Dkts. 290, 290-1, 293.

With respect to the Compensation Decisions, the Parties again vigorously disputed the facts and the meaning of those facts. In response to Plaintiffs' argument that McBride Defendants paid excessive compensation, Defendants presented fact evidence that McBride had engaged an independent compensation consult to advise it on those issues, along with expert evidence that the compensation was reasonable. As a legal matter, the Parties strongly disagreed as to whether the allegations resulted in any damage to the Plan. Defendants argued the facts supporting the Compensation Decisions related to McBride's corporate conduct only, not subject to any ERISA's fiduciary duty and that, as a legal matter, ERISA's strictures were inapplicable. *See* Dkt. 258 at 11–13; Dkt. 262 at 10–12. GreatBanc further argued that imposing ERISA to its conduct in this regard would be without precedent (Dkt. 290 at 12–14); that even if ERISA applied there was no

evidence demonstrating a flaw in GreatBanc's process; Plaintiff's experts admitted they had no opinions in this regard (*id*. at 14–18); and that Plaintiffs' remedy of disgorgement did not apply to GreatBanc in any event because it received none of the challenged compensation (*id.* at 18–19). Defendants based their arguments on the application of 29 C.F.R. § 2510.3-101 (the "Plan Assets Regulation"), the Final Regulations Relating to the Definition of Plan Assets (*see* 51 Fed. Reg. 41, 262)(Nov. 13, 1986), and the "operating company" exemption, which Defendants argued would serve as a bar to all of Plaintiffs' claims regarding the Compensation Decisions. Dkt. 258 at 12; Dkt. 262 at 11–12. Plaintiffs strongly disagreed with all of these arguments, identified case law opposing Defendants' arguments, and argued that a breach of fiduciary allegation was pled, irrespective of the Plan Asset Regulations because the value of the ESOP was substantially diluted through the Compensation Decisions. Dkt. 267. at 39–41. If Defendants had prevailed on this legal issue, Plaintiffs would have recovered no damages on the Compensation Decisions whatsoever. Even if the Court instead ruled favorably for Plaintiffs, Defendants would have likely appealed on the legal issue, presenting additional risk that Plaintiffs might recover nothing on these claims, but at a minimum further delaying resolution of this matter and increasing the costs for the Parties.

Ultimately, these factual and legal disagreements would have resulted in a battle of experts on the valuation and damages issues — as Plaintiffs and Defendants presented competing liability and damages experts on all three challenged categories of claims — which would have placed the ultimate outcome of the litigation in doubt, because no Party could reasonably be certain that its expert or evidence, or positions on respective burdens of proof, would carry the day and be considered dispositive. In sum, Plaintiff "would have faced significant obstacles in prevailing." *Douglas v. W. Union Co.*, 328 F.R.D. 204, 215 (N.D. Ill. 2018)(Feinerman, J.)(approving settlement).

3. The Risk of Collectability

The collectability of a judgment was also uncertain. *See Fish et al., v. Great Banc Trust Co., et al.,* No. 09-1668, Dkt. 781-1 (N.D. Ill. Oct. 27, 2017)(declaration filed by Plaintiffs' counsel in connection with proposed settlement stated that: "In the course of these [settlement] negotiations, GreatBanc's counsel asserted that any judgment obtained against GreatBanc by Plaintiffs ***would be uncollectible because available insurance had been largely depleted (and would almost certainly be fully depleted by the time of collection efforts), and because GreatBanc had few if any assets that would be available to satisfy a judgment***")(emphasis added).

4. The Complexity of this Action was Significant

Regarding complexity, it is well-recognized that ERISA is a "particularly complex area of law." *Abbott v. Lockheed Martin Corp*, No. 06-705, 2015 WL 4398475, at *2 (S.D. Ill. July 17, 2015); *Stevens v. SEI Invs. Co.*, No. 18-4205, 2020 WL 996418, at *3 (E.D. Pa. Feb. 28, 2020) *citing Krueger v. Ameriprise Fin., Inc.*, No. 11-2781, 2015 WL 4246879, at *1 (D. Minn. July 13, 2015)(noting that ERISA is "complex field that involves difficult and novel legal theories and often leads to lengthy litigation"). This ERISA Action is no different.

The complexity here makes the likelihood of success even more uncertain, and it drives up litigation costs. This litigation would only have become more expensive if it were to proceed further. Trial was set for August 1, 2022, which would have required several attorneys from both sides spending most of their time preparing in the weeks leading up to trial. And regardless of the outcome, appeals would likely have followed, further delaying resolution, and causing more expense. This factor weighs strongly in favor of approval.

5. The Benefit of Settlement Outweighs the Risks

Compared to the costs, risks and delay of trial and appeal, the immediate and certain recovery of $16,500,000.00 outweighs the uncertain possibility of a greater amount in the future,

particularly given the amount of time it would take — including preparing for and conducting the trial, post-trial and post-judgment briefing, and appeals — for any judgment to be reduced to actual payment to Plan participants. *See Douglas*, 328 F.R.D. at 215–16 (in approving settlement as fair the court noted that the defendant's potential defenses and the legal uncertainties, as well as the time and expense inherent in litigation, posed substantial risks to the plaintiff and the putative class that they would have recovered nothing; "[a] settlement need not provide the class with the maximum possible damages to be reasonable."). A district court should not "reject[ ] a settlement solely because it does not provide a complete victory to the plaintiffs, for the essence of settlement is compromise." *Id.* (*citing Isby v. Bayh*, 75 F.3d 1191, 1200 (7th Cir. 1996))(internal quotation marks omitted).

D. The Proposed Settlement's Proposed Method of Distributing Relief to the Class.

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. The proposed method for distributing relief to Settlement Class Members here is effective and equitable. The Settlement Agreement contemplates Defendants providing, or causing the provision of, the names and last known addresses of the Settlement Class Members and the number of vested shares of McBride stock allocated to their ESOP account. Dkt. 308-1 at 10–11 (§2.1.3). That information has already been provided. ILYM will use this information to implement the Plan of Allocation. According to the Plan of Allocation, those Class Members with an active account in the McBride & Son 401(k) Savings Plan ("401(k) Plan") shall receive a deposit of their Class Member Benefit directly into their 401(k) Plan accounts such that their distributions can be invested for retirement in a tax-efficient manner. *See* Dkt. 308-1 at 48–49 (¶3). Distribution of such deposits to the Class Members' 401(k) Plan accounts shall be made in accordance with the terms of the 401(k) Plan. *Id.*

Class Members who do not have an active account in the 401(k) Plan will be notified by ILYM of their entitlement to receive their Class Member Benefit from the Net Settlement Fund and will be given an opportunity to elect whether to receive such payment directly or by means of a rollover to an eligible retirement plan or IRA. *Id.* In the event ILYM fails to receive an election response from a Class Member prior to distributions, ILYM shall issue the distribution payable to the same payee as that designated by the Class Member with respect to his previous distribution from the ESOP. *Id.* There will be no claims process and no reversion of any part of the Settlement Funds to any Defendant. Payments will be made automatically, making the distribution process 100% effective. This method of distributing relief is highly efficient and weighs in favor of granting final approval.

The Settlement Agreement offers cash compensation in the aggregate amount of $16,500,000.00 with the net amount (after payment of notice and related costs, attorneys' fees and costs, and Plaintiffs' Case Contribution Awards as may be allowed by the Court) guaranteed to be paid to the Class Members.

E. The Proposed Settlement's Proposed Award of Attorneys' Fees.

Rule 23(e)(2)(C)(iii) looks at the terms of any proposed award of attorneys' fees, including timing of payment. Contemporaneously with this motion, Plaintiffs filed a motion for approval of an award of attorneys' fees of $5.5 million and litigation expenses of $954,069.47. That request is consistent with the Settlement Agreement's provisions that Class Counsel's petition for an award of attorneys' fees would not exceed one-third of the Class Settlement Amount and with the statement in Plaintiffs' brief in support of preliminary approval (Dkt. 308 at 20) that Class Counsel will seek no more than $5.5 million in fees. The request for litigation expenses is also consistent with Plaintiffs' statement in support of preliminary approval that they would seek no more than $979,000, and in fact are seeking less. *Id.* The attorneys' fees and expenses shall be paid from the

Class Settlement Amount of the Gross Settlement Fund. The requested fee is within the range of approved fee awards in this jurisdiction.

The Settlement Class has been notified of the maximum amount of fees and litigation expenses that could be requested and have had the opportunity to object to the fee application. As of the date of this filing, no objections to the Settlement have been received. *See* Boyko Decl. ¶35.

F. The Proposed Settlement 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. Under the Plan of Allocation, the funds will be allocated to each Settlement Class Member in proportion to the vested company shares that he or she held in the Plan compared to the total vested company shares held in the Plan by all Settlement Class Members. Dkt. 308-1 at 47–48 (¶2). Therefore, individual Class Members will not receive preferential treatment but instead all will receive a distribution based on their Cumulative Vested Shares during the Class Period as detailed in the Plan of Allocation. *Id.*

G. The Proposed Settlement Also Satisfies the Additional Seventh Circuit Factors.

The Seventh Circuit has also identified additional nonexclusive factors to consider in evaluating proposed settlements. *Wong v. Accretive Health, Inc.*, 773 F.3d 859, 863–64 (7th Cir. 2014). Two of those factors are the amount of opposition to the settlement and the reaction of members of the class to the settlement. *Id.* To date, no objection has been received, but the deadline to object is September 19, 2022. Dkt. 312-1 at 8. If any objections are received before the deadline, Class Counsel will address those in a supplemental filing. Boyko Decl. ¶35.

Courts in this Circuit also look at the opinion of competent counsel. *Wong*, 773 F. 3d at 863–64. Courts are "entitled to rely heavily on the opinion of competent counsel" *Gautreaux v. Pierce*, 690 F.2d 616, 634 (7th Cir. 1982)(citation omitted), and counsel for Defendants and Plaintiffs are

competent and have experience in ERISA litigation, including ESOP litigation. *See Douglas*, 328 F.R.D. at 216 (noting that class counsel's experience in the field strongly supported the settlement). Moreover, as discussed above with respect to the extensive litigation and negotiation process that occurred before Settlement, there is no indication that it is the result of collusion.

In sum, all the additional Seventh Circuit factors further support granting final approval.

V. CONCLUSION

For the foregoing reasons, the Settlement Agreement should be finally approved. A proposed Final Judgment and Order Approving Class Settlement and Dismissal with Prejudice has been filed with this Motion.

Dated: August 19, 2022

Respectfully submitted,

By: /s/ *Mark G. Boyko*
Mark G. Boyko (IL #6288036)
mboyko@baileyglasser.com
Bailey & Glasser LLP
34 N. Gore Ave., Suite 102
Webster Groves, MO 63119
Telephone: (314) 863-5446
Facsimile: (314)-863-5483

Patrick O. Muench (IL #6290298)
pmuench@baileyglasser.com
Bailey & Glasser LLP
318 W. Adams St., Suite 1606
Chicago, IL 60606
Telephone: (312) 500-8680
Facsimile: (202) 463-2103

Ryan T. Jenny
rjenny@baileyglasser.com
Gregory Y. Porter (admitted *pro hac vice*)
gporter@baileyglasser.com
Bailey & Glasser LLP
1055 Thomas Jefferson St., NW, Suite 540
Washington, DC 20007
Telephone: (202) 463-2101
Facsimile: (202) 463-2103

Thomas E. Clark Jr. (IL #6294921)
tclark@wagnerlawgroup.com
Jordan D. Mamorsky (IL #6337130)
jmamorsky@wagnerlawgroup.com
The Wagner Law Group, PC
190 South LaSalle Street, Suite 2100
Chicago, IL 60603
Telephone: (314) 236-0065
Facsimile: (314) 236-5743

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that, on August 19, 2022, I caused a true and correct copy of the foregoing to be filed electronically using the Court's CM/ECF system and to be thereby served upon all registered participants identified in the Notice of Electronic Filing in this matter on this date.

/s/ Mark G. Boyko
Mark G. Boyko