UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE ING GROEP, N.V. ERISA LITIGATION	Master File No. 1:09-cv-00400-JEC
THIS DOCUMENT RELATES TO: All Actions	

Memorandum in Support of Plaintiffs' Motion for Preliminary Approval of Proposed Settlement, Conditional Certification of Settlement Class, Approval of Notice Plan, and Setting a Fairness Hearing

HARRIS PENN LOWRY DELCAMPO, LLP
David J. Worley
400 Colony Square
1201 Peachtree Street, N.E., Suite 900
Atlanta, Georgia 30361
Tel: (404) 961-7650
Fax: (404) 961-7651

Interim Liaison Counsel for Plaintiffs and the Settlement Class

BOTTINI & BOTTINI, INC.
Francis A. Bottini, Jr.
Albert Y. Chang
7817 Ivanhoe Avenue, Suite 102
La Jolla, California 92037
Tel: (858) 914-2001
Fax: (858) 914-2002

Interim Lead Counsel for Plaintiffs and the Settlement Class

GAINEY & MCKENNA
Thomas J. McKenna
Gregory M. Egleston (of counsel)
440 Park Avenue South, 5th Floor
New York, New York 10016
Tel: (212) 983-1300
Fax: (212) 983-0383

Counsel for Plaintiffs and the Settlement Class

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Plaintiffs Kent Sewright and Deadre D. Diggs ("Plaintiffs") respectfully submit this memorandum in support of their motion for an order:

(1) granting preliminary approval of the Stipulation and Agreement of Settlement (the "Stipulation");[1]

(2) conditionally certifying the Settlement Class (for settlement purposes only) pursuant to Rules 23 and 23.2 of the Federal Rules of Civil Procedure, and appointing Class Counsel for the Settlement Class and the Plans (for settlement purposes only) pursuant to Rule 23(g);

(3) approving the form of the Notice and Publication Notice, and directing the Claims Administrator to cause the Notice to be mailed to each member of the Settlement Class at the address identified on the Plan Participant List within 30 days of the Preliminary Approval Date;

(4) setting a briefing schedule and a date and time for a hearing to determine whether the Stipulation is fair, reasonable, and adequate to the Settlement Class and the Plans and to consider whether the Court should enter the Order and Final Judgment (the "Fairness Hearing");

(5) setting a deadline by which all objections to the Settlement (as defined in paragraph 3.39 of the Stipulation) must be made; and

[1] This memorandum incorporates all provisions of the Stipulation, including all definitions and defined terms; all capitalized terms not otherwise defined in this memorandum shall have the same meaning as ascribed to them in the Stipulation.

(6) determining that pursuant to Rules 23(c)(2) and 23(e) of the Federal Rules of Civil Procedure the forms of notice collectively constitute the best notice practicable under the circumstances and due and sufficient notice of the hearing and the rights of the Settlement Class and all other Persons entitled to such notice.

In further support of their motion, Plaintiffs submit the following exhibits:

- the Stipulation, as Exhibit 1;
- a proposed Notice of Pendency of Litigation, Proposed Settlement and Hearing, as Exhibit 1-A;
- a proposed Publication Notice, as Exhibit 1-B;
- a proposed Order Providing Preliminary Approval of Proposed Settlement, Conditionally Certifying the Settlement Class, Approving the Notice Plan, and Setting a Fairness Hearing, as Exhibit 1-C;
- a proposed Order and Final Judgment (to be entered after final approval), as Exhibit 1-D;
- a proposed Plan of Allocation, as Exhibit 1-E;
- the resume of Bottini & Bottini, Inc., as Exhibit 2; and
- the resume of Gainey & McKenna, as Exhibit 3.

I. INTRODUCTION

Consisting of a cash payment of $3,500,000.00, the proposed Settlement provides substantial benefit to the Settlement Class and resolves all claims asserted by Plaintiffs against all persons and entities named as defendants[2] in this Action. The Settlement is the product of vigorous negotiations at arm's length and in good faith, including negotiations presided over by an experienced mediator from the Eleventh Circuit's Kinnard Mediation Center. Plaintiffs submit that the Settlement represents an excellent recovery for the proposed Settlement Class.

Tested based on the six factors set forth in *Bennett v. Behring Corp.*, 737 F.2d 982, 986 (11th Cir. 1984), the Settlement falls within the range of reasonableness for preliminary approval. Certification of the proposed Settlement Class is appropriate under Rule 23 of the Federal Rules of Civil Procedure because the requirements of numerosity, commonality, typicality, and adequacy are met. In addition, the proposed form and manner of notice, which has been approved in numerous similar cases, satisfies the requirements of due process. Because, as discussed below, all prerequisites for preliminary approval and class certification are met, the Court should grant this motion and schedule a fairness hearing.

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[2] The following were named as defendants in the Consolidated Complaint: ING Groep, N.V., ING North America Insurance Corporation, ING Life Insurance and Annuity Company, ING U.S. Pension Committee, David A. Wheat, Darryl Harris, William Delahanty, Kimberly Shattuck, Bryon Scott Burton, Catherine H. Smith, Tom McInerney, Michel J. Tilmant, Jan H.M. Hommen, John C.R. Hele, Eric Boyer de la Giroday, Dick Harryvan, Hans van der Noordaa, Koos Timmermans, Jacques de Vaucleroy, Peter A.F.W. Elverding, Henk Breukink, Claus Dieter Hoffmann, Piet Hoogendoorn, Piet C. Klaver, Wim Kok, and Karel Vuursteen.

II. FACTUAL BACKGROUND

A. Course of Proceedings

This Action is a product of the consolidation of two class actions arising under the Employee Retirement Income Security Act of 1974 ("ERISA"). The first case was filed on February 13, 2009, on behalf of the participants and beneficiaries of the ING Americas Savings Plan and ESOP and the ING 401(k) Plan for ILIAC Agents Plan (collectively, the "Plans"), alleging claims for, among other things, breaches of fiduciary duties under ERISA. Another case was filed on March 5, 2009 alleging substantially similar claims. The Court consolidated the cases on May 8, 2009 (Doc. No. 19) and appointed Johnson Bottini, LLP[3] as Interim Lead Counsel and Page Perry, LLC[4] as Liaison Counsel.

Plaintiffs filed the Consolidated Complaint on June 8, 2009 (Doc. No. 21). Defendants moved to dismiss the Consolidated Complaint on August 7, 2009 (Doc. No. 34). Plaintiffs filed their opposition to Defendants' motion on September 18, 2009 (Doc. No. 45). Defendants replied on October 30, 2009 (Doc. No. 51).

On March 31, 2010, the Court issued an order granting Defendants' motion (the "Dismissal Order") dismissing the Consolidated Complaint with prejudice, and entered judgment in Defendants' favor (Doc. Nos. 53, 54).

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[3] Now known as Bottini & Bottini, Inc.

[4] The responsible attorneys have notified the Court that they now practice at Harris Penn Lowry DelCampo, LLP.

Plaintiffs appealed the dismissal order to the United States Court of Appeals for the Eleventh Circuit. The appeal was fully briefed. During the pendency of the Appeal, the Parties engaged in a series of settlement negotiations at arm's length and in good faith with the assistance of an experienced, independent mediator. In April 2012, the Parties reached an agreement in principle to settle the Action.

B. Investigation of Claims

The Consolidated Complaint seeks to recover losses under ERISA §§ 409 and 502(a)(2), 29 U.S.C. §§ 1109 and 1132(a)(2), suffered by the Plans as a result of Defendants' alleged breaches of fiduciary duty. The Consolidated Complaint asserts five causes of action based on Defendants' alleged failure to: (1) prudently and loyally manage the Plans' investment in ING Stock; (2) adequately monitor fiduciary appointees; (3) disclose necessary information to co-fiduciaries; (4) provide Participants with complete and accurate information regarding ING Stock; and (5) prevent breaches by co-fiduciaries of their duties of (a) prudent and loyal management, (b) adequate monitoring, and (c) giving complete and accurate communications to Participants.

Plaintiffs' Counsel have conducted a thorough investigation into Plaintiffs' claims and the allegations set forth in the Consolidated Complaint. Investigative efforts have included: (1) inspecting, reviewing, and analyzing documents relating to ING, including documents concerning ING's financial condition and the

performance of ING Stock during the Relevant Period, as well as news articles, related complaints and pleadings, press releases, analyst reports, and regulatory filings; (2) inspecting, reviewing, and analyzing numerous documents concerning the Plans and the administration of the Plans; (3) interviewing participants of the Plans, and reviewing and analyzing documents collected from such participants; and (4) researching the applicable law with respect to the claims asserted in the Action and the potential defenses thereto.

C. Settlement Negotiations

To explore the potential of settlement, the Parties participated in a mediation session in July 2010, presided over by an independent mediator, R. William Roland of the Kinnard Mediation Center of the Eleventh Circuit. Although the mediation was unsuccessful at that time, the Parties continued thereafter to negotiate a potential settlement. The further settlement negotiations consisted of numerous telephone conferences, emails, letters, and eventually the exchange of proposals and counter-proposals, and were at all times in good faith and at arm's length. The Parties reviewed and considered information regarding their respective positions, including information on the performance of the Plans' investments, ING Stock, the financial status of ING and the amount of ING Stock purchased and held by the Plans since June 1, 2007, as well as internal ING documents that Defendants would have relied upon to establish their defenses to liability.

D. Terms of the Stipulation

Settlement Amount: The Parties agreed to settle the Action for the sum of $3,500,000 in cash.

Settlement Class: The class of persons releasing claims pursuant to the Stipulation is defined as a non-opt out class under Rule 23(b)(1) of the Federal Rules of Civil Procedure consisting of all persons (other than Defendants or any other persons named as defendants in the Consolidated Complaint), and their heirs, agents, executors, administrators, successors and assigns, who were participants in or beneficiaries of the Plans at any time between June 1, 2007 and November 5, 2012 (the "Relevant Period"), and whose individual Plan account(s) included units of investment in ING Stock at any time during the Relevant Period.

Forms of Notice: A proposed Preliminary Approval Order is attached as Exhibit 1-C. The Preliminary Approval Order provides for the following notices:

- A Notice of Pendency of Litigation, Proposed Settlement and Hearing (Exhibit 1-A) to be mailed to the last known address of Settlement Class members and to be published on a Web site; and
- A Publication Notice (Exhibit 1-B) to be electronically published.

Plan of Allocation: The Net Settlement Amount will be distributed for the benefit of the Settlement Class and the Plans according to the Plan of Allocation (Exhibit 1-E), which is subject to the Court's approval pursuant to Section 6 of the Stipulation.

E. Reasons for the Settlement

Plaintiffs have entered into this proposed Settlement with an understanding of the strengths and weaknesses of their claims. This understanding is based on: (1) the motion practice undertaken by the Parties; (2) the investigation and research outlined above; (3) the likelihood that Plaintiffs would prevail on the Appeal; (4) the likelihood that Plaintiffs would prevail in this Court if the Appeal was won, including prevailing on class certification, on summary judgment and at trial, and then through further appeal; (5) the range of possible recovery; (6) the amount of time necessary to prosecute this Action through the currently pending Appeal, and any subsequent trial, post-trial motions, and any additional appeals; and (7) the significant uncertainties in predicting the outcome of this complex litigation. Having undertaken this analysis, Plaintiffs' Counsel and Plaintiffs have concluded that the Settlement is fair, reasonable, and adequate and should be presented to the Court for approval.

III. PROPOSED SCHEDULE

Plaintiffs' Counsel recommends the following schedule set forth in the proposed Preliminary Approval Order (Exhibit 1-C):

Event	Time for Compliance
Deadline for Plaintiffs' Counsel to cause the Notice to be published on the Web site identified in the Notice.	5 days after entry of the Preliminary Approval Order.
Deadline for Plaintiffs' Counsel to cause the Publication Notice to be published by at least one electronic publication.	10 days after entry of the Preliminary Approval Order.
Deadline for mailing of Notice to members of the Settlement Class.	30 days after entry of the Preliminary Approval Order.
Deadline for Plaintiffs to file their (1) motion for final approval of the proposed Settlement, including approval of the Plan of Allocation; and (2) motion for award of Attorneys' Fees and Expenses and the Plaintiffs' Incentive Award.	21 days prior to the date of the Fairness Hearing.
Deadline for members of the Settlement Class to comment upon or object to the proposed Settlement.	14 days prior to the date of the Fairness Hearing.
Deadline for Plaintiffs' Counsel to file reply papers in support of their motions.	7 days prior to the date of the Fairness Hearing.
Proposed Fairness Hearing.	90 days after entry of the Preliminary Approval Order, or such later date as may be convenient for the Court.

IV. LEGAL STANDARD

As the Eleventh Circuit recognized in *Bennett*, there is a "strong judicial policy favoring settlement." *Bennett*, 737 F.2d at 986. Settlements of class actions are "particularly favored" and are not to be lightly rejected. *Maher v. Zapata Corp.*, 714 F.2d 436, 455 (5th Cir. 1983). This policy applies to ERISA class actions; indeed, many courts have noted that the complexity of such actions weighs in favor of settlement. *See*, *e.g.*, *In re Ikon Office Solutions, Inc. See. Litig.*, 209 F.R.D. 94 (E.D. Pa. 2002) (finding that the complexity and duration of litigation of similar breach of fiduciary duty claims weighed heavily in favor of settlement). Rule 23 of the Federal Rules of Civil Procedure entrusts the approval of class action settlements to the discretion of district courts. *See Bennett*, 737 F.2d at 984 ("[d]etermining the fairness of the settlement is left to the sound discretion of the trial court"). In reviewing class action settlements under Rule 23, district courts generally follow a two-step procedure set forth in the Federal Judicial Center's Manual for Complex Litigation § 21.632 at 504-05 (4th ed. 2012). *See*, *e.g.*, *McNamara v. Bre-X Minerals Ltd.*, 214 F.R.D. 424, 426 (E.D. Tex. 2002). First, a court must determine whether the proposed settlement is deserving of preliminary approval. *Id.* Second, following notification of class members, the court must determine whether final approval is warranted. *Id.*

This motion seeks the Court's determination at the first step – preliminary approval. By definition, "preliminary" approval requires only a preliminary review. Preliminary approval is "at most a determination that there is what might be termed 'probable cause' to submit the [settlement] proposal to class members and hold a full-scale hearing as to its fairness." *In re Traffic Executive Assoc.,* 627 F.2d 631, 634 (2d Cir. 1980) (citing MANUAL FOR COMPLEX LITIGATION § 1.46 at 55 n.10 (1977)). A "presumption of fairness" attaches to the proposed Settlement so long as it is a product of arm's-length negotiations by experienced counsel. *In re Checking Account Overdraft Litig.*, No. 09-MD-2036-JLK, 2012 U.S. Dist. LEXIS 56115, at *52 (S.D. Fla. Apr. 20, 2012). The Court should grant preliminary approval if the proposed Settlement appears to fall within the "range of reasonableness." *Id.* at *52. To make a preliminary determination of the reasonableness of the terms of the Settlement, the Court may consider the following six factors set forth in *Bennett*:

> (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 the 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.

Columbus Drywall & Insulation, Inc. v. Masco Corp., 258 F.R.D. 545, 558-59 (N.D. Ga. 2007) (quoting *Bennett*, 737 F.2d at 986).

V. ARGUMENT

A. The Settlement Falls within the Range of Reasonableness under *Bennett*'s Six-Factor Test

(1) Likelihood of Plaintiffs' Success at Trial

As evidenced by the vigor with which they have prosecuted the Action and the Appeal, and the amount of time and money they have expended toward that end, Plaintiffs' Counsel are optimistic about their ultimate success. Nonetheless, Plaintiffs and Plaintiffs' Counsel are mindful that in order to prevail, they face several significant obstacles – including the Court's Dismissal Order.

The key issue decided in the Dismissal Order and contested in the Appeal is whether, at the pleading stage, Defendants are entitled to a presumption of prudence adopted in *Moench v. Robertson*, 62 F.3d 553 (3d Cir. 1995). Plaintiffs argue against adopting the *Moench* presumption. Since the filing of the Appeal, however, the Eleventh Circuit and other Courts of Appeals have issued decisions that Defendants would argue cast significant doubts on Plaintiffs' arguments. *See Lanfear v. Home Depot, Inc.*, 679 F.3d 1267 (11th Cir. 2012); *In re Citigroup ERISA Litig.*, 662 F.3d 128 (2d Cir. 2011); *Quan v. Computer Scis. Corp.*, 623 F.3d 870 (9th Cir. 2010). The Supreme Court has declined to review the Second Circuit's *Citigroup* decision. *See Gray v. Citigroup Inc.*, No. 11-1531, 2012 WL 2375361, at *1 (U.S. Oct. 15, 2012). Accordingly, Plaintiffs' likelihood of prevailing in the Appeal is uncertain.

(2) Possible Range of Recovery at Trial

Even if, after winning the Appeal, Plaintiffs succeed in establishing liability at trial, they face significant risks in proving damages on at least three fronts. First, Defendants will likely argue that Plaintiffs and the class suffered no damage based on the fluctuation of the price of ING Stock. In determining losses under ERISA, the relevant benchmark is what a prudent investment would have returned in lieu of the allegedly imprudent one. *Donovan v. Bierwirth*, 754 F.2d 1049, 1056 (2d Cir. 1985) ("the measure of loss applicable under ERISA . . . requires a comparison of what the Plan actually earned on the . . . investment with what the Plan would have earned had the funds been available for other Plan purposes"). Plaintiffs could recover the highest amount of damages if the comparison of the Plans' ING Stock fund to an alternative investment ends at some time between February and March 2009, when the consolidated actions were initially filed, because the prices of ING Stock were at the lowest – with the closing price of $3.03 on March 5, 2009. But the price of ING Stock has risen sharply since 2009. For example, ING Stock was consistently traded above $8 in the first two weeks of October 2012. Defendants are expected to argue that the measure of damages should end long after 2009, and that Plaintiffs suffered no damages at all.

Second, Defendants would argue that even if liability is established, damages are limited to only "new" purchases of ING Stock made after the

beginning of the Relevant Period, rather than all ING Stock held in the Plans.[5] Should Defendants prevail on this argument, damages to the Plans would be significantly reduced (even assuming that Plaintiffs succeed in establishing liability and that damages should be measured at the lowest prices of ING Stock).

Third, Defendants would argue that the fiduciaries could not have liquidated ING Stock in the Plans without simultaneously releasing information to the market and thereby causing or hastening the eventual price decline. Plaintiffs could counter that insider trading laws do not prohibit disclosure of material information, and that, despite their knowledge of non-public information, Defendants could have, at a minimum, caused the Plans to cease purchasing ING Stock, the prices of which were inflated by non-public information. But the outcome of these competing arguments is far from certain. And in the event that Defendants prevail on this issue, Plaintiffs' damages would be severely curtailed or eliminated.

In all, Plaintiffs face significant hurdles in proving damages even if they succeed in establishing liability, whereas the amount of the Settlement is fixed at $3.5 million.

[5] With no ERISA case directly on point, courts may look to cases in securities law area, in which damages must be limited to losses that were causally related to fraud. *See Dura Pharms., Inc., v. Broudo*, 544 U.S. 336 (2005). In this regard, while Plaintiffs would argue that the entire loss to the Plans was due to imprudence, Defendants would argue that, at most, only the loss due to new investment in the Plans during the Relevant Period is linked to any imprudence.

(3) Settlement Amount in Relation to the Possible Range of Recovery

To assess the reasonableness of a proposed settlement seeking monetary relief, "the present value of the damages plaintiffs would likely recover if successful, appropriately discounted for the risk of not prevailing, should be compared with the amount of the proposed settlement." *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 806 (3d Cir. 1995) (citing MANUAL FOR COMPLEX LITIGATION § 30.44 at 252 (2d ed. 1985)). Here, Plaintiffs face the risks of establishing liability and proving damages.

Plaintiffs' risks are significant. As discussed above, in light of *Lanfear*, *Citigroup*, and *Quan*, Plaintiffs' likelihood of prevailing in the Appeal is uncertain. The Supreme Court's denial of the petition of the *Citigroup* plaintiffs for *certiorari* casts further doubt in the merits of the Appeal. *See Gray*, 2012 WL 2375361, at *1. In the event of losing the Appeal, Plaintiffs and members of the proposed Settlement Class will recover nothing in this Action.

Under the best of circumstances, if the Action is remanded upon Plaintiffs' success on appeal, and if Plaintiffs defeat Defendants' anticipated motion for summary judgment, trial remains a risky business and success cannot ever be guaranteed. *See Masco Corp.*, 258 F.R.D. at 559 ("in the absence of a settlement, plaintiffs will continue expending a great deal of time and money to attempting to recover a judgment that may not succeed or result in any larger recovery").

While Plaintiffs expect to establish the damages, Defendants are expected to vigorously challenge their calculation. In light of the risks that Defendants prevail on their challenges (as discussed in part V.A.(2) above), preventing Plaintiffs from recovering any damages, the Settlement Amount falls well within the range that courts have repeatedly found to be fair and adequate under the law. *See*, *e.g.*, *Bennett*, 737 F.2d at 987 n.9 (affirming an approval of a settlement that recovered 0.05625% of the outer range of the potential recovery – a settlement fund of $675,000 where the "range of possible recovery [was] zero to $12,000,000").

Because the Settlement Amount immediately restores to the Plans and the proposed Settlement Class a substantial recovery, the Settlement is clearly an excellent result for the proposed Settlement Class in this complex litigation, and falls within the range of reasonableness for preliminary approval. *See id.*

(4) The Complexity, Expense, and Likely Duration of Continued Litigation

The complexity of ERISA breach of fiduciary duty cases such as this one is well known.[6] Though Plaintiffs believe in the merit of their claims, this Action has

[6] *See*, *e.g.*, *Ikon*, 209 F.R.D. at 104; *In re Enron Corp. Sec., Derivative & ERISA Litig.*, 228 F.R.D. 541, 565 (S.D. Tex. 2005) (finding that the "complexity, expense and likely duration of the litigation . . . are self evident and exceptional"); *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 456 (S.D.N.Y. 2004) (finding that "[f]iduciary status, the scope of fiduciary responsibility, the appropriate fiduciary response to the Plans' concentration in company stock and [Global Crossing's] business practices would be issues for proof, and numerous legal issues concerning fiduciary liability in connection with company stock in 401(k) plans remain unresolved. These uncertainties would substantially increase the ERISA cases' complexity, duration, and expense — and thus militate in favor of settlement approval.").

added complexities given that Plaintiffs' claims have been dismissed and are presently on appeal. If this Settlement is not approved, Plaintiffs may lose the Appeal with the Settlement Class thereby receiving no recovery. If Plaintiffs win the Appeal and the case remanded to this Court, a substantial amount of work would need to be performed by the parties and the Court, including the completion of fact and expert discovery, briefing and adjudicating motions for class certification and summary judgment, designation of witnesses and exhibits, preparation of pre-trial memoranda and proposed findings of fact and conclusions of law, presentation of witnesses and evidence at trial, and briefing a probable appeal regardless of the trial's outcome. The Settlement obviates this multi-year delay and will, if approved, offer the Plans an immediate and certain recovery. *See Enron Corp.*, 228 F.R.D. at 566 (a settlement "would save great expense and would give the Plaintiffs hard cash, a bird in the hand"). Thus, this factor also speaks strongly in favor of preliminary approval of the proposed Settlement.

(5) Objections to the Settlement

This prong of the analysis is not applicable at this preliminary stage where notice of the proposed Settlement has not yet been disseminated to the Settlement Class. It is worth noting, however, both Sewright and Diggs recommend the Settlement because it is in the best interest of the proposed Settlement Class.

(6) The Stage of the Proceedings at the Time of Settlement

Although full discovery was not completed in this Action, Plaintiffs have conducted a thorough investigation and evaluation of their claims sufficient to demonstrate the fairness of the Settlement. *See Cotton v. Hinton*, 559 F.2d 1326, 1332 (5th Cir. 1977) (affirming approval of settlement with little formal discovery); *Mashburn v. Nat'l Healthcare, Inc.*, 684 F. Supp. 660, 669 (M.D. Ala. 1988) (only a reasonable amount of discovery is required to determine the fairness of the settlement). This investigation included the detailed review of thousands of pages of documents regarding the Plans, Defendants' financial condition, and the performance of ING Stock during the Relevant Period. These documents include: (1) Plan-related documents produced by Defendants; (2) internal ING documents upon which Defendants would have based their defenses; and (3) documents from participants of the Plans. Plaintiffs' Counsel also performed extensive legal research in responding to the motion to dismiss and in briefing the Appeal.

Fully cognizant of the strength of their claims and the risks that they face, Plaintiffs believe without hesitation that the Settlement is in the best interests of the proposed Settlement Class. Thus, taking this and the other factors discussed above into account, Plaintiffs respectfully submit that the Settlement is fair, adequate, and reasonable. The Court should grant preliminary approval of the proposed Settlement.

B. Preliminary Certification of the Settlement Class Is Appropriate

Plaintiffs seek certification for purposes of settlement only of the following class of participants and beneficiaries of the Plans:

> All persons (other than Defendants or any of the other persons named as defendants in the Consolidated Complaint), and their heirs, agents, executors, administrators, successors and assigns, who are or were participants in either or both the Plans and whose accounts included units of investment in ING Stock at any time during June 1, 2007 to October 23, 2012.

The proposed Settlement Class meets all four prerequisites of Rule 23(a) and (b)(l), making this Settlement Class appropriate for class certification.

(1) The Proposed Settlement Class Satisfies Rule 23(a)

(a) Numerosity

To warrant certification under Rule 23(a)(l), a proposed class must be "so numerous that joinder of all class members is impracticable." FED. R. CIV. P. 23(a)(l). Plaintiffs need not show that the number of class members is so large that it would be impossible to join every class member, only that it is impracticable. *In re Theragenics Corp. Sec. Litig.*, 205 F.R.D. 687, 694 (N.D. Ga. 2002) ("'Impracticable' is not synonymous with 'impossible.'"); *Rhodes v. Cracker Barrel Old Country Store, Inc.*, 213 F.R.D. 619, 674 (N.D. Ga. 2003) (same). Rather, the individual plaintiffs "need only show that it would be extremely difficult or inconvenient to join all members of the class." *In re Miller Indus. Sec. Litig.*, 186 F.R.D. 680, 685 (N.D. Ga. 1999). Here, the proposed

Settlement Class satisfies the numerosity requirement because it has thousands of members, and it is plainly impracticable to join all of them. *See* Consolidated Complaint ¶ 65; s*ee also Kilgo v. Bowman Tramp., Inc.*, 789 F.2d 859, 878 (11th Cir. 1986) (affirming class of "at least thirty-one individual class members").

(b) Commonality

Rule 23(a)(2) requires that the Plaintiffs show that "there are questions of law or fact common to the class." FED. R. CIV. P. 23(a)(2). The rule is satisfied where the proposed class representatives share at least one question of fact or law with the claims of the prospective class. *Cheney v. Cyberguard Corp.*, 213 F.R.D. 484, 490 (S.D. Fla. 2003); *Brown v. SCI Funeral Servs. of Fla., Inc.*, 212 F.R.D. 602, 604 (S.D. Fla. 2003). "The threshold for commonality is not high." *Cheney*, 213 F.R.D. at 490. Common questions abound in ERISA breach of fiduciary duty cases because plaintiffs and class members are similarly affected by defendants' plan-wide conduct. Consequently, in the ERISA context, courts routinely find that Rule 23(a)'s commonality requirement is satisfied.[7]

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[7] *See*, *e.g.*, *Moore v. Comcast Corp.*, 268 F.R.D. 530, 535 (E.D. Pa. 2010) ("[Plaintiff] has established, as well, that a number of common issues pervade this case, including whether defendants were fiduciaries of the Plan and whether defendants breached their fiduciary duties by allowing the Plan to invest in the Company Stock Fund. A plaintiff need show only one common issue to fulfill the commonality requirement."); *In re CMS Energy ERISA Litig.*, 225 F.R.D. 539, 543-44 (E.D. Mich. 2004) (finding in ERISA company stock case that plaintiffs "have persuaded the court that common issues, the resolution of which would advance the litigation, certainly exist among members of the proposed class," including, as plaintiffs noted "whether CMS stock was an imprudent investment for the Plan."); *In re Syncor ERISA Litig.*, 227 F.R.D. 338, 344 (C.D. Cal. 2005) (same).

This case presents multiple common questions of law and fact, including:

- whether Defendants were fiduciaries of the Plans;
- whether Defendants breached their fiduciary duties;
- the measure and aggregate amount of losses sustained by the Plans; and
- the proper remedy for the Plans' losses.

For settlement purposes, these common issues of law and fact satisfy Rule 23(a)(2).

(c) Typicality

Under Rule 23(a)(3), Plaintiffs' claims must be "typical" of those of the Settlement Class. FED. R. CIV. P. 23(a)(3). Claims are typical if they arise from the "same event or pattern or practice and are based on the same legal theory." *Cheney*, 213 F.R.D. at 491 (citing *Kornberg v. Carnival Cruise Lines, Inc.*, 741 F.2d 1332, 1337 (11th Cir. 1984)). Because both commonality and typicality focus on the similarity of the claims, the two requirements "tend to merge." *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 158 n.13 (1982); *see also In re Miller*, 186 F.R.D. at 685 (finding that "[t]he same factors that satisfy the commonality requirement also may satisfy the typicality requirement") (citing *Cox v. Am. Cast Iron Pipe Co.*, 784 F.2d 1546, 1557 (11th Cir. 1986)).

Here, Plaintiffs' claims satisfy the typicality requirement because they are not individual claims – they are brought under ERISA § 502(a)(2), 29 U.S.C. §

1132(a)(2), on behalf of the Plans as a whole and any relief obtained in the lawsuit would necessarily flow to the Plans as a whole, not to Plaintiffs as individual participants. *LaRue v. DeWolf Boberg & Assocs., Inc.*, 552 U.S. 248, 254 (2008); *accord id.* at 261 (Thomas, J., concurring) ("The plain text of § 409(a), which uses the term 'plan' five times, leaves no doubt that § 502(a)(2) authorizes recovery only for the plan."). Plaintiffs' claims rise and fall under ERISA's fiduciary duty provisions, and are thus substantially identical to the absent class members' claims.

(d) Adequacy

Plaintiffs, the proposed representatives of the Settlement Class, have and will continue to "fairly and adequately protect the interests of the class." FED. R. CIV. P. 23(a)(4). The adequacy requirement has two prongs: (1) "'whether plaintiffs' counsel are qualified, experienced, and generally able to conduct the proposed litigation . . . [;] and (2) whether plaintiffs have interests antagonistic to those of the rest of the class.'" *Cheney*, 213 F.R.D. at 495 (quoting *Kirkpatrick v. J.C. Bradford & Co.*, 827 F.2d 718,726 (11th Cir. 1987)).

First, Plaintiffs retained attorneys that are highly qualified, experienced, and able to conduct this litigation. Plaintiffs' Counsel – the law firms of Bottini & Bottini, Inc. and Gainey & McKenna – have extensive experience, and are at the forefront in litigating complex ERISA breach of fiduciary duty class actions. *See* Resume of Bottini & Bottini, Inc. attached as Exhibit 2; *see also* Resume of

Gainey & McKenna attached as Exhibit 3. Plaintiffs' Counsel have successfully litigated similar cases.

Second, the law governing the adequacy of representatives is well settled: "[O]nly a conflict that goes to the very subject matter of the litigation will defeat a party's claim of representative status." 7A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 1768 at 390 (3d ed. 2005). Here, the interests of Plaintiffs are aligned with, not antagonistic to, the interests of the proposed Settlement Class. Each member of the proposed Settlement Class, just like Plaintiffs, has an interest in recovering losses suffered by the Plans as a result of the decline in value of ING Stock. As such, Plaintiffs' interests in the lawsuit are the same as absent members of the Settlement Class. Accordingly, given the retention of highly experienced and competent counsel and the lack of conflict, Plaintiffs should be appointed representatives of the Settlement Class under Rule 23(a)(4).

(2) The Proposed Settlement Class Satisfies Rule 23(b)(l)

In addition to demonstrating that the requirements of Rule 23(a) are met, Plaintiffs must also establish that at least one subsection of Rule 23(b) is satisfied.

Rule 23(b)(l) provides that a class may be certified if:

> (1) the prosecution of separate actions by or against individual members of the class would create a risk of

> (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or
>
> (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests[.]

FED. R. CIV. P. 23(a)(1). Thus, Rule 23(b)(l)(A) "considers possible prejudice to the defendants, while 23(b)(l)(B) looks to possible prejudice to the putative class members." *In re Ikon Office Solutions, Inc. Sec. Litig.*, 191 F.R.D. 457, 466 (E.D. Pa. 2000).

Here, Rule 23(b)(l)(A) is satisfied. This case has approximately 10,000 prospective members of the Settlement Class. In the absence of class certification, there is potential for a large number of individual cases based on the same underlying facts, creating a high risk of inconsistent or varying adjudications that would establish incompatible standards of Defendants' conduct. *Id.* at 466 (finding a "risk of inconsistent dispositions that would prejudice the defendants: contradictory rulings as to whether Ikon had itself acted as a fiduciary, whether the individual defendants had, in this context, acted as fiduciaries, or whether the alleged misrepresentations were material would create difficulties in implementing such decisions"). Moreover, the claims Plaintiffs allege on behalf of the proposed Settlement Class are derived from core issues that are not individual in nature:

whether Defendants were fiduciaries, whether Defendants breached their fiduciary duties, and whether Plaintiffs were harmed by Defendants' breaches. *See Jones v. NovaStar Fin. Inc.*, 257 F.R.D. 181, 194 (W.D. Mo. 2009) (finding that "central questions concerning whether fiduciaries breached their duties to the Plan are not individual" matters).

Rule 23(a)(1)(B) is also satisfied. The Advisory Committee Note to Rule 23(b)(l)(B) emphasizes that this provision is particularly applicable where trust beneficiaries charge a breach of trust by a fiduciary:

> The same reasoning applies to an action which charges a breach of trust by an indenture trustee or other fiduciary similarly affecting the members of a larger class of security holders or other beneficiaries, and which requires an accounting or like measure to restore the subject of the trust.

FED. R. CIV. P. 23(b)(l)(B) Advisory Committee Note (1966 Amendment); *see Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 834 (1999) (quoting the Advisory Committee Note to Rule 23(b)(l)(B) and describing a fiduciary breach of trust as a "[c]lassic example" of the type of action appropriate for certification under 23(b)(l)(B)).

Here, were the Court to adjudicate Plaintiffs' claims that Defendants allegedly breached their fiduciary duties by making misrepresentations and failing to disclose information on a Plan-wide basis, it would effectively dispose of the claims of the absent members of the Settlement Class. *See Syncor*, 227 F.R.D. at

346 (certifying a class under Rule 23(b)(l)(B) and finding that "[i]f the primary relief is to the Plan as a whole, then adjudications with respect to individual members of the class would 'as a practical matter' alter the interests of other members of the class -- if one plaintiff forces the Defendants to pay damages to the Plan, the benefit would affect everyone who has a right to disbursements from the Plan"). Rule 23(b)(l)(B), therefore, is a proper vehicle for certification of Plaintiffs' claims for settlement purposes.

Accordingly, a number of courts in the Eleventh Circuit have certified classes for settlement pursuant to Rule 23(b)(1) involving claims for breach of fiduciary duty asserted under ERISA. *See Specialty Cabinets & Fixtures, Inc. v. Am. Equitable Life Ins. Co.*, 140 F.R.D. 474, 479 (S.D. Ga. 1991) ("Because individuals may bring class actions to remedy breaches of fiduciary duty only on behalf of the plan, rather than themselves, the court cannot allow absent participants or beneficiaries to opt out of this class."); *Eslava v. Gulf Tel. Co.*, No. 04-0297, 2007 WL 2298222, at *6 (S.D. Ala. Aug. 7, 2007) (rejecting defendants' position that Rule 23(b)(1) certification was only appropriate in "limited funds" cases and finding that addressing a claim seeking to recover, on behalf of the plan, damages for alleged breaches of fiduciary duties can be certified as a class claim under Rule 23(b)(1)(B)); *In re Beazer Homes USA, Inc. ERISA Litig.*, No. 07-cv-0952-RWS (N.D. Ga. Nov. 15, 2010) (certifying settlement class under Rule

23(b)(1)); *In re Winn-Dixie Stores, Inc. ERISA Litig.*, No. 04-cv-0194-VMC-MCR (M.D. Fl. Mar. 20, 2008) (same); *cf. Pantoja v. Edward Zengel & Son Exp., Inc.*, No. 10-20663-CIV, 2011 WL 7657382, at *8 (S.D. Fla. Aug. 5, 2011) (denying certification under Rule 23(b)(1) in a case regarding diversion of employee benefits noting "this is not a stock drop case [...] in short this is not one of those ERISA cases that is a 'paradigmatic [example] of claims appropriate for certification as a Rule 23(b)(1) class'"). District courts from other circuits agreed. *See*, *e.g.*, *Stanford v. Foamex L.P.*, 263 F.R.D. 156, 173-74 (E.D. Pa. 2009) (Rule 23(b)(1) certification appropriate because "a participant's individual account is still a part of the Plan, and, therefore, adjudication as to the Plan will likewise impact a participant's individual accounts"); *Hochstadt v. Boston Sci. Corp.*, 708 F. Supp. 2d 95, 105-06 (D. Mass. 2010) ("Given that the present case involves an ERISA § 502(a)(2) claim brought on behalf of the Plan and alleging breaches of fiduciary duty on the part of Defendants that will, if true, be the same with respect to every class member, I find that Rule 23(b)(1)(B) is clearly satisfied."); *Kanawi v. Bechtel Corp.*, 254 F.R.D. 102, 111 (N.D. Cal. 2008) ("Most ERISA class action cases are certified under Rule 23(b)(1)."); *see also In re Schering-Plough Corp. ERISA Litig.*, 589 F.3d 585, 594 (3d Cir. 2009) ("Section 502(a)(2) claims are, by their nature, plan claims").

C. The Proposed Forms of Notice to Members of the Settlement Class Satisfy Rule 23 and Due Process Requirements

In certifying non-opt out settlement classes in ERISA breach of fiduciary cases, courts routinely require notice to absent class members in such cases to afford the class members the opportunity to object to the proposed settlement.

To satisfy due process, notice to the Settlement Class 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." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). Notice should also provide a "very general description[] of the proposed settlement." *Weinberger v. Kendrick*, 698 F.2d 61, 70 (2d Cir. 1982).

Accordingly, the form of notice must be sufficient to accomplish this purpose. *See Walsh v. Great Atl. & Pac. Tea Co.*, 726 F.2d 956, 963 (3d Cir. 1983) (explaining that in a non-opt out class, the "form and purpose of the notice 'need only be such as to bring the proposed settlement to the attention of representative class members who may alert the court to inadequacies in representation, or conflicts in interest among subclasses, which might bear upon the fairness of the settlement'"); *see also Frank v. United Airlines, Inc.*, 216 F.3d 845, 851 (9th Cir. 2000) (noting that in a non-opt out action, "there is no requirement for individualized notice beyond that required by due process").

Here, the proposed form of Notice (*see* Exhibit 1-A) describes in plain English (1) the terms and operation of the Stipulation, (2) the considerations that caused Plaintiffs and Plaintiffs' Counsel to conclude that the Settlement is fair and adequate, (3) the maximum attorneys' fees and case contribution awards that may be sought, (4) the procedure for objecting to the Settlement, and (5) the date and place of the Fairness Hearing. With the Court's approval, the Notice will be posted to a Web site established by Plaintiffs' Counsel within five days after entry of the Preliminary Approval Order, and will be mailed to members of the Settlement Class no later than 30 days after entry of the Preliminary Approval Order. In addition, a Publication Notice (*see* Exhibit 1-B) will be electronically published on the Business Wire within five days from the entry of the Preliminary Approval Order.

The proposed form of Notice and Publication Notice will fairly apprise members of the Settlement Class of the Settlement and their options related thereto, as well as fully satisfy due process requirements. Courts in analogous ERISA actions have approved similar forms of notice. *See In re Mirant Corp. ERISA Litig.*, No. 03-cv-1027 (N.D. Ga. Nov. 16, 2006) (order granting final approval for notice plan); *Spivey v. S. Co.*, No. 04-cv-1912 (N.D. Ga. Aug. 14, 2007) (same).

VI. CONCLUSION

For all the foregoing reasons, the proposed Settlement falls within the range of reasonableness for preliminary approval. The Court should therefore grant this motion and enter the proposed Preliminary Approval Order:

(1) granting preliminary approval of the Stipulation;

(2) conditionally certifying the Settlement Class (for settlement purposes only) and appointing Bottini & Bottini, Inc. as Lead Counsel for the Settlement Class and the Plans under Rules 23 and 23.2;

(3) approving the form of the Notice and Publication Notice, and directing the Claims Administrator to cause the Notice to be mailed to each member of the Settlement Class at the address identified on the Plan Participant List within 30 days of the Preliminary Approval Date;

(4) setting a briefing schedule and a date for the Fairness Hearing;

(5) setting a deadline by which all objections to the Settlement must be made; and

(6) determining that, pursuant to Rules 23(c)(2) and 23(e), the forms of notice collectively constitute the best notice practicable under the circumstances and due and sufficient notice of the Fairness Hearing and the rights of the Settlement Class and all other Persons entitled to such notice.

Dated: November 14, 2012

Respectfully submitted,

HARRIS PENN LOWRY DELCAMPO, LLP

s/ David J. Worley
David J. Worley

400 Colony Square
1201 Peachtree Street, N.E., Suite 900
Atlanta, Georgia 30361
Tel: (404) 961-7650
Fax: (404) 961-7651

Interim Liaison Counsel for
Plaintiffs and the Settlement Class

BOTTINI & BOTTINI, INC.
Francis A. Bottini, Jr.
Albert Y. Chang
7817 Ivanhoe Avenue, Suite 102
La Jolla, California 92037
Tel: (858) 914-2001
Fax: (858) 914-2002

Interim Lead Counsel for
Plaintiffs and the Settlement Class

GAINEY & MCKENNA
Thomas J. McKenna
Gregory M. Egleston (of counsel)
440 Park Avenue South, 5th Floor
New York, New York 10016
Tel: (212) 983-1300
Fax: (212) 983-0383

Counsel for Plaintiffs and
the Settlement Class

CERTIFICATE OF SERVICE

I certify that I caused a copy of the foregoing Memorandum in Support of Plaintiffs' Motion for Preliminary Approval of Proposed Settlement, Conditional Certification of Settlement Class, Approval of Notice Plan, and Setting of Fairness Hearing to be served on all counsel of record using the CM/ECF system on the 14th day of November, 2012.

s/ David J. Worley
David J. Worley