**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
GEORGIA ATLANTA DIVISION**

GENEVA HENDERSON et al., Plaintiffs, v. EMORY UNIVERSITY et al., Defendants.	Civil Action No. 1:16-cv-02920-CAP

FINAL ORDER AND JUDGMENT

This matter is before the court on the Plaintiffs' Unopposed Motion for Final Approval of the Settlement of the above-referenced litigation under the terms of a Class Action Settlement Agreement dated April 28, 2020, (the "Settlement Agreement"). [Doc. No. 233]. The Court held a fairness hearing on November 4, 2020. Having considered the motion, the facts of the case as applied to the relevant principles of applicable law, and the sole objection the settlement, the Court hereby orders and adjudges as follows.[1]

I. Factual Allegations

On August 11, 2016, the Plaintiffs Geneva Henderson, Helen Dulock, Rena Guzman, Jacqueline Goldberg, Connie Corpening, Joanne Rackstraw,

[1] For purposes of this Final Order and Judgment, capitalized terms used herein have the definitions set forth in the Settlement Agreement, which is incorporated herein by reference.

Joann D. Wright, Deon M. Moore, Cynthia T. James, Huberta W. Waller, Jacqueline Blackwell, and Kathryn T. Presley[2] filed a class action complaint against Emory University, Emory Healthcare, Inc., Emory Pension Board, Emory Investment Management, and Mary L. Cahill under 29 U.S.C. §§ 1132(a)(2) and (3) for breach of fiduciary duties under the Employee Retirement Income Security Act, 29 U.S.C. §§ 1001-1461 ("ERISA"). The Plaintiffs allege that the Defendants breached their fiduciary duties related to the Emory University Retirement Plan and the Emory Healthcare, Inc. Retirement Savings and Matching Plan (the "Plans"). In particular, the Plaintiffs allege that the Defendants breached their duty as follows:

> (1) by allowing the Plans to be locked into the CREF Stock Account and TIAA recordkeeping (Count I); (2) engaged in transactions prohibited by 29 U.S.C. § 1106(a)(1) by allowing the Plans to be locked into the CREF Stock Account and TIAA recordkeeping (Count II); (3) breached their duties of prudence and loyalty under 29 U.S.C. § 1104(a)(1)(A) and (B) by allowing the Plans' vendors to charge excessive recordkeeping and administrative fees and failing to monitor those fees, failing to consolidate recordkeepers, and allowing the vendors to place their expensive proprietary investments into the Plans (Count III); (4) engaged in transactions prohibited by 29 U.S.C. § 1106(a)(1) by allowing the Plans' recordkeepers to collect revenue sharing payments for administrative services (Count IV); (5) breached their duties of prudence and loyalty under 29 U.S.C. § 1104(a)(1)(A) and (B) by allowing Plan participants to be charged unreasonable investment management fees and unnecessary 12b-1 and mortality and expense risk fees, selecting and retaining among the Plans' investment

[2] Helen Dulock, Jacqueline Blackwell, and Kathryn T. Presley withdrew as plaintiffs and class representatives on October 3, 2017. Following their withdrawal, there are only nine named plaintiffs in this case. The plaintiffs seek incentive awards of $25,000 for each of the nine remaining plaintiffs.

> options poorly performing and expensive mutual funds and variable annuities, and failing to engage in a prudent process for monitoring Plan investments and removing imprudent investments within a reasonable period (Count V); (6) engaged in transactions prohibited by 29 U.S.C. § 1106(a)(1) by selecting investment options managed by TIAA, Fidelity, and Vanguard, and causing the Plans to pay fees in connection with these investments (Count VI); and (7) Emory University and Emory Healthcare, Inc. breached their fiduciary duties to monitor their appointees' performance, fiduciary process, and investment monitoring activities, and failed to remove appointees whose performance was inadequate (Count VII).
>
> [Doc. No. 233-2 at 6-7].

The Defendants have denied the allegations.

II. Procedural Background

This case was filed on August 11, 2016. The Plaintiffs amended the complaint twice. The Defendants filed a motion to dismiss the first amended complaint; the Court granted in part and denied in part that motion on May 10, 2017. The second amended complaint was filed on December 20, 2017. On September 13, 2018, the Court granted class certification. After the completion of discovery and prior to filing any summary judgment motions, the parties moved to stay the case in early March 2019 because they agreed to engage in mediation. The case was stayed, and the parties attended mediation on May 3, 2019, but were unable to reach a settlement. The parties then filed several motions to exclude expert testimony. Shortly after filing these motions, they moved to stay the case again as they attempted to work out a settlement. The Court granted the requested stay, and on April 16, 2020, the parties informed

the court they have reached a settlement. The Court granted preliminary approval of the class action settlement on June 11, 2020. After the initial class notices were sent out, the parties became aware that some class members had not been notified because they were not included in the original data set received from the Plans' recordkeepers. A second round of class notices were then set out and the final approval hearing was continued to November 4, 2020. Out of 77,108 class members, only one has objected to the settlement.

III. Motion for Final Approval of Class Action Settlement [Doc. No. 233]

The Settlement Agreement [Doc. No. 218-1] incorporates the following terms:

- The Defendants will pay $16,750,000 into an interest-bearing settlement account (the "Settlement Fund"). The Settlement Fund will pay out to the class members. Most of these payments will go directly into the class member's tax-deferred retirement account in the Plans. Those class members who no longer participate in the Plans will receive a check or a rollover into another tax-deferred account.

- The settlement period will last for 3 years. Annual updates regarding the Plans' investments will be provided by the defendants to the class counsel.

- Within 90 days of approval of the settlement, the Plans' fiduciaries will retain an independent consultant to review the existing investment structure and develop a plan for future investments.

- The settlement contains detailed plans for recordkeeping and administrative services related to the Plans. Such plans include determining the number of recordkeepers required, hiring new recordkeeping and administrative service providers, and disclosing the bid amounts for these service providers.

- Within 18 months of the settlement approval, the defendants shall inform the Plan participants in writing of the recordkeeping and investment structure for the Plans. Participants will be able to access a webpage with information on fees, and 1-, 5-, and 10-year historical performances of the investment options.

In accordance with the Court's Preliminary Approval Order, Settlement Notice was timely distributed by electronic or first-class mail to all Class Members who could be identified with reasonable effort, and Settlement Notice was published on the Settlement Website maintained by Class Counsel. In addition, pursuant to the Class Action Fairness Act, 28 U.S.C. § 1711, *et seq*., notice was provided to the Attorneys General for each of the states in which a Class Member resides, the Attorney General of the United States, and the United States Secretary of Labor. The form and methods of notifying the Settlement Class of the terms and conditions of the proposed Settlement Agreement met the requirements of Fed. R. Civ. P. 23(c)(2), any other applicable law, and due process, and constituted the best notice practicable under the circumstances; and due and sufficient notices of the Fairness Hearing and the rights of all Class Members have been provided to all people, powers and entities entitled thereto.

All requirements of the Class Action Fairness Act, 28 U.S.C. § 1711, *et seq*., have been met. Class Members had the opportunity to be heard on all issues regarding the resolution and release of their claims by submitting objections to the Settlement Agreement to the Court. Of the 77,108 class

members, only one, Ms. Carol Crochet of Decatur, Georgia, has submitted an objection. [Doc. No. 229]. Ms. Crochet is an employee of Emory Healthcare. She initially worked at DeKalb Medical for twenty years, from 1998 to 2018. In 2018, DeKalb Medical merged into Emory Healthcare and her retirement fund was invested in a different Vangard fund that had a higher expense ratio fee than the Vangard fund her retirement was in before the merger. She states that she did some research and determined that Emory Healthcare could have been offering her old Vangard fund to its employees, thereby saving them money. Ms. Crochet objects to the settlement on the following grounds: (1) she believes that better investment options for the Plans should be available immediately instead of on the graduated timeline under the three-year plan that is part of the settlement, and she is concerned about what will happen after the three-year oversight period concludes; (2) she does not believe that there is any benefit in the settlement to the actual class members, and that the $16,750,000 settlement only benefits the class counsel and the class representatives because the attorneys will get $5,583,333.33 in attorneys' fees and the class representatives will each receive $25,000 as an incentive award; (3) she believes that the Defendants should admit liability and accept responsibility for its actions as part of the settlement. Ms. Crochet also wants Emory Healthcare to offer her old Vangard fund.

Both sides have filed responses to Ms. Crochet's objection, asking the

Court to overrule the objection and approve the settlement. The Defendants aver that "Ms. Crochet's complaint turns on her dissatisfaction with Emory's decision to reevaluate certain retirement-plan changes that were being considered *independent* of the settlement; according to Ms. Crochet, she learned that in March 2020 that Emory would be implementing changes to certain investments in the retirement plans, but then later learned in April 2020 that Emory was going to "postpone" that project due to "financial market volatility" associated with the global pandemic." [Doc. No. 234 at 3]. They argue that this project has no bearing on the settlement in this case. They also assert that the settlement means that the Defendants will be considering the types of changes to the investment plans that Ms. Crochet wants – the changes just will not be as immediate as Ms. Crochet would like. As for admitting liability, the Defendants note that "it is commonplace for parties to resolve disputes without admitting liability, and a disclaimer of liability does not undermine the validity or fairness of a settlement agreement whatsoever." [*Id*. at 4]. The Defendants emphasize that the fact that Ms. Crochet is the only one of the 77,108 class members to object supports the proposition that the settlement is reasonable and should be approved.

The Plaintiffs note that the objection rate to the settlement is 0.0013%. They assert that the fact that Ms. Crochet is the only objector supports the proposition that the settlement is fair and reasonable. They state that Emory's

agreement to the settlement was predicated on it being able to deny liability. They argue that an admission of liability is hard to obtain and a demand that the Defendants admit liability would have likely undermined their ability to negotiate a beneficial class-wide settlement. As for Ms. Crochet's objection to the three-year plan, the Plaintiffs aver that "[t]he methodical approach set forth in the Settlement ensures that Plan participants will be presented with carefully considered, prudent investment options going forward." [Doc. No. 235 at 4]. They note that "three years is a standard settlement period in ERISA excessive fee cases." [*Id*. at 5]. As for the attorneys' fees and incentive awards to the class representatives, the plaintiffs stress that the fees and all aspects of the settlement have been reviewed and approved by an independent fiduciary, Gallagher Fiduciary Advisors, LLC.

As for Ms. Crochet's objection that she would like better investment options to be available immediately, the Court notes that, under the terms of the settlement, an independent consultant is to be retained within 90 days of the settlement effective date, and thus the process of reviewing and changing the investment options will begin soon after the settlement is approved. Each year for the next three years, the Defendants will have to investigate investment alternatives and fees and retain an independent consultant to review the existing investments and create recommendations for the investment structure. The Plans' fiduciaries must consider the recommendation and decide whether or

not to follow it. If they do not follow the recommendation, then class counsel may determine that they have not complied with the settlement and class counsel could then seek enforcement of the settlement from the Court. The three-year plan in the settlement agreement allows for oversight by both an independent consultant and class counsel. Ms. Crochet is concerned that this oversight only lasts for three years, but the absence of permanent oversight does not mean that the settlement is not approvable. It is not within the Court's power to rewrite the terms of the settlement. *In re Equifax Inc. Customer Data Security Breach Litigation*, No. 1:17-md-2800-TWT, 2020 WL 256132, at * 16 (N.D. Ga. Mar. 17, 2020). "[T]he court's responsibility to approve or disapprove does *not* give this court the power to force the parties to agree to terms they oppose. The court must either approve or disapprove of the settlement *as a whole,* and *as written* by the parties." *Howard v. McLucas*, 597 F. Supp. 1504, 1506 (M.D. Ga. 1984) (emphasis in original)), *rev'd in part on other grounds by* 782 F.2d 956 (11th Cir. 1986).

Ms. Crochet objects that there is not really any benefit in the settlement to the actual class members, and that only the class counsel and class representatives are benefiting. The court notes that she has not actually objected to the requested amounts for attorneys' fees and incentive awards, and neither has any other class member. The attorneys' fees are reasonable given the amount and type of litigation and the fact that class counsel remains

involved in oversight of the settlement for the next three years. An independent fiduciary, Gallagher Fiduciary Advisors, LLC, has reviewed these fees, the incentive awards, and all aspects of the settlement, and has approved them. This further supports the finding that the fees and the settlement as a whole are reasonable and should be approved. According to the settlement agreement, the $16,750,000 shall be paid out as follows:

> Within one-hundred twenty (120) calendar days after the Settlement Effective Date, the Gross Settlement Amount will be distributed from the Qualified Settlement Fund as follows: (a) first, all Attorneys' Fees and costs shall be paid to Class Counsel within seven (7) business days after the Settlement Effective Date; (b) second, all Administrative Expenses not paid previously shall be paid within seven (7) business days after the Settlement Effective Date; (c) third, any Class Representatives' Compensation ordered by the Court shall be paid within seven (7) business days after the Settlement Effective Date; (d) fourth, a contingency reserve not to exceed an amount to be mutually agreed upon by the Settling Parties shall be set aside by the Settlement Administrator for: (1) Administrative Expenses incurred before the Settlement Effective Date but not yet paid, (2) Administrative Expenses estimated to be incurred after the Settlement Effective Date but before the end of the Settlement Period, (3) an amount estimated for adjustments of data or calculation errors, and (e) fifth, the Net Settlement Amount will be distributed in accordance with the Plan of Allocation.

[Doc. No. 218-1 at 17-18]. This Plan of Allocation calls for distribution of funds to current participants and authorized former participants (or their beneficiaries) of the Plans. The amounts to be paid will vary according to the participants because the amounts are based on the participants' individual

investments in the Plans over the class period. At the fairness hearing on November 4, 2020, the Plaintiffs informed the Court that the majority of class members will receive monetary compensation ranging from $1,000 to $10,0000, and that the highest recovery will be $60,000. The class members are thus being compensated under the settlement agreement.

Although Ms. Crochet would like for the Defendants to have to admit liability, that is often not a term of settlement. "[A]n admission of wrongdoing is not required for settlement approval." *Carter v. Forjas Taurus S.A.*, 2016 WL 3982489, at *12 (S.D. Fla. July 22, 2016). "Settlement is the offspring of compromise; the question we address is not whether the final product could be prettier, smarter or snazzier, but whether it is fair, adequate and free from collusion." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1027 (9th Cir. 1998), *overruled on other grounds by Wal-Mart Stores, Inc. v. Dukes et al*, 564 U.S. 338 (2011).

Ms. Crochet has raised understandable concerns in her objection, however, the objection fails to establish that the settlement is either unfair, unreasonable, or inadequate. The Court therefore overrules the objection. Ms. Crochet is the only one out of 77,108 class members to object to the settlement. This reflects an objection rate of 0.0013%. This miniscule number indicates strong support for the Settlement by Settlement Class Members and weighs strongly in favor of final approval." *In re the Home Depot, Inc., Customer Data*

Sec. Breach Litig., 2016 WL 6902351, at *4 (N.D. Ga. Aug. 23, 2016).

This litigation has been complex and has generated considerable expense, as evidenced by the motion for an award of $5,583,333.33 in attorneys' fees and $595,249.35 in litigation expenses. [Doc. No. 224]. Discovery had been completed at the time the parties reached the settlement. The settlement provides for a substantial recovery for the class. As noted above, only one of the 77,108 class members has objected to the settlement. The incentive fees for the named plaintiffs have been reviewed and approved by an independent fiduciary, Gallagher Fiduciary Advisors, LLC. The court does not find that the settlement benefits the named plaintiffs and their counsel to the expense of absent class members. The incentive awards for the named plaintiffs are less than what some of the class will obtain under the settlement, and total only 1.3% of the settlement amount. The amount of requested attorneys' fees is one-third of the settlement amount. Plaintiff's counsel indicates that this one-third calculation is "consistent with both the market rate in ERISA excessive fee cases and common-fund fee awards approved in this district." [Doc. No. 235 at 6]. The Court agrees. At the Fairness Hearing on November 4, 2020, it was noted that counsel has not requested compensation for their work on the case after filing the motion for approval of the settlement. Such work included preparing and filing the motion for fees and costs, as well as coordinating the supplemental class notices that had to be mailed out in September 2020, and responding to

Ms. Crochet's objection. Plaintiff's counsel is also not charging the class for its work overseeing the settlement over the three-year period encompassed in the Settlement Agreement or for any efforts that may be necessitated to enforce to the settlement. "Courts often accord great weight to the opinions of counsel for the class in approving class action settlements." *Holmes v. Continental Can Co.*, 706 F.2d 1144, 1149 (11th Cir. 1983). Class counsel avers that the $16,750,000 settlement in this case is "the largest settlement in any 403(b) fee lawsuit against a university." [Doc. No. 224-1 at 7]. The court notes that class counsel spent 7,587 hours of attorney time and 1,007 hours of non-attorney time on the case up to the point of preparing the motion for attorneys' fees, awards, and expenses. There is no indication of fraud or collusion behind the settlement.

The Court finds that the terms of the settlement are fair, reasonable and adequate within the meaning of Federal Rule of Civil Procedure 23. The interests of the class representatives are aligned with those of the other members of the class as they are all employees of the Defendants. The settlement was negotiated at arm's length. The parties attended several mediations and continued to work together to reach the settlement. The relief provided to the class is adequate. The size of the settlement is one of the largest of its type and provides for both monetary and non-monetary benefits for the class. Continued litigation would have likely incurred several more million dollars in attorneys' fees. Any trial would likely not occur before 2021, and any

appeal would likely delay a final resolution for a year or more after that. The guaranteed recovery under the settlement outweighs the possibility of any future relief after such continued and lengthy litigation. The class is not required to submit claims to receive relief under the settlement and will instead automatically receive the relief as outlined in the settlement. All class members are treated equitably relative to each other. Furthermore, the class representatives and class counsel have adequately represented the class.

IV. Conclusion

The Motion for Final Approval of the Settlement Agreement is hereby **GRANTED**, the Settlement of the Litigation is **APPROVED** as fair, reasonable, and adequate to the Plans and the Settlement Class, and the Settling Parties are hereby directed to take the necessary steps to effectuate the terms of the Settlement Agreement. The operative complaint and all claims asserted therein in the Litigation are hereby dismissed with prejudice and without costs to any of the Settling Parties and Released Parties other than as provided for in the Settlement Agreement. The Plans, the Class Representatives, and the Class Members (and their respective heirs, beneficiaries, executors, administrators, estates, past and present partners, officers, directors, predecessors, successors, assigns, agents, and attorneys) hereby fully, finally, and forever settle, release, relinquish, waive, and discharge all Released Parties (including Defendants) from the Released

Claims, regardless of whether or not such Class Member receives a monetary benefit from the Settlement, executed and delivered a Former Participant Claim Form, filed an objection to the Settlement or to any application by Class Counsel for an award of Attorneys' Fees and Costs, and whether or not the objections or claims for distribution of such Class Member have been approved or allowed.

The Class Representatives, the Class Members, and the Plans acting individually or together, or in combination with others, are hereby barred from suing or seeking to institute, maintain, prosecute, argue, or assert in any action or proceeding (including but not limited to an IRS determination letter proceeding, a Department of Labor proceeding, an arbitration, or a proceeding before any state insurance or other department or commission), any cause of action, demand, or claim on the basis of, connected with, or arising out of any of the Released Claims. Nothing herein shall preclude any action to enforce the terms of the Settlement Agreement in accordance with the procedures set forth in the Settlement Agreement.

Class Counsel, the Class Representatives, the Class Members, or the Plans may hereafter discover facts in addition to or different from those that they know or believe to be true with respect to the Released Claims. Such facts, if known by them, might have affected the decision to settle with the Defendants and the other Released Parties, or the decision to release,

relinquish, waive, and discharge the Released Claims, or the decision of a Class Member not to object to the Settlement. Notwithstanding the foregoing, each Class Representative, each Class Member, and the Plans has and have hereby fully, finally, and forever settled, released, relinquished, waived, and discharged any and all Released Claims. The Class Representatives, Class Members, and the Plans have hereby acknowledged that the foregoing waiver was bargained for separately and is a key element of the Settlement embodied in the Settlement Agreement of which this release is a part.

The Class Representatives, Class Members, and the Plans hereby settle, release, relinquish, waive, and discharge any and all rights or benefits they may now have, or in the future may have, under any law relating to the releases of unknown claims, including without limitation, Section 1542 of the California Civil Code, which provides: "A general release does not extend to claims that the creditor or releasing party does not know or suspect to exist in his or her favor at the time of executing the release and that if known by him or her would have materially affected his or her settlement with the debtor or released party." The Class Representatives, Class Members, and the Plans with respect to the Released Claims also hereby waive any and all provisions, rights and benefits conferred by any law or of any State or territory within the United States or any foreign country, or any principle of common law, which is similar, comparable or equivalent in substance to Section 1542 of the

California Civil Code.

The Court finds that it has subject matter jurisdiction over the claims herein and personal jurisdiction over Class Members herein pursuant to the provisions of ERISA, and expressly retains that jurisdiction for purposes of enforcing this Final Order and the Settlement Agreement. Any motion to enforce this Final Order or the Settlement Agreement, including by way of injunction, may be filed in this Court, and the provisions of the Settlement Agreement and/or this Final Order may also be asserted by way of an affirmative defense or counterclaim in response to any action that is asserted to violate the Settlement Agreement.

Each Class Member shall hold harmless Defendants, Defense Counsel and the Released Parties for any claims, liabilities, attorneys' fees and expenses arising from the allocation of the Gross Settlement Amount or Net Settlement Amount and for all tax liability and associated penalties and interest as well as related attorneys' fees and expenses.

The Settlement Administrator shall have final authority to determine the share of the Net Settlement Amount to be allocated to each Current Participant and each Authorized Former Participant. With respect to payments or distributions to Authorized Former Participants, all questions not resolved by the Settlement Agreement shall be resolved by the Settlement Administrator in its sole and exclusive discretion. With respect to

any matters that arise concerning the implementation of distributions to Current Participants (after allocation decisions have been made by the Settlement Administrator in its sole discretion), all questions not resolved by the Settlement Agreement shall be resolved by the Plan administrator or other fiduciaries of the Plans in accordance with applicable law and the governing terms of the Plans. Within twenty-one (21) calendar days following the issuance of all settlement payments to Class Members, the Settlement Administrator shall prepare and provide to Class Counsel and Defense Counsel a list of each person who was issued a settlement payment and the amount of such payment. Upon entry of this Order, all Class Members shall be bound by the Settlement Agreement (including any amendments) and by this Final Order.

SO ORDERED this 4th day of November, 2020

/s/CHARLES A. PANNELL, JR.
HON. CHARLES A. PANNELL, JR.
UNITED STATES DISTRICT
JUDGE