UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA

HAROLD DEWHURST and DAVID BRYAN, on behalf of themselves and all other persons similarly situated, and UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO/CLC	)	C.A. No. 2:09-cv-01546
Plaintiffs,	)	Judge John T. Copenhaver, Jr.
v.	)	
CENTURY ALUMINUM COMPANY, CENTURY ALUMINUM OF WEST VIRGINIA, INC., CENTURY ALUMINUM MASTER WELFARE BENEFIT PLAN, and DOES 1 THROUGH 20,	)	
Defendants.	)	

MEMORANDUM OF LAW IN SUPPORT OF THE PARTIES' JOINT MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AGREEMENT AND ENHANCEMENT AWARDS

INTRODUCTION

The parties request that the Court grant final approval of the Settlement Agreement ("Settlement Agreement" or "Agreement"), presented to and preliminarily approved by this Court. The Settlement Agreement resolves the dispute between Plaintiffs United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL CIO, CLC ("USW") and the Class Representatives on behalf of the Class (collectively, the "Plaintiffs"), and Defendants Century Aluminum Company ("CAC"), Century Aluminum of West Virginia, Inc. ("CAWV"), and Century Aluminum Master Welfare Benefit Plan (collectively, "Century") regarding the entitlement to and/or provision or vesting of

retiree medical obligations that are the subject of the above-captioned case. The Settlement Agreement was reached after extensive, informed negotiations at arm's length and represents a fair, reasonable, and adequate resolution of this litigation. Additionally, the parties request that the Court grant final approval of certain enhancement awards for the surviving Class Representative and certain other Class Members who actively participated in this litigation on behalf of the Class.

STATEMENT OF THE CASE

This case has a long and complex history of which the Court is well aware. The parties incorporate by reference the Statement of the Case provided in their Memorandum of Law in Support of the Parties' Joint Motion for Preliminary Approval,[1] Memo. 2–6, ECF No. 206, but briefly summarize and add as follows.

This dispute arose in 2009 when CAWV announced that it would modify its retiree medical benefits program for retirees of CAWV's Ravenswood, West Virginia facility (the "Ravenswood Plant"). The parties each filed suit: in the Southern District of West Virginia, CAWV sought a declaration that it had the right to make the modifications, and in the Southern District of Ohio, the USW sought a declaration that CAWV was contractually obligated to provide the unmodified benefits for life and a preliminary injunction to enjoin the changes. The cases were consolidated into the litigation before this Court. After the parties developed a considerable evidentiary record and extensively briefed the core issue of whether the retiree

[1] The parties submitted a Memorandum of Law in Support of the Parties' Joint Motion for (1) Modification of Class Definition, (2) Preliminary Approval of Class Action Settlement Agreement, (3) Approval of Proposed Class Action Notice, (4) Preliminary Approval of Enhancement Awards, and (5) an Order Setting the Dates for Objections to the Proposed Settlement and the Fairness Hearing, ECF No. 206. For the sake of brevity, ECF No. 206 is referred to herein as the "Memorandum of Law in Support of the Parties' Joint Motion for Preliminary Approval."

benefits were vested for life, on June 24, 2010, the Court denied the preliminary injunction, which the Fourth Circuit Court of Appeals eventually affirmed on August 22, 2011.

Following additional changes made by CAWV in late 2010 to the retiree medical benefits at issue, Plaintiffs filed an amended complaint. Thereafter, on October 14, 2011, Century moved to dismiss the case. In response, Plaintiffs further amended their complaint, and Century renewed its motion. The parties then engaged in settlement negotiations, during which Plaintiffs filed a Third Amended Complaint on June 11, 2012, but these settlement discussions ultimately did not produce a settlement. On August 9, 2011, Century moved to dismiss the Third Amended Complaint. On December 19, 2012, the Court denied Century's motion. The parties then engaged in significant fact discovery, and on February 26, 2014, Century moved for summary judgment. On July 27, 2015, the Ravenswood Plant was closed.

On September 9, 2015, the Court granted Century's Motion for Summary Judgment, finding, as a matter of law, that the applicable collective bargaining agreements ("CBA") were unambiguous – they provided the retirees a right to healthcare benefits for the terms of the applicable CBAs only, but there was no basis to conclude that those benefits extended beyond the terms of their expiration applicable CBAs. On October 7, 2015, Plaintiffs timely appealed to the Fourth Circuit. After the appeal was fully briefed, the parties renewed their settlement negotiations and reached an agreement in principle in September 2016. On January 13, 2017, the parties jointly requested the Fourth Circuit to remand the case to this Court to conduct the settlement approval process. On February 7, 2017, the Fourth Circuit granted that request.

On February 9, 2017, the parties filed a joint motion in this Court requesting the following: (i) modification of the class definition, (ii) preliminary approval of the class action settlement agreement, (iii) approval of the proposed class notice, (iv) preliminary approval of

enhancement awards, and (v) an order setting the dates for objections to the proposed settlement and the fairness hearing.

On April 7, 2017, the Court conducted a courtroom conference with the parties. The Court instructed the parties to submit a filing addressing the following issues: the Court's authority to amend the class definition; the effect of the Court's grant of leave to file the Third Amended Complaint including an amended class definition; how potential disputes between class members and the VEBA Trust would be resolved; and the parties' position respecting altering proposed benefits for class members who die before final approval of the Settlement Agreement. On April 12, 2017, the parties filed a Joint Submission in accordance with the Court's instructions at the April 7, 2017 conference. Thereafter, on May 23, 2017, the Court approved the proposed amended class definition.

Counsel for the parties attended a telephonic conference with the Court on May 25, 2017 regarding the proposed class notice, the schedule for sending class notices, and setting of the fairness hearing. Subsequently, the parties jointly submitted a Revised Class Notice on May 26, 2017.

On May 31, 2017, this Court granted preliminary approval of the Settlement Agreement, finding the Agreement "within the range of possible final approval as being fair, reasonable, and adequate." Mem. Op. & Order 7, ECF No. 216. In the same Order, the Court preliminarily approved the proposed enhanced awards, approved the Revised Class Notice and ordered Century to send Class Notice to each identified Class Member by June 9, 2017. Century followed this instruction. *See* Aff. Mailing, ECF No. 219.

In its May 31, 2017 Order, the Court required Class Members to file objections to the Settlement Agreement by July 24, 2017. No Class Member filed an objection.[2]

THE SETTLEMENT AGREEMENT

The parties entered into the Settlement Agreement on February 9, 2017. *See* ECF Nos. 205-1, 205-2, 205-3, 205-4 & 205-5. The Settlement Agreement settles all claims of the Class Members, the USW, and Century that arise from this dispute. The Settlement Agreement provides that, following the effective date of the Agreement, CAWV will pay the USW Century Aluminum Retirees Health and Welfare Trust ("Welfare Trust") certain amounts, which the Welfare Trust will use toward providing Class Members with reimbursement for some pre-settlement medical expenses as well as contributions to Healthcare Reimbursement Accounts ("HRAs"), which will help Class Members pay for some of their future medical costs. This program is described in Section 5 of the Notice to the Class. *See* Class Notice, ECF No. 217.

With the exception of three additional Class Members identified in June 2017,[3] the known Class Members are listed on Exhibit 1 to the Settlement Agreement. *See* Class List, ECF. No. 205-2; *see also* Agreement, § 1.4, ECF No. 205-1. This list represented the parties' best effort to identify Class Members and does not necessarily constitute an exhaustive list of all Class Members. If an individual meets the definition of a Class Member, that individual is a Class Member under the Settlement Agreement whether or not he or she is listed on Exhibit 1. An individual who is a Class Member but who is not listed on Exhibit 1 may be eligible to obtain

[2] On July 17, 2017, Class Member Karen Gorrell filed a letter "in **SUPPORT** of the proposed settlement agreement, not in objection." Letter, ECF No. 218. This letter also made a request that a Class Member be made a member of the administrative board of the Welfare Trust. *See id.* As explained more fully in Plaintiffs' response to Ms. Gorrell's letter, which is filed separately, Ms. Gorrell has withdrawn this request. *See* Response, ECF No. 220.

[3] These individuals were identified after Century mailed out the Class Notices. Century mailed them Class Notices on July 11, 2017.

plan benefits if the Welfare Trust Committee confirms that the individual meets the definition of a Class Member. *See* Agreement, § 4.4.

Section 4.2 of the Settlement Agreement sets forth the amounts that CAWV will pay to the Welfare Trust (defined as "VEBA Trust" in the Settlement Agreement), as follows:

> 4.2 Payments to the VEBA Trust.
>
> Following the Effective Date, CAWV will be obliged to make the payments described in this Section 4.2 to the VEBA Trust (the "VEBA Payments").
>
> 4.2.1 First Payment. Within fifteen business days of the Effective Date, CAWV shall make a payment to the VEBA Trust in the amount of five million dollars and no cents ($5,000,000).
>
> 4.2.2 Annual Payments. Thereafter, on or before each annual anniversary of the Effective Date, CAWV shall make a subsequent payment to the VEBA Trust in the amount of two million dollars and no cents ($2,000,000), until such time as CAWV's total payment is $23 million, made as one payment of $5,000,000, and nine payments of $2,000,000 each.

The Settlement Agreement also provides for modest enhancement awards not to exceed a cumulative total of $31,000 for the surviving Class Representative, David Bryan, as well as for each of the members of the Retiree Committee, including Karen S. Gorrell, Ronald Dixon, Luther Gibson, Clarence M. Lawrence, Lesley L. Shockey, John Morris and James D. Weltner. *See* Agreement, § 14.2. The enhancement awards will be deducted from the first payment to the Welfare Trust under Section 4.2.1. *See id.*; *see also infra* Section III. Class Counsel seeks no attorneys' fees or expenses. *See* Agreement, § 14.2.

NOTICES UNDER CAFA

On February 10, 2017, within the ten-day period prescribed by the Class Action Fairness Act ("CAFA"), 28 U.S.C. § 1715(b), Defendants served notice of the Settlement Agreement to the appropriate federal and state attorneys general. *See* Defs.' Notice Regarding Class Action

Fairness Act, ECF No. 213. No attorney general has objected to the Settlement Agreement. *See* Aff. Mailing, ¶ 2.

NOTICES TO CLASS MEMBERS

Following the Court's preliminary approval of the Settlement Agreement, on June 2, 2017, Defendants caused 758 notices to be mailed to Class Members at their last known current addresses. *See* Aff. Mailing. ¶ 3. In the following several weeks, a number of notices were returned as undeliverable. *Id.* at ¶ 4. New addresses were identified. In total, 192 notices were re-mailed.[4] *Id.* at ¶¶ 5, 6. The last of the re-mailed notices were sent on July 10, 2017. *Id.* at ¶ 6. No additional notices have been returned as undeliverable. *Id.* at ¶ 7.[5]

RULE 23(e)(3) STATEMENT

Per Rule 23(e)(3), the only agreements made in connection with this settlement are the Settlement Agreement, the Limited Guaranty Agreement (establishing CAC's financial guarantee of CAWV's payments to the Welfare Trust), and the Participation Agreement (establishing the legal basis for CAWV's payments to the Welfare Trust and for participation by the Class in the Welfare Trust). *See* Guaranty, ECF No. 205-3; Part. Agmt., ECF No. 205-4.

ARGUMENT

I. Settlement of Class Actions Is Strongly Favored.

Public policy "strongly favors settlement of litigation." *In re A.H. Robins Co.*, No. 98-1825, 1999 WL 55394 (4th Cir. Feb. 8, 1999). Additionally, due to their complexity, public policy particularly favors settlement of class action suits. *See, e.g.*, *Lomascolo v. Parsons*

[4] In addition, there were seven returned notices for deceased Class Members for whom there was no identifiable person to re-send their notice.

[5] None of the individuals who received re-mailed notices requested a modification of the deadlines for objecting to the settlement or requesting an opportunity to appear at the fairness hearing.

Brinckerhoff, Inc., No. 1:08CV1310 (AJT/JFA), 2009 WL 3094955, at *10 (E.D. Va. Sept. 28, 2009). Indeed, "there is an overriding public interest in favor of settlement, particularly in class action suits." *Id.* (citing *Cotton v. Hinton*, 559 F.2d 1326, 1331 (5th Cir. 1977)). Accordingly, courts apply a "strong presumption in favor of finding a settlement fair" in class action litigation. *Id.* (internal quotations and citations omitted); *accord Hoffman v. First Student, Inc.*, Civil No. WDQ-06-1882, 2010 WL 1176641 (D. Md. March 23, 2010) (quoting *id.*); WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS, § 13.1 (5th ed. 2017) (explaining that courts apply a "strong judicial policy in favor of class action settlement" to further the policy interests of finality of resolution and preservation of judicial resources).

This litigation presents complex issues, which the parties have vigorously disputed over the course of over seven years. The Settlement Agreement reached by the parties serves the judicial policies of finality of resolution and preservation of judicial resources. Accordingly, the judicial policy presuming fairness of class action settlement weighs in favor of approving the Settlement Agreement.

II. The Settlement Meets the Standard for Final Approval Under Rule 23.

Judicial approval of a proposed class action settlement involves a two-step process. Class counsel must submit the proposed settlement to the court for preliminary approval of its terms. If the court grants preliminary approval, it will then direct notice of the settlement to be given to class members and hold a fairness hearing. *Annotated Manual for Complex Litigation* § 21.633 (2016); s*ee also, e.g.*, *In re Mid-Atl. Toyota Antitrust Litig.*, 564 F. Supp. 1379, 1384 (D. Md. 1983). Here, preliminary approval has been granted, notice has been given, a fairness hearing is scheduled, and the parties respectfully request final approval.

Courts applying Federal Rule of Civil Procedure 23(e)(2) grant final approval to a binding settlement where the court determines the proposed settlement is "fair, reasonable, and adequate." *In re Serzone Prods. Liab. Litig.*, 231 F.R.D. 221, 241 (S.D. W. Va. 2005); *see also In re Jiffy Lube Secs. Litig.*, Civ. No.Y-89-1939, 1990 WL 39127, at *5 (D. Md. Jan. 2, 1990). To make this determination, the Fourth Circuit has adopted "a bifurcated analysis, separating the inquiry into a settlement's 'fairness' from the inquiry into a settlement's 'adequacy.'" *In re Serzone*, 231 F.R.D. at 243 (internal citations omitted); *In re MicroStrategy, Inc. Secs. Litig.*, 148 F. Supp. 2d 654, 663 (E.D. Va. 2001) (citing *In re Jiffy Lube Secs. Litig.*, 927 F.2d 155, 158–59 (4th Cir. 1991)); *see also In re Jiffy Lube*, 1990 WL 39127, at *5; *In re Mid-Atl. Toyota*, 605 F. Supp. at 443. The "fairness" inquiry of the analysis "centers on the settlement process;" whereas the "adequacy" inquiry centers on the "substance of the settlement." *Whitaker v. Navy Fed. Credit Union*, Civ. No. RDB 09-cv-2288, 2010 WL 3928616 (D. Md. Oct. 4, 2010).

In assessing the "fairness" prong of a proposed settlement, "the court is obligated to ascertain that the settlement was reached as a result of good-faith bargaining at arms [sic] length. . . . Alternatively stated, the court must weigh those factors which indicate the presence or absence of collusion among the parties." *In re Jiffy Lube*, 1990 WL 39127, at *5 (quoting *In re Montgomery Cnty. Real Estate Antitrust Litig.*, 83 F.R.D. 305, 315 (D. Md. 1984)). To answer this inquiry, courts weigh the following factors: "(1) the posture of the case at the time settlement is proposed; (2) the extent of discovery that has been conducted; (3) the circumstances surrounding the negotiations; and (4) the experience of counsel." *Id.* (citing *In re Montgomery Cnty.*, 83 F.R.D. at 315; *In re Mid-Atl. Toyota*, 564 F. Supp. at 443); *see also In re Serzone*, 231 F.R.D. at 243 (internal citations omitted).

To determine a proposed settlement's adequacy, "the court must weigh the likelihood of plaintiff's recovery on the merits against the amount offered in settlement." *In re Mid-Atl. Toyota*, 564 F. Supp. at 443 (quoting *In re Montgomery Cnty.*, 83 F.R.D. at 315). Courts look to the following factors to determine a proposed settlement's adequacy:

> (1) the relative strength of the plaintiffs' case on the merits, (2) the existence of any difficulties of proof or strong defenses the plaintiffs are likely to encounter if the case goes to trial, (3) the anticipated duration and expense of additional litigation, (4) the solvency of the defendants and the likelihood of recovery on a litigated judgment, and (5) the degree of opposition to the settlement.

In re Jiffy Lube, 1990 WL 39127, at *7; *In re Serzone*, 231 F.R.D. at 243 (internal citations omitted); *In re Mid-Atl. Toyota*, 564 F. Supp. at 443 (quoting *In re Montgomery Cnty.*, 83 F.R.D. at 315–16).

A. <u>The Settlement Satisfies the Fairness Test.</u>

Each of the factors established by the Fourth Circuit in determining a settlement's fairness under Rule 23(e)(2) weighs in favor of approving the Settlement Agreement. The Settlement Agreement is the product of good faith, arm's length bargaining.

1. The Posture of the Case at the Time the Settlement Is Proposed.

The stage of the current litigation weighs heavily in favor of approving the Settlement. Courts first consider the posture of the case at the time of the settlement's proposal. This inquiry assists the court in "evaluating whether the plaintiffs and their counsel have sufficiently developed the case to appreciate the merits of their claims." *In re Serzone*, 231 F.R.D. at 244; s*ee also Whitaker*, 2010 WL 3928616, at *3.

Here, the Settlement Agreement resulted after extensive litigation spanning over seven years. The litigation has included preliminary injunction proceedings both before this Court and the Fourth Circuit; motion to dismiss proceedings before this Court; summary judgment proceedings before this Court; and a fully briefed appeal to the Fourth Circuit on the award of summary judgment. Throughout the course of these proceedings, each of the parties has extensively researched and argued about the core issue in this case: whether the subject retiree welfare benefits have vested for life.

In sum, the parties have more than sufficiently developed the case so as to appreciate the merits of their claims and defenses. Therefore, the posture of the case supports final approval of the Settlement. *See, e.g.*, *Boyd v. Coventry Health Care Inc.*, 299 F.R.D. 451, 460 (D. Md. 2014) (granting final class action settlement approval where four years and many stages of litigation lead to the parties' "clear view of the strengths and weaknesses of their respective positions"); *Deem v. Ames True Temper, Inc.*, No. 6:10-CV-01339, 2013 WL 2285972, at *2 (S.D. W. Va. May 23, 2013) (granting final class action settlement approval where the parties "were on the eve of trial"); *In re Serzone*, 231 F.R.D at 243-44 (weighing first factor in favor of settlement where the parties litigated for over two years before reaching settlement); *Whitaker*, 2010 WL 3928616, at *3 (granting final approval of class action settlement, even absent formal discovery, where parties had participated in "two rounds of motion-to-dismiss briefing and had conducted the related internal investigations that precede formal discovery").

2. The Extent of Discovery.

Courts next consider the extent of discovery in determining the fairness of a proposed settlement. "There is . . . no minimum or definitive amount of discovery that must be undertaken." *In re Serzone*, 231 F.R.D. at 244. Rather, the discovery proceedings must simply

"show that they are not designed to justify a settlement, but [are] an aggressive effort to move towards trial." *Deem*, 2013 WL 2285972, at *2 (approving final settlement where the parties were nearing trial and had completed discovery); *see also See Berry v. LexisNexis Risk & Info. Analytics Grp., Inc.*, No. 3:11-CV-754, 2014 WL 4403524, at *14 (E.D. Va. Sept. 5, 2014) (granting final approval of class action settlement in part because the parties' "[e]xtensive discovery" favored approval); *In re Serzone*, 231 F.R.D at 243-44 (applying discovery factor in favor of settlement where the parties exchanged thousands of documents and consulted expert witnesses).

Here, the parties' discovery proceedings resulted from aggressive efforts in advancing their respective case theories. Indeed, the extensive discovery record the parties developed resulted in summary adjudication for Century on the core issue of lifetime vesting of the retirees' benefits. The extensive evidentiary record the parties developed includes over 57,500 pages of produced documents and 40 depositions encompasses all of the collective bargaining agreements and plan documents governing the retiree medical benefits at issue and, in addition, extensive extrinsic evidence. The parties' extensive discovery suggests thorough review of their arguments' merits as well as aggressive efforts toward securing resolution in their favor. This factor weighs in favor of final approval.

3. The Circumstances Surrounding the Negotiations.

"Absent evidence to the contrary, the Court may presume that settlement negotiations were conducted in good faith and that the resulting agreement was reached without collusion." *Muhammad v. Nat'l City Mortg., Inc.*, No. 2:07-0423, 2008 WL 5377783 (S.D. W. Va. Dec. 19, 2008) (Copenhaver, J.); *see also Archbold v. Wells Fargo Bank, N.A.*, No. 3:13-CV-24599, 2015 WL 4276295, at *2 (S.D. W. Va. July 14, 2015); NEWBERG ON CLASS ACTIONS § 13.45 (5th ed.).

The Court applies this factor to assess whether the settlement "represents the product of hard-fought, arms-length [sic] negotiations." *In re Serzone*, 231 F.R.D. at 244.

The circumstances surrounding the Settlement Agreement's negotiation demonstrate a hard-fought battle. As explained, the parties engaged in thorough preliminary injunction proceedings, a motion to dismiss, extensive discovery, and a motion for summary judgment. The parties reached settlement only after this Court granted summary judgment and the parties fully briefed the appeal of summary judgment to the Fourth Circuit. *See* Mem. Op. & Order 5-6, ECF No. 216. Moreover, the parties conducted their settlement negotiations at arm's length and represented their respective interests. The circumstances surrounding the litigation and the settlement's negotiations make no "suggest[ion] … that this settlement agreement was tainted by collusion" or bad faith. *In re Serzone*, 231 F.R.D. at 244. This factor favors final approval.

4. The Experience of Counsel in the Area of Class Action Litigation.

"The opinion of class action counsel, with substantial experience in litigation of similar size and scope, is an important consideration" when determining the fairness of a settlement. *Muhammad*, 2008 WL 5377783, at *4 (Copenhaver, J.). "When the parties' attorneys are experienced and knowledgeable about the facts and claims, their representations to the court that the settlement provides class relief which is fair, reasonable and adequate should be given significant weight." *Deem*, 2013 WL 2285972, at *2 (quoting *Rolland v. Cellucci*, 191 F.R.D. 3, 10 (D. Mass. 2000) (internal quotations omitted)); *see also In re The Mills Corp. Secs. Litig.*, 265 F.R.D. 246, 255 (E.D. Va. 2009) (explaining that counsel's representations regarding settlement "should be given significant weight" where counsel's decisions result from "exploration and deliberation") (quoting *Rolland*, 191 F.R.D. at 10); *In re MicroStrategy, Inc.*, 148 F. Supp. 2d at 665 (approving settlement giving "significant weight to the judgment of class counsel" in light of

counsel's experience and ability) (quoting *S.C. Nat'l Bank v. Stone*, 139 F.R.D. 335, 339 (D. S.C. 1991)) (internal quotations omitted).

Class Counsel demonstrated their qualifications through materials submitted in connection with the class certification orders. Accordingly, the Court found Class Counsel qualified. Moreover, Class Counsel (including, among others, William Payne) have litigated scores of employee benefits class actions. *See* Am. Mem. Supp. Mtn. Class Certification 12–15, ECF No. 32; Pls.' Counsel Resumes, ECF Nos. 20-2 through 20-5, 32-1. Similarly, Plaintiffs' co-counsel Joseph Stuligross has a wealth of experience in this area. Ex. B, Decl. Joseph Stuligross Supp. Joint Mtn. Preliminary Approval, ECF No. 205-6.

Plaintiffs' counsel, each boasting significant experience in this area of litigation, determined the Settlement Agreement is in the best interests of the Class. Plaintiffs' counsel reached this determination after years of litigation involving myriad stages, including jurisdictional issues, preliminary injunction, dismissal, summary judgment, and appellate proceedings. To support their respective positions, Plaintiffs' counsel engaged in extensive fact discovery. Finally, after engaging in vigorous arm's-length negotiations over the Settlement terms, Plaintiffs' counsel, viewing the posture of the case and discovery involved, determined that the Settlement Agreement represents the best interests of the Class and is fair, reasonable, and adequate. Decl. P. Ewing Supp. Joint Mtn. Preliminary Approval, ECF No. 205-7, ¶ 3. Therefore, Plaintiffs' counsel's approval of the Settlement Agreement strongly favors final approval. *Muhammad*, 2008 WL 5377783, at *4.

B. <u>The Settlement Satisfies the Adequacy Test.</u>

Each of the factors used by courts in the Fourth Circuit to determine whether a settlement is adequate under Rule 23(e)(2) is satisfied here.

1. The Relative Strength of the Plaintiffs' Case on the Merits, and the Existence of Any Difficulties of Proof or Strong Defenses the Plaintiffs Are Likely to Encounter If the Case Goes to Trial.

"The most important factor to be considered in determining whether there has been such a clear abuse of discretion [in approving a class action settlement] is whether the trial court gave proper consideration to the strength of the plaintiffs' claims on the merits[.]" *Flinn v. FMC Corp*., 528 F.2d 1169, 1172 (4th Cir. 1975).

Here, Plaintiffs face clear risk that they will not prevail on the merits of their case and that the Class Members will have no recovery whatsoever, as demonstrated by this case's procedural history. Applying the applicable heightened standards at the preliminary injunction proceedings, both this Court and the Fourth Circuit ruled against Plaintiffs. *See Real Truth About Obama, Inc. v. Fed. Election Comm'n*, 575 F.3d 342, 345–47 (4th Cir. 2009) (articulating the heightened standards applicable to preliminary injunction proceedings), *vacated by* 130 S. Ct. 2371 (2010), *reinstated in part by* 607 F.3d 356 (4th Cir. 2010). During the preliminary injunction proceedings, this Court held that Plaintiffs had not shown a likelihood of success on the merits of their claims. The Fourth Circuit, affirming this Court's denial of preliminary injunction, agreed.

Following the preliminary injunction rulings, this Court denied Century's motion to dismiss "to allow completion of the evidentiary record" but reiterated that the "retirees lack a clear likelihood of success on the merits." Mem. Op. & Order 10, ECF No. 146. Thereafter, the parties completed the evidentiary record, and Century filed for summary judgment. This Court, finding the applicable CBA's durational provisions "clear and unambiguous," awarded summary judgment to Century. In granting Century summary judgment, this Court explained that the "retirees' healthcare benefits remained in effect for the term of the applicable CBA[,]" and

"[t]here is no basis in light of this language to conclude those benefits vested beyond the term of each CBA." Mem. Op. & Order 25, ECF No. 197. While Plaintiffs vigorously dispute this conclusion and so argued on appeal, it is possible that they would not prevail on appeal. *See* Mem. Op. & Order 7, ECF No. 216 (citing *Barton v. Constellium Rolled Products-Ravenswood*, LLC, 856 F.3d 348 (4th Cir. 2017) (upholding employer's right to modify retiree health benefits)).[6]

Thus, because of the history of this litigation and the risk that Plaintiffs face on appeal, the first two adequacy factors weigh heavily in favor of final settlement approval.

2. The Anticipated Duration and Expense of Additional Litigation.

The third factor weighs in favor of approving the proposed settlement in this case, as proceeding with the litigation "would necessarily be expensive and time consuming." *See In re Serzone*, 231 F.R.D. at 245 (applying expense and duration factor in favor of settlement where products liability case involved complex medical and scientific issues); *In re Montgomery Cnty.*, 83 F.R.D. at 317 (weighing third factor in favor of settlement where litigation "would be protracted and complex, and the financial burden upon all of the private parties would be substantial"). "Avoiding … unnecessary and unwarranted expenditure of resources and time would benefit all parties[.]" *Harris v. McCrackin*, Nos. 2:03-3845-23, 2:03-3943-23, 2:04-2314-23, 2006 WL 1897038, at *8 (D.S.C. July 10, 2006).

[6] In its Order Granting Preliminary Approval, the Court stated that "the likelihood that [the award of summary judgment to Century] will be reversed is small when considering that the court of appeals found that the court did not abuse its discretion in denying plaintiffs' motion for a preliminary injunction on the grounds that they were not likely to succeed on the merits of their claims, together with the Fourth Circuit's recent decision in *Barton v. Constellium Rolled Products-Ravenswood, LLC*, which similarly involved a company's decision to modify the health benefits program of its retirees." Mem. Op. & Order 7, ECF No. 216 (citing *Barton*, 856 F.3d 348).

It is well known that litigation over retiree medical benefits can be expensive and protracted. Indeed, the parties have been litigating this case for over seven years, since November 2009. During that time, the parties participated in lengthy and contentious motion practice concerning venue, preliminary injunction, dismissal pursuant to Rule 12(b)(6), and summary judgment, plus two appeals to the Fourth Circuit. This motion practice culminated in negotiations of, and ultimate agreement to, the Settlement Agreement. Accordingly, the parties have already faced significant expenses in connection with this litigation.

Compounding this already significant expense, if the Settlement Agreement is not approved, the case will return to the Fourth Circuit for appellate proceedings. The Fourth Circuit proceedings could result in oral argument and, potentially, remand to this Court if summary judgment is not affirmed. Such remand would result in trial before this Court, and, thereafter, an inevitable appeal by the party that did not prevail. Thus, ensuing litigation would be complex, expensive, and lengthy. Accordingly, this factor weighs heavily in favor of preliminary approval of the Settlement Agreement.

3. The Solvency of the Defendants and the Likelihood of Recovery on a Litigated Judgment.

This factor is "relevant to determining the adequacy of a settlement if it appears that the defendant would not be able to satisfy a litigated judgment, thus making settlement the only means for claimants to recover at all." *In re Serzone*, 231 F.R.D. at 245. Here, the parties, pursuant to the Settlement Agreement, entered into a guarantee arrangement to alleviate any potential concerns over CAWV's solvency. *See* Agreement, § 5. Pursuant to this arrangement, CAC, a public corporation listed on the Nasdaq Stock Market and CAWV's parent, will guarantee CAWV's financial obligations under the Settlement Agreement. *Id.* Thus, the Settlement Agreement mitigates any risk of potential insolvency. Therefore, this factor weighs

in favor of approval. *See Deem*, 2013 WL 2285972, at *3 (approving class action settlement that "avoid[ed] all risk of eventual insolvency").

If, despite the precautions taken by the parties described above, any doubt remains about favoring this factor toward approval, courts apply less weight to this factor where the remaining factors favor approval. *See In re Red Hat, Inc. Secs. Litig.*, No. 5:04-CV-473-BR(3), 2010 WL 2710517, at *4 (E.D.N.C. June 11, 2010); *In re Serzone*, 231 F.R.D. at 245; *Henley v. FMC Corp.*, 207 F. Supp. 2d 489, 494 (S.D. W. Va. 2002). As explained by the parties, each of the other factors weighs toward settlement in these circumstances.

4. The Degree of Opposition to the Settlement.

Finally, and critically, the Class Members' lack of objection to—and stated support of, *see* Letter, ECF No. 218—the Settlement Agreement speaks volumes toward the appropriateness of approval. "[T]he views of putative class members are certainly relevant and entitled to great weight" in granting approval of a settlement. *In re Serzone*, 231 F.R.D. at 245. Where no class members object to a proposed settlement, this factor "supports final approval of the Settlement as fair, adequate, and reasonable." *Boyd*, 299 F.R.D. at 461; *Whitaker*, 2010 WL 3928616, at *3 (approving settlement where no class members objected). No Class Members have objected here. *See* Aff. Mailing. Accordingly, this factor weighs heavily in favor of approval of the settlement.

III. The Proposed Enhancement Awards Should Be Approved.

Plaintiffs propose, and Century does not oppose, that the following enhancement awards be paid from the first payment to be made by CAWV:

David Bryan:	$4,000
Ronald Dixon:	$4,000

Luther Gibson:	$4,000
Karen S. Gorrell:	$5,000
Clarence M. Lawrence:	$2,000
John Morris:	$4,000
Lesley L. Shockey:	$4,000
James D. Weltner:	$4,000

Mr. Bryan served as the sole surviving Class Representative, actively participating in this case by, among other things, having his deposition taken.

The remaining individuals, all Class Members, served in various capacities on the Century Aluminum Retiree Committee, which was instrumental in lobbying for and ultimately obtaining the settlement. Over the course of six years, the Committee members engaged in settlement discussions, traveled to shareholder meetings and board of directors' meetings and engaged in other lobbying efforts. Led by Ms. Gorrell, Lead Spokeswoman for the Committee, the Committee members have made hundreds of phone calls and sent thousands of emails. They have rallied, picketed, met with politicians, and made approximately 200 road trips. Notably, despite their advanced ages, the Committee members camped in front of the Ravenswood facility for 75 days during the winter from December 18, 2011 through March 2, 2012.

The parties are in agreement that this settlement would not have been reached without the actions of the eight individuals for whom Plaintiffs seek enhancement awards. It accordingly is reasonable to extend to them the identified modest incentive awards, and Plaintiffs ask the Court to grant final approval of these awards. *See Kruger v. Novant Health, Inc.*, No. 1:14CV208, 2016 WL 6769066, at *6 (M.D.N.C., 2016) (awarding each class representative a $25,000

contribution award "given the benefits accruing to the entire class in part resulting from [named plaintiff's] efforts"). Century does not oppose this request.

CONCLUSION

For the foregoing reasons, the parties respectfully request that the Court (i) grant final approval of the Settlement Agreement and (ii) grant final approval of the enhancement awards.

Dated: August 8, 2017

/s/ Stanley Weiner

Mark H. Dellinger (WVSB No. 7703)
Bowles Rice LLP
600 Quarrier Street (25301)
Post Office Box 1386
Charleston, W. Va. 25325
Telephone: (304) 347-1178
Facsimile: (304) 347-1756
E-Mail: mdellinger@bowlesrice.com

Stanley Weiner (admitted *pro hac vice*)
JONES DAY
North Point
901 Lakeside Avenue
Cleveland, OH 44114-1190
Telephone: (216) 586-7763
Facsimile: (216) 579-0212
E-mail: sweiner@jonesday.com

Sarah McClure (admitted *pro hac vice*)
JONES DAY
51 Louisiana Avenue, N.W.
Washington, D.C. 20001-2113
Telephone: (202) 879-3811
Facsimile: (202) 626-1700
E-mail: sbmcclure@jonesday.com

Counsel for Defendants
CENTURY ALUMINUM COMPANY, CENTURY ALUMINUM COMPANY OF WEST VIRGINIA, INC., CENTURY ALUMINUM MASTER WELFARE BENEFIT PLAN, AND DOES 1 THROUGH 20

/s/ Pamina Ewing (per consent)

Bradley J. Pyles (WV Bar #2998)
brad.pyles@cphtlogan.com
PYLES & TURNER, LLP
P.O. Box 596
Logan, WV 25601
Telephone: (304) 752-6000

William T. Payne
wpayne@fdpklaw.com
FEINSTEIN DOYLE PAYNE
& KRAVEC, LLC
Law & Finance Building, 13th Floor
429 Fourth Avenue
Pittsburgh, PA 15219
Telephone: (412) 281-8400

Pamina Ewing
pewing@fdpklaw.com
FEINSTEIN DOYLE
PAYNE & KRAVEC, LLC
Law & Finance Building, 13th Floor
429 Fourth Avenue Pittsburgh, PA 15219
Telephone: (412) 281-8400

Joseph P. Stuligross
Associate General Counsel
jstuligross@usw.org
United Steelworkers
Five Gateway Center, Suite 807
Pittsburg, PA 15222
Telephone: (412) 562-2526

Counsel for Plaintiffs
UNITED STEEL, PAPER & FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL & SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO/CLC AND HAROLD DEWHURST AND DAVID BRYAN

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of August, 2017, a copy of the foregoing document was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to the parties indicated on the electronic filing receipt.

/s/ Stanley Weiner
Stanley Weiner