IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA

Luanna Scott, Shunderia Garlington, Ruth Bell, Wendy Bevis, Katherine Bracey, Ruby Brady, Marie Alice Brockway, Vickie Clutter, Diane Conaway, Judy Corrow, Traci Davis, Carol Dinolfo, Rebecca Dixon, Pamela Ewalt, Nancy Fehling, Teresa Fleming, Irene Grace, Dorothy Harson, Charlene Hazelton, Shelly Hughes, Christal J. Joslyn, Ada L. Kennedy, Margie A. Little, Carol Martin, Leanne Maxwell, Wanda Mayfield, Doris Moody, Vanessa L. Peeples, Veronica Perry-Preddie, Ruth Ellen Phelps, Sheila Pippin, Lana Radosh, Michelle Rodgers, Vada Rose, Vickey Jo Scrivwer, Linda R. Silva, Nancy Smith, Marie E. Spellissy, Judy Tidrick, Beverly L. Triplett, Debbie Vasquez, Claire White, Bonnie Williams, and Cindy Marie Zimbrich, Individually and on behalf of the class they represent,	)	
Plaintiffs,	)	CASE NUMBER: 3:08-cv-540
v.	)	
Family Dollar Stores, Inc.,	)	
Defendant.	)	

MEMORANDUM OF LAW IN SUPPORT OF JOINT MOTION FOR FINAL APPROVAL OF SETTLEMENT AGREEMENT

Plaintiffs submit this memorandum in support of the Parties' joint motion for final approval of the settlement reached in this case. Specifically, the Parties request that the Court finally approve their proposed Settlement Agreement and find that the Agreement is sufficiently fair, reasonable, and adequate, and in the best interests of the Parties and in accordance with all applicable law. In addition, the Parties' joint motion requests that the Court find: (1) that the

attorney's fees and expenses set forth in the Parties' Settlement Agreement and Notice to the class are fair, adequate, and reasonable; (2) that the notice provided to Class Members, including direct mail notice, is in accordance with the terms of the Settlement Agreement, the Court's Preliminary Approval Order, and thereby satisfied the requirements of the Federal Rules of Civil Procedure and all applicable laws; (3) that there is no just reason for delay in entry of the Parties' Proposed Order Granting Final Approval of the Settlement Agreement and Attorneys' Fees and Expenses, (4) that the case be dismissed with prejudice subject to the terms and conditions of the Settlement Agreement, which shall be implemented by the Parties and the Settlement Administrator; and (5) that the Court will retain jurisdiction of all matters relating to the interpretation, administration, implementation, effectuation, and enforcement of the Settlement.

INTRODUCTION

After over a decade of intense litigation, the Parties have reached a settlement that is fair, reasonable and adequate. Specifically, the Parties have agreed to a settlement that provides comprehensive non-monetary, programmatic relief in addition to monetary relief of $45,000,000 for the benefit of a class of female Store Managers who are or were employed by Family Dollar anywhere in the United States at any time between July 2, 2002 and the present (collectively with the Class Representatives, the "Settlement Class Members"). Excluded from the Settlement Class are the few (9) class members who have timely opted-out of this case. Taken together, the programmatic and monetary provisions set forth in the Settlement Agreement will provide the class with prompt, certain, and adequate relief – in contrast to the complexity, delay, expense and

risk of continuing litigation.[1]

The current proceedings began nearly 15 years ago when 49 female Store Managers and their counsel filed EEOC Charges which alleged a pattern and practice of discriminatory wages paid to women as a class at Family Dollar since July 2, 2002. Plaintiffs alleged that Family Dollar discriminated against female employees by paying them less than men are paid for the same job in violation of Title VII of the Civil Rights Act of 1964 and the Equal Pay Act of 1963 ("EPA"). The EEOC eventually issued right-to-sue letters which led to the filing of this case. Thereafter, Plaintiffs filed the present action in the Northern District of Alabama. Dkt. 1. The case was then transferred to this Court in 2008. Dkt. 27. The parties vigorously litigated the case over the last decade, including multiple motions to dismiss the class allegations, formal and informal discovery, an unsuccessful mediation in 2011, a renewed motion to strike the class allegations in light of the Supreme Court's decision in *Wal-Mart Stores, Inc. v. Dukes,* 131 S. Ct. 2541 (2011), briefing and argument on Plaintiffs' motion to amend the class allegations to meet the requirements of *Wal-Mart*, appeal of the decision dismissing the original class allegations and denying Plaintiffs' request for amendment, briefing Family Dollar's Petition For Certiorari to the Supreme Court, extensive discovery and statistical analysis on remand, preparation of briefs and evidentiary submissions in support of class certification, summary judgment, arbitration and notice to the class, and a second round of mediation in March 2017.

This is not a case in which the parties reached an early or easy settlement. Instead, this has

[1] Family Dollar has denied and specifically continues to deny that it violated any federal, state, or local law, regulation, or other legal requirement. Family Dollar accordingly denies all material allegations as well as all liability or fault based on the Class Representatives' claims. The Settlement Agreement and its terms and provisions are not to be construed as evidence of, or an admission or concession of, any wrongdoing or liability by Family Dollar. *See also* S.A. ¶ 83.

been a hard-fought case in which both sides worked diligently to gather and interpret information and to represent their clients in discovery, in litigating class certification, on appeal, in preparation for trial, and later in mediation. The Mediator determined and proposed the terms of settlement once the Parties left the 2017 mediation without reaching settlement for a second time.[2] The Mediator, Mark Rudy is a distinguished, highly respected professional who has had substantial experience in mediating complex class actions. The formal mediation proceedings took place for two days in March 2017 in San Francisco and negotiations continued for several months after that. After reaching an agreement in principle, the Parties continued to negotiate and finalize the procedural and logistical details needed to embody and document their agreement as well as the supporting documents (e.g., Class Notice and General Release) for the agreement. From March through October, the parties communicated with the Mediator both separately and together until the final details of the settlement agreement were documented in the Settlement Agreement now pending before the Court.

I. ESSENTIAL TERMS OF THE PROPOSED SETTLEMENT

The proposed settlement creates a settlement fund of forty-five million dollars ($45,000,000), which will be used to pay female store managers for alleged past losses, pay service awards to those class representatives and named plaintiffs who enter into and do not revoke a General Release of all claims relating to their employment at Family Dollar, and pay reasonable attorneys' fees, expenses and settlement administration costs. *Joint Stipulation of Class Action Settlement and Release*, ¶¶ 14, 25, 54 (ECF 322). It also includes significant prospective

[2] The parties' first mediation occurred in 2011 with Eric Greene, a well-regarded mediator from Boston. That mediation was unsuccessful despite the Parties' and the mediator's best efforts.

programmatic remedies aimed at providing adjustments to Family Dollar's pay practices that will modify the way in which Store Manager salaries are set and will be formally validated by experts in the fields of industrial organizational psychology and labor economics. *Id.* ¶¶ 64-70.

The Settlement Class Members have responded favorably to the settlement. Notice of the Settlement was mailed to Class Members on January 12, 2018 and objections and opt-outs were due on February 12, 2018. *See* Administrator Decl. ¶¶ 4, 7.[3] As reported by the Settlement Administrator appointed by the Court, only nine (9) Class Members have opted-out of the Settlement. *Id.* ¶ 7. This represents just .024% of the Settlement Class of over 37,000 Class Members. *See id.* ¶ 4. Likewise, only nineteen (19) Settlement Class Members have submitted a timely and un-rescinded objection to the Settlement. *Id.* ¶ 8. And the vast majority of those purported objectors appear to have mistaken the purpose of the objection form—only two (2) of them provided *any* written reason for their objection.[4] *Id.* ¶ 8; *see also id.* Ex. B. None of the objections set forth any legitimate reason for objecting to or not approving the Settlement Agreement or attorneys' fees. *See id.*

[3] The Notice of Settlement and Claim Forms were sent via U.S. mail to Settlement Class Members on January 12, 2018. The list of notice recipients was determined using data provided by Family Dollar and data gathered by Class Counsel during the course of litigation. If, Notices were returned as undeliverable to the Parties' Settlement Administrator, the Administrator worked diligently to obtain updated addresses via the Class Member's Social Security Number to re-send the Notice. Administrator Decl. ¶¶ 3-6. Information about the Settlement was also provided on the following website: www.familydollarsettlement.com. The Parties' Settlement Administrator, has reported responses to the Notice via declaration attached hereto as Exhibit E ("Administrator Decl.").

[4] Notably, it appears that many of the Class Members believed that they had to return the Court approved Objection Form in order to participate in the case. Two hundred (200) Class Members submitted an Objection (many without any written reason for the objection) but later rescinded their objections after Class Counsel and/or the Settlement Administrator spoke with them and explained the purpose of the Objection Form. See Administrator Decl. ¶ 8.

This overwhelming class member support for the settlement strongly favors final approval. *See e.g.*, *In re General Tire and Rubber Co. Securities Litigation*, 726 F.2d 1075, 1085 (6th Cir. 1984) (explaining that the small number of objectors to the settlement was a factor which the district court properly weighed in finding that the settlement was in the best interest of the parties); *In re National Football League Players Concussion Injury Litigation*, 821 F.3d 410, 438 (3d Cir. 2016) (finding that only approximately 1% of the class members objected and agreeing with district court that this figure weighed in favor of settlement approval).

In addition, Class Counsel, who are experienced in litigating employment discrimination and class action cases, attest to the fact that the proposed settlement is in the best interest of the Settlement Class Members. The Parties' have stipulated to the fairness, adequacy and reasonableness of the agreed-upon terms of the Settlement Agreement as follows:

> Acknowledgement that the Settlement is Fair and Reasonable. The Parties believe this Settlement Agreement is a fair, adequate, and reasonable settlement of the Action and have arrived at this Settlement after arm's-length negotiations, pursuant to a mediator's proposal, and in the context of adversarial litigation, taking into account all relevant factors, present and potential. The Parties further acknowledge that they are each represented by competent counsel and that they have had an opportunity to consult with their counsel regarding the fairness and reasonableness of this Settlement.

Joint Stipulation of Class Action Settlement and Release, p. 21, ¶ 81 (ECF 322).

II. THE COURT SHOULD APPROVE THE SETTLEMENT

The proposed settlement is a fair, reasonable, and adequate settlement of the Parties' claims and defenses in this case. The proposed settlement was crafted to: (1) offer programmatic relief; (2) offer monetary relief that is fair to the class based on the results of extensive statistical analyses of information gathered in discovery and analyzed independently by experts for both sides; and (3) distribute such relief equally among the participating class members based on their number of weeks employed as a Store Manager since July 2, 2002. The settlement achieves a favorable result

without the risks, costs, and delay of additional sustained litigation, appeals and remands. It was negotiated after lengthy litigation of the Plaintiffs' claims, including an in-person two-day mediation attended by all counsel in San Francisco in March 2017.

What the Court found true in approving the settlement preliminarily has remained true after giving class members notice of their right to comment, object or opt-out, including the following findings:

> Specifically, it appears to the Court, on a preliminary basis, that the Settlement is fair and reasonable to Class Members when balanced against the probable outcome of further litigation, liability and damages issues, and the potential appeal of any rulings. It further appears that the settlement terms, including but not limited to the monetary terms and non-monetary terms as set forth in the Settlement Agreement, confer substantial benefits upon the Class, particularly in light of the damages that Plaintiffs and their counsel believe are potentially recoverable or provable at trial, without the costs, uncertainties, delays, and other risks associated with continued litigation, trial, and/or appeal. It also appears that the proposed Settlement has been reached as the result of intensive, informed, and non-collusive negotiations between the Parties, including arms'-length negotiations that occurred over a two-day, in-person mediation session with an experienced class action mediator (Mark S. Rudy) that ultimately led to the Parties' acceptance of a mediator's proposal. Based on the Court's review of the papers submitted in support of preliminary approval, and the Court's familiarity with the issues in the case, the Court concludes that the proposed Settlement Agreement has no obvious defects and is within the range of possible settlements appropriate for approval such that notice to the Class is appropriate.

Order at p. 2, ¶ 1 (ECF 324).

SUMMARY OF ESSENTIAL SETTLEMENT TERMS

I. PROGRAMMATIC RELIEF

The Settlement Agreement requires Family Dollar to undertake a systematic review of its process for setting Store Managers' compensation in consultation with experts in the fields of labor economics and industrial/organizational psychology. *Joint Stipulation of Class Action Settlement and Release*, ¶¶ 64-65 (ECF 322). Part of this review will be based on a validation study of the criteria used to set Store Manager's starting salaries. *Id.* ¶ 65. Based on such validation study,

Family Dollar will implement adjustments to its starting pay practices as necessary and appropriate within 120 days of the effective date of the Settlement Agreement or such later deadline as agreed to by the Parties or ordered by the Court. *Id.* ¶¶ 66, 69. Among other changes, the revised pay practices will provide that exceptions be reviewed on an individual basis by a designated representative or team, which may include responsible HR management. *Id.* ¶ 66. Prior to implementing revised pay practices for Store Managers, Family Dollar will make the modified practices available to Class Counsel on a confidential basis for review and provide Class Counsel with certification from a qualified expert that the pay practice, as revised, has been validated according to professional standards. *Id.* ¶¶ 66-67. Within thirty (30) calendar days of Family Dollar's implementation of the revised pay practices, the Parties shall submit a joint filing notifying the Court that the programmatic relief terms of the Settlement Agreement have been completed. *Id.* ¶ 68.

Family Dollar is also required to conduct a good faith review of the salary levels for incumbent female Store Managers. That review may include factors which impact individual pay including, but not limited to, those identified by the parties' respective expert witnesses. *Id.* ¶ 70. Based on such review, Family Dollar will make salary adjustments to the pay of incumbent female Store Managers as it deems necessary and appropriate. *Id.* Class Counsel will be provided, on a confidential basis, sufficient information to allow them to understand the methodology used in allocating any such adjustments. *Id.*

II. MONETARY RELIEF

Family Dollar has agreed to pay $45,000,000.00 (forty-five million five dollars and zero cents) in full satisfaction of all Released Claims (as defined in the Settlement Agreement, ¶ 45) on or before the funding date defined in the Settlement Agreement. *Id.* ¶ 25. The Total Class

Settlement Amount shall be applied as follows:

(a) Payment of Individual Settlement Payments to eligible Settlement Class Members pursuant to the terms set forth in the Settlement Agreement;

(b) Payment of Service Awards to qualifying Class Representatives and Named Plaintiffs for prosecution of this case, pursuant to the standards set forth in the Settlement Agreement;

(c) Payment of Class Counsels' attorneys' fees and expenses for prosecution of this case;

(d) Payment of all Class Notice and settlement administration costs; and,

(e) Payment of any employer withholding taxes to the extent required by federal, state or local law.

Id.

Settlement Class Members are automatically eligible to receive an individual settlement payment without having to submit a claim form or otherwise prove entitlement. *See id.* ¶¶ 52-53. All Class Members will be treated equally in the allocation and distribution of the proposed settlement fund. *See id.* The allocation will be based on the number of weeks that each Class Member worked as a store manager at Family Dollar between July 2, 2002 and November 14, 2017, the date of preliminary approval of the Settlement Agreement (the "Class Period"). *Id.* The following mutually agreed-upon point system will be used to calculate and apportion the settlement funds to individual Class Members:

- All participating class members will receive two (2) points for each week worked as a Store Manager from July 2, 2002 through December 31, 2006, one and a half (1.5) points for each week worked as a Store Manager from January 1, 2007 through December 31, 2014, and one (1) point for each week worked from January 1, 2015 through November 14, 2017.

- The value of each individual point will be determined by dividing the Net Settlement Amount by the total points attributed to all participating Class Members, resulting in the "point value."

- Each participating Class Member's individual settlement payment will be calculated by multiplying the Class Member's total number of points by the point value.

Id. ¶ 53.

Class members have been notified—via the Court approved Notice of Settlement—of their number of weeks worked as a Store Manager as documented in Family Dollar's records. Class Members were also given the opportunity to dispute that information and show that they worked a greater number of weeks than shown in such records. Only twenty-four (24) Class Members (.0064% of the entire Class) submitted such disputes. Administrator Decl. ¶ 9. The Settlement Administrator determined the merits of each of those disputes. *See id.*; *see also Joint Stipulation of Class Action Settlement and Release*, ¶ 34 (ECF 322).

The settlement is being administered by a reliable third-party settlement administrator approved by the Court. *See Joint Stipulation of Class Action Settlement and Release*, ¶ 23 (ECF 322). If the Court grants final approval of the Parties' settlement, the Settlement Agreement will release, resolve, relinquish and discharge the Settlement Class Members, as well as their respective assigns, executors, administrators, successors and agents from each and all of the Released Claims defined in the Agreement.

LEGAL STANDARD

I. PRESUMPTION IN FAVOR OF SETTLEMENT.

There is a "strong judicial policy in favor of settlements, particularly in the class action context." *Reed v. Big Water Resort, LLC*, 2016 U.S. Dist. LEXIS 187745, No. 2:14-cv-01583-DCN, *14 (D. S.C. May 26, 2016); *US Airline Pilots Ass'n v. Velez*, 2016 U.S. Dist. LEXIS 120714, **15-16 (W.D. N.C. 2016) (Conrad, J.); *see also Bennett v. Behring Corp.*, 737 F.2d 982, 984 (11th Cir. 1984); *In re Jiffy Lube Sec. Litig.*, 927 F.2d 155, 158-59 (4th Cir. 1991). In

evaluating the settlement agreement, "[t]he Court must be guided by 'the strong judicial policy favoring settlement as well as by the realization that compromise is the essence of settlement.'" *Carnegie v. Mutual Sav. Life Ins. Co.*, 2004 WL 3715446, at *17 (N.D. Ala. Nov. 23, 2004) (quoting *Bennett*, 737 F.2d at 968).

"Settlement of the complex disputes often involved in class actions minimizes the litigation expenses of both parties and also reduces the strains such litigation imposes upon already scarce judicial resources." *Reed*, 2016 U.S. Dist. LEXIS 187745 at *15. Moreover, "settlement agreements are highly favored in the law and will be upheld whenever possible because they are a means of amicably resolving doubts and preventing lawsuits." *Miller v. Republic Nat'l Life Ins. Co.*, 559 F.2d 426, 428 (5th Cir. 1977). "Particularly in class action suits, there is an overriding public interest in favor of settlement." *Cotton v. Hinton*, 559 F.2d 1326, 1331 (5th Cir. 1977); *see also* 2 Herbert Newberg & Alba Conte, *Newberg on Class Actions* § 11.41 at 11-88 (3d ed. 1992) (citing cases) ("The law favors settlement, particularly in complex cases where substantial judicial resources can be conserved by avoiding formal litigation."). The Supreme Court has explained that "[i]n enacting Title VII, Congress expressed a strong preference for encouraging voluntary settlement of employment discrimination claims." *Carson v. American Brands, Inc.*, 450 U.S. 79, 88 n.14 (1981).

II. STANDARD FOR DETERMINING THAT A PROPOSED SETTLEMENT IS FAIR, REASONABLE, AND ADEQUATE.

"The Court's role is not to engage in a claim-by-claim, dollar by dollar evaluation, but to evaluate the proposed settlement in its totality." *Borcea v. Carnival Corp.*, 238 F.R.D. 664, 673 (S.D. Fla. 2006). "To determine whether a proposed settlement is fair, reasonable, and adequate, the court must examine whether the interests of the class are better served by the settlement than

by further litigation." Manual for Complex Litigation, Fourth, at § 21.61 at p. 309; *Bailey v. Great Lakes Canning. Inc*. 908 F.2d 38, 42 (6th Cir. 1990); *McDermott Inc. v. AmCyde,* 511 U.S. 202 (1994); *Air Line Stewards and Stewardesses Association v. Trans World Airlines*, 630 F.2d 1164 (7th Cir. 1980).

Courts primarily consider the strength of the case for the plaintiffs on the merits, balanced against the amount offered in the settlement. *Armstrong v. Board of School Directors of the City of Milwaukee,* 616 F.2d 305, 314 (7th Cir. 1980). Courts evaluate the following factors in determining whether a settlement is fair, reasonable, adequate and proper for final approval: "(1) the fairness of the settlement negotiations and the views and experience of counsel; (2) the relative strength of the parties' cases as well as the uncertainties of litigation on the merits; (3) the complexity, expense, and likely duration of the litigation; (4) the adequacy of the settlement amount viewed against the risks and expenses of continued litigation; and (5) the stage of the litigation, including the factual record developed." *Reed*, 2016 U.S. LEXIS 187745 at *16-17; *see also Bennett* 737 F.2d at 986; *Jiffy Lube*, 927 F.2d at 158-59; *Velez*, 2016 U.S. Dist. LEXIS 120714, *15 (W.D. N.C. 2016); *Synfuel Technologies Inc. v. DHL Express (USA Inc.)*, 463 F.3d 646 (7th Cir. 2006); *Armstrong,* 616 F.2d at 314. "[T]here is a strong presumption in favor of finding a settlement fair that must be kept in mind in considering the various factors." *Lomascolo v. Parsons Brinckerhoff, Inc.*, 2009 U.S. Dist. LEXIS 89136, 2009 WL 3094955, at *10 (E.D. Va. Sept. 28, 2009); *see also Horton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 855 F. Supp. 825, 828 (E.D.N.C. 1994) (citing *Flinn v. FMC Corp.*, 528 F.2d 1169, 1173 (4th Cir. 1975)).

Here, as detailed below, each of these factors weighs firmly in favor of granting final approval of the Parties' Settlement Agreement.

A. The Settlement Negotiations were Conducted Fairly and Experienced Counsel Recommend the Settlement.

"In a class action settlement, there is a presumption of fairness, reasonableness, and adequacy when it is achieved through arms-length negotiations between experienced and capable counsel who are necessary to effect representation of the class interest after meaningful discovery." *Reed*, 2016 U.S. Dist. LEXIS 187745 at *17 (quotation omitted). The Fourth Circuit recognizes the following factors in assessing the standard for fair settlement negotiations: (1) the posture of the case at the time settlement was proposed, (2) the extent of discovery that had been conducted, (3) the circumstances surrounding the negotiations, and (4) the experience of counsel in the area of class action litigation. *Jiffy Lube*, 927 F.2d at 158-59.

These factors strongly favor approval of the proposed settlement. There is no basis for concern about fraud or collusion here because the resulting settlement was executed by experienced counsel following lengthy, contested and substantial legal and factual investigation. Moreover, the settlement was achieved in good faith after arm's length negotiations, and intensive litigation and mediation. *See e.g.*, *Ashley v. Regional Transp. Dist. & Amalgamated Transit Union Div. 1001 Pension Fund Trust*, No. 05-CV-01567-WYD-BNB, 2008 WL 384579, at *6 (D. Colo. Feb. 11, 2008) (finding that involvement by a mediator and a four-month negotiation period indicated no fraud or collusion); *see* Manual for Complex Litigation, Fourth, §21.612 at p. 313-14 ("Extended litigation between or among adversaries might bolster confidence that the settlement negotiations were at arm's length.").

In the instant case, at the instruction of the Court, the Parties participated in negotiations with the assistance of two experienced mediators, Eric Greene in 2011 and Mark Rudy in 2017. The Parties' negotiations were protracted and required multiple lengthy communications,

including a face-to-face mediation with Eric Greene in 2011 and Mark Rudy in October of 2017. Under the supervision of the mediators, all negotiations were conducted at arm's length and in good faith. The extensive discovery, fact-gathering, and motion practice that was conducted prior to the mediation allowed Class Counsel – who are experienced employment discrimination attorneys – to assess the strengths and weaknesses of the claims against Family Dollar and the benefits of the proposed settlement under the circumstances of this case. As a result of discovery exchanges, depositions, and communications with class members during the past 15 years, Class Counsel was well informed regarding Family Dollar's policies and practices and relied on that information in negotiating the non-monetary, programmatic terms of the Settlement Agreement. Class Counsel were also well informed regarding the potential for monetary recovery as Plaintiffs' statistical experts performed extensive compensation analyses and damages analyses using the personnel and payroll data provided by Family Dollar.

Because the settlement is the non-collusive result of extensive factual and legal analysis and protracted arm's length negotiations between experienced and well-informed counsel under the supervision of experienced mediators, this factor weighs heavily in favor of the Court's approval. *See e.g, Wineland*, 267 F. R.D. at 677 ("[T]he Settlement is the product of arm's length negotiations and, thus, is presumed to be fair and reasonable"); *see also* 2 Herbert Newberg & Alba Conte, *Newberg on Class Actions* §11.41 at 11-88 (3d ed. 1992) (there is usually a presumption of fairness when a proposed settlement, which was negotiated at arm's length by counsel, is presented for approval); *Fisher Bros. v. Cambridge-Lee Indus. Inc.*, 630 F. Supp. 482, 488-89 (E.D. Pa. 1985); *In re McDonnell Douglas Equip. Leasing Sec. Litig.*, 838 F. Supp. 729, 738-39 (S.D.N.Y. 1993) ("[C]ourts have consistently refused to substitute their business judgment for that of counsel, absent evidence of fraud or overreaching."); *Carnegie v. Mutual Sav. Life Ins.*

Co., 2004 WL 3715446, at *19 (N.D. Ala. 2004) (finding proposed settlement fair because it was reached four years after the action was commenced, following extensive discovery and filing of affidavits from experts for both parties).

B. The Relative Strength of the Parties' Cases, the Uncertainty of Litigation, and the Adequacy of the Proposed Settlement Amount Favors Settlement.

1. The range of possible recovery demonstrates the settlement reached is fair, adequate, and reasonable.

"The likelihood of success at trial is by far the most important factor when evaluating a settlement." *Knight v. Alabama,* 469 F. Supp. 2d 1016, 1032-33 (M.D. Ala. 2006). In evaluating the relative strength of the Parties' cases, the Court should consider the merits of the Class Members' claims, the defenses raised by Defendant, the manageability of the trial, the risks faced by the Parties, the difficulty of prevailing, and the likelihood of appeal. *Carnegie,* 2004 WL 3715446, at *20; *see also In re Domestic Transp. Antitrust Litig.*, 148 F.R.D. 297, 319 (N.D. Ga. 1993). Judge Conrad recently noted that "[i]n analyzing adequacy, courts must weigh the following factors against the settlement amount: (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." *Velez*, 2016 U.S. Dist. LEXIS 120714 at **16-17 (relying upon Jiffy Lube, 927 F.2d at 159).

Here, Plaintiffs sought both monetary and prospective programmatic relief. The proposed settlement provides both forms of such relief. As already shown above, the settlement provides significant non-monetary benefits to the class members through the modification of Family Dollar's pay practices for Store Managers. *See supra* (describing prospective programmatic relief).

These new pay practices benefit current and future Family Dollar Store Managers and will have a positive effect for years to come. *See e.g. Numismatic Guaranty Corp. of America*, No. 06-61677-CIV, 2008 WL 649124, at * 10 (S.D. Fla. Jan. 31, 2008) ("Where, as here, the injunctive relief addresses the very practices that gave rise to the suit - and indeed are at the core of the Plaintiffs goals in pursuing the litigation – a court is justified in viewing such injunctive relief as a significant component of the settlement."); *DeHoyos v. Allstate Corp.*, 240 F.R.D. 269, 291 (W.D.Tex. 2007) (finding that the proposed settlement was in the best interests of the class because of the substantial and immediate benefits provided to class members, including implementation of a new policy aimed at correcting the disparate impact on minorities, the risks and length of trial in class actions, and the likelihood of appeals and subsequent proceedings if the case proceeded on the litigation track).

The monetary fund is also a fair and reasonable compromise of the range of backpay calculated by each side's experts independently of one another. Plaintiffs' experts calculated damages in the range of $38 million. Family Dollar strongly disagreed, asserting that the damage exposure, if liability was found, would be less than half of that.[5] Taking into consideration the risk of loss and the inevitable delay in recovery, Plaintiffs' experts and Class Counsel came to the conclusion that the terms of settlement, fashioned by the Mediator as his own proposal, should be accepted because it allowed payment of nearly thirty million dollars to the class, meaningful programmatic relief, and payment of the reasonable fees, expenses, and settlement administration

[5] Family Dollar's statistical expert, Dr. Saad, asserted that, among other things, any exposure calculation should be limited to: (1) the post-2006 time period that Family Dollar used the Pay Modeler policy that is argued to be the primary basis for Plaintiffs' claims in this case; and (2) class members who did not sign arbitration agreements. Dr. Saad also asserted that additional non-discriminatory factors identified by the experts needed to be taken into account.

costs for the work done on behalf of the Class. The proposed Settlement Agreement provides for monetary compensation to all Class Members without them having to bear the expense, risk, delay and uncertainty of litigation, or proving their individual claims or damages. The Court has already found preliminarily that "the settlement terms, including but not limited to the monetary terms and non-monetary terms as set forth in the Settlement Agreement, confer substantial benefits upon the Class, particularly in light of the damages that Plaintiffs and their counsel believe are potentially recoverable or provable at trial, without the costs, uncertainties, delays, and other risks associated with continued litigation, trial, and/or appeal." *Order* at p. 2, ¶1 (ECF 324).

The Supreme Court has cautioned that in reviewing a proposed class settlement, a court should "not decide the merits of the case or resolve unsettled legal questions." *Carson v. Am. Brands, Inc.,* 450 U.S. 79, 88 n.14, 101 S. Ct. 993, 67 L. Ed. 2d 59 (1981). "Because the object of settlement is to avoid, not confront, the determination of contested issues, the approval process should not be converted into an abbreviated trial on the merits." *Airline Pilots,* 2016 U.S. Dist. LEXIS 120714 at **15-16 (noting that the settlement hearing is not "a trial or a rehearsal of the trial"); *United States v. North Carolina*, 180 F.3d 574, 581 (4th Cir. 1999). Instead, courts have consistently held that the function of a judge reviewing a settlement is to determine whether the proposed settlement is reasonable "without substituting its business judgment for that of counsel, absent evidence of fraud or overreaching." *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 455 (S.D.N.Y. 2004) (internal quotation marks and citations omitted). And, "[a]n integral part of the strength of the case on the merits is a consideration of the various risks and costs that accompany continuation of the litigation." *Reed*, 2016 U.S. Dist. LEXIS 187745 at *21.

The factual and legal issues in this case are complex, as demonstrated by the Parties' years of hard-fought litigation and negotiation over the terms of the Settlement Agreement itself.

Moreover, currently pending before the Court of Appeals, but not yet briefed, argued, or decided, is a significant dispute about the arbitration agreements signed by a significant number of Settlement Class Members. The decision in that appeal could have a significant impact on the continued litigation and present substantial potential risks for both Parties, and especially those Class Members who have signed arbitration agreements.

In addition, the liability phase of trial of the Settlement Class Members' claims would be complex and would require substantial additional preparation and many fact and expert witnesses. The Parties previously estimated that the liability phase of trial alone would last a minimum of 4 to 6 weeks. Moreover, the damages phase of trial, if necessary, would have added to the complexity and may have required individual assessment of each Settlement Class Member's alleged claims and damages. All of these complex proceedings would be extremely lengthy and expensive and would result in significant delay before any potential recovery.

In the end, Plaintiffs could spend significant amounts of time and money preparing for and participating in a drawn-out trial and recover nothing, or significantly less than the relief provided by the proposed settlement. Likewise, Family Dollar could spend significant amounts of money defending itself at trial and lose this case. In this circumstance, settlement is preferable to the risks of continued litigation faced by the Parties. The fact that settlement allows both Parties to avoid the risk and expense of further litigation is a factor in support of settlement approval.

Moreover, "victory -- even at the trial stage -- is not a guarantee of ultimate success" given the risks and expense of appeal. *In re Milken & Assoc. Sec. Litig.*, 150 F.R.D. 46, 53 (S.D.N.Y. 1993). Even if the Settlement Class Members succeeded at trial, they would most likely face a challenging and lengthy appeal. Such an appeal could significantly alter any potential relief awarded at trial and could even eliminate such relief altogether. At the very least, an appeal would

postpone any recovery or remedy for years and could result in Family Dollar ultimately paying no damages at all if such an appeal were successful. If Family Dollar were to prevail at trial, it too would likely face a lengthy appellate process with an uncertain outcome.

The various strengths and weaknesses of the Parties' claims and defenses strongly favors settlement. As set out above, continued litigation has clear risks and uncertainties and unproven benefits. The inherent fees and costs associated with extensive litigation and trial will reduce the net amounts available to satisfy claims. Based on the foregoing, the proposed settlement is a fair resolution of the dispute between the Parties.

2. The Complexity, Expense, and Duration of Litigation Also Weighs in Favor of Settlement.

The complexity, expense and duration of the litigation of this case also weighs in favor of settlement. *See Reed*, 2016 U.S. Dist. LEXIS 187745 at *21; *see also Carnegie,* 2004 WL 3715446, at *22 (finding the complexity, expense, and duration of continued litigation and possible appeals weigh in favor of the proposed settlement because expert testimony on complex actuarial methodologies would be mandatory and trial likely would consume several months and postpone conclusion of the action); *In re Metropolitan Life Derivative Litig.*, 935 F. Supp. 286, 293-94 (S.D.N.Y. 1996) (finding that settlement would undoubtedly be in the best interest of all the parties, in light of the effort and expense that would be required to take the case to and through trial.). The circumstances here are like those before Judge Conrad when he approved the settlement in *Velez*:

> The Settlement Agreement would put to final rest eight years of litigation between the East Pilots and West Pilots. These cases had been litigated with extensive motion practice by the time settlement was reached. Prior to settlement, the Parties engaged in a combination of formal and informal discovery, and counsel for the Parties conducted investigation relating to the potential claims and the underlying events and transactions. [I]t is clear that after numerous cases and years of litigation, the Parties are well aware of

> the important facts and the strength of their cases. The Parties hired an independent mediator, engaged in mediation over three days in January 2016, and continued negotiating in the weeks following the mediation sessions. It was only after those extensive negotiations that the Parties ultimately consummated the Settlement Agreement. It appears that negotiations were at arm's length, and there are no signs of collusion. Counsel for both sides have . . . ample experience in the type of case at issue here. Consequently, all the fairness factors favor final approval of the Settlement Agreement.
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> It is clear, based in part on the many years of litigation amongst the Parties, that there are viable competing claims that could have been litigated over years. Each of the Parties have weighed the ultimate success on the merits and the risks of establishing liability inherent in litigation. Each party thinks its case is strong, but recognizes the difficulties in proving and defending its claims. The anticipated duration of these consolidated cases weighs heavily in favor of settlement. The Parties have been litigating for over eight years and are still in the discovery process. The ordeal of additional discovery, dispositive motions, trial, and appeal would deplete the USAPA treasury. The hemorrhaging has to stop.

Velez, 2016 U.S. Dist. LEXIS 120714 at **15-17.

As in that case, this is a complex and protracted case, requiring statistical and other experts who are extremely expensive, as well as burdens of proof which shift between the parties. On the issue of liability on their disparate impact claims, Plaintiffs must prove that Family Dollar's pay policies have a disparate impact on female Store Managers. If Plaintiffs meet this burden, Family Dollar would have multiple potential defenses, including proving that the elements of the pay policies are job related and consistent with business necessity. If Family Dollar is successful in that intermediate defense, Plaintiffs must then show that less burdensome alternative means are available.[6] The experts on both sides of this case had opposing views that were well thought out and argued, including disagreement on a number of statistical matters and analyses of the data.

[6] A similarly complex, though substantively different, framework of proof is necessary for Plaintiffs' Title VII disparate treatment.

Resolution of these differences would require that the Court decide between competing views on detailed and complex statistical methods and models. In addition, the Settlement Agreement spares the Parties the difficulties and risks that they would have faced in litigating the issue of damages.

For these reasons, neither side can be sure which view would have been ultimately accepted by the Court and the jury if this case went to trial. This case has been pending more than a decade and has required review and production of thousands and thousands of documents, multiple motions that have had to be briefed and argued, and experts who have each issued lengthy, complex reports. The ordeal of significant pre-trial motions and other pleadings, as well as a lengthy trial and an inevitable appeal by at least one, if not both, Parties will necessarily result in extending the length of this case and significant additional expenses.

In contrast to the complexity, delay, risk and expense of continuing litigation, the proposed settlement will yield a prompt, certain, and fair, reasonable, and adequate recovery for Settlement Class Members. Accordingly, this factor also weighs in favor of settlement. *See e.g.*, *Reed*, 2016 U.S. Dist. LEXIS 187745 at *21-22.

C. The Stage of the Proceedings at which the Settlement was Achieved Favors Settlement.

To reach a fair settlement, the "parties must have an adequate appreciation of the merits of the case before negotiating." *In re Prudential Ins. Co. America Sales Practice Litig. Agent Actions*, 148 F.3d 283, 319 (3d Cir. 1998) (quotation marks omitted). Here, the Parties have had ample time and discovery to evaluate their positions in the case and believe this settlement to be a fair resolution of all claims and defenses. Plaintiffs' counsel thoroughly investigated and prosecuted the claims involved in this litigation and Family Dollar's counsel thoroughly investigated and prosecuted the defenses involved in this litigation.

Over the past decade, the Parties engaged in extensive fact-gathering, motion practice, and discovery. The Parties thoroughly litigated this matter, conducting fact and expert depositions, reviewing voluminous documents, including time and payroll records produced by Family Dollar, and compiling and analyzing multiple expert reports, complex databases and computer programs used in the analyses of damages and statistical disparities in wages and overall compensation. Depositions included experts, named plaintiffs, a 30(b)(6) corporate representative, executive vice-presidents, human resource management, and operations management. Both sides also responded to multiple sets of written discovery, which resulted in Plaintiffs' counsel reviewing tens of thousands of personnel and payroll records, emails, policies and other document production. Class Counsel received and analyzed, with expert assistance, personnel and payroll data for the period from July 2, 2002 through 2017.

In addition, the parties vigorously litigated certification of the class in both this Court and the Court of Appeals. With respect to motion practice, in addition to the highly contested class certification motions, which went up on appeal to the Fourth Circuit Court of Appeals, the Parties have also briefed and argued multiple motions, including multiple motions to dismiss, a motion for judgment on the pleadings, a motion for summary judgment, motions to compel discovery, a motion to compel arbitration and motions on numerous other issues. Thus, the current stage of the litigation is favorable to settlement. *See e.g.*, *Reed*, 2016 U.S. Dist. LEXIS 187745 at *22.

The resulting settlement is the product of arm's length negotiations and was executed by experienced counsel following lengthy, contested and substantial legal and factual investigation. This factor therefore weighs heavily in favor of the Court's approval. *See e.g, Wineland,* 267 F. R.D. at 677 ("[T]he Settlement is the product of arm's length negotiations and, thus, is presumed to be fair and reasonable"); *see also* 2 Herbert Newberg & Alba Conte, Newberg on Class Actions

§11.41 at 11-88 (3d ed. 1992) (there is usually a presumption of fairness when a proposed settlement, which was negotiated at arm's length by counsel, is presented for approval); *Fisher Bros. v. Cambridge-Lee Indus. Inc.,* 630 F. Supp. 482, 488-89 (E.D. Pa. 1985); *In re McDonnell Douglas Equip. Leasing Sec. Litig.,* 838 F. Supp. 729, 738-39 (S. D.N.Y. 1993) ("[C]ourts have consistently refused to substitute their business judgment for that of counsel, absent evidence of fraud or overreaching."). "These facts suggest that the proceedings were fairly advanced, and that the parties had sufficient opportunity to evaluate the strengths and weaknesses of the case." *See Carnegie v. Mutual Sav. Life Ins. Co.*, 2004 WL 3715446, at *19 (N.D. Ala. 2004) (finding proposed settlement fair because it was reached four years after the action was commenced, following extensive discovery and filing of affidavits from experts for both parties); *see alsoMemorandum Of Law In Support Of Consent Motion For Preliminary Approval Of Settlement Agreement* at pp. 14-15 (ECF #323).

Moreover, "[i]f settlement is not approved, substantial additional work and expenses will be expended in the prosecution and defense of Plaintiffs' claims." *Id*. Accordingly, approval of the settlement is proper. *Id.* at *22-23.

CONCLUSION

For all the foregoing reasons, the Parties respectfully request that the Court approve the Parties' Settlement Agreement, find that there is no just reason for delay, direct the Clerk of the Court to enter an Order Granting Final Approval of the Settlement and enter Final Judgment forthwith; and, retain jurisdiction of all matters relating to the interpretation, administration, implementation, effectuation, and enforcement of the Settlement.

Respectfully submitted this 13th day of March, 2018.

/s/ Robert L. Wiggins, Jr.
Robert L. Wiggins, Jr., ASB-1754-G63R
Greg O. Wiggins, ASB-1752-I68G
Ann K. Wiggins, ASB-7006-I61A
Rocco Calamusa, Jr., ASB-5324-A61R
Kevin W. Jent, ASB-0804-E61K
Wiggins, Childs, Pantazis, Fisher & Goldfarb
The Kress Building, 301 19th Street North
Birmingham, Alabama 35203
205-314-0500
205-254-1500 (facsimile)

Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing on counsel via electronic filing with the Court's ECF system, to the following:

Jason C. Schwartz
Gibson, Dunn & Crutcher LLP
1050 Connecticut Avenue, N.W.
Washington, DC 20036-5306
Telephone: 202/955-8242
Fax: 202/530-9522
jschwartz@gibsondunn.com

John R. Wester
David C. Wright, III
Adam K. Doerr
Amanda R. Pickens
ROBINSON BRADSHAW & HINSON, PA
101 North Tryon Street, Suite 1900
Charlotte, NC 28246
jwester@robinsonbradshaw.com
dwight@robinsonbradshaw.com
adoerr@robinsonbradshaw.com

Ryan C. Stewart
Gibson, Dunn & Crutcher LLP
1050 Connecticut Avenue N.W.
Washington, D.C. 20036-5306
Telephone: 202/955-8230
Fax: 202/831-6012
rstewart@gibsondunn.com

Michele L. Maryott
Gibson, Dunn & Crutcher LLP
3161 Michelson Drive
Irvine, California 92612-4412
Telephone: 949/451-3945
Fax: 949/475-4668
mmaryott@gibsondunn.com

Theane Evangelis
Gibson, Dunn & Crutcher LLP
333 South Grand Avenue
Los Angeles, California 90071-3197
Telephone: 213/229-7726
Fax: 213/229-6726
tevangelis@gibsondunn.com

This 13th day of March, 2018.

/s/Robert L. Wiggins, Jr.
OF COUNSEL