IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

SUPERMEDIA INC., ET AL.,	§	
	§	
Plaintiffs,	§	
	§	**CIVIL ACTION NO.**
v.	§	**3:12-CV-2034-G**
	§	
SANDRA NOE, CARL OHNSTAD,	§	
and CLAIRE PALMER,	§	
individually, and on behalf of all others	§	
similarly situated,	§	
	§	
Defendants.	§	

JOINT MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT AND BRIEF IN SUPPORT

Pursuant to Federal Rule of Civil Procedure 23, Plaintiffs SuperMedia Inc., SuperMedia LLC, SuperMedia Services Inc., SuperMedia Sales Inc., SuperMedia Employee Benefits Committee, Idearc Inceptor LTD, Dex Media, Inc., and Dex Media Benefits and Compensation Committee (collectively, "SuperMedia" or "Plaintiffs") and Defendants Sandra Noe, Carl Ohnstad and Claire Palmer, individually, and on behalf of all others similarly situated (collectively, "Defendants" or "Class Representatives") hereby file their Joint Motion for Preliminary Approval of Class Action Settlement and Brief in Support.

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I.
SUMMARY OF MOTION

After extensive arm's length negotiations and Court-ordered mediation between their respective counsel, SuperMedia and Defendants have reached an agreement to settle the above-captioned class action in a manner that is consistent with federal law under the Employee Retirement Security Act of 1976 ("ERISA") and that is fair, reasonable, and adequate. The settlement agreement is intended to fully and finally settle this class action, upon final Court approval. The purpose of this motion is to obtain preliminary court approval of the settlement agreement and the notice of the proposed settlement to be disseminated to class members.

Generally, the proposed class settlement provides that (i) the Court shall issue declarations of SuperMedia's right to modify, amend, or terminate its health and welfare benefits plans, (ii) SuperMedia shall pay class counsel their reasonable and necessary attorneys' fees and costs in the agreed amount of $140,000, and (iii) the final declaratory judgment and release shall bind all class members who have not opted-out of the settlement. The full terms of the settlement are set forth in full in the Stipulation and Settlement Agreement (the "Agreement"), filed contemporaneously with this motion and attached hereto as Exhibit A.[1] Preliminary approval of the settlement and submission of the settlement to the proposed class members are warranted because the "proposed settlement is fair, reasonable, and adequate," and "the interests of the Class are better served by the settlement than by further litigation." Manual for Complex Litigation, Fourth § 21.61 at 309 (2004).

[1] The Settlement Agreement (Exhibit A) includes several documents: (i) the Mediated Settlement Agreement, a handwritten summary drafted by Court-appointed mediator Jeffrey Abrams, (ii) the typewritten Stipulation and Settlement Agreement, (iii) Exhibit A, the agreed proposed Order Preliminarily Approving Settlement, (iv) Exhibit B, the proposed agreed Order Finally Approving Settlement; and (v) Exhibit C, the proposed Agreed Class Action Final Judgment, and, alternatively, the agreed Final Declaratory Judgment as to Defendants Sandra Noe, Carl Ohnstad, Claire Palmer and Pamela Bennett.

Therefore, Plaintiffs and Defendants respectfully move this Court for a Preliminary Approval Order:

(a) preliminarily certifying the class for the purposes of settlement;

(b) preliminarily approving the terms of the settlement set forth in the Agreement;

(c) establishing a date for a hearing to determine the fairness, reasonableness, and adequacy of the settlement set forth in the Agreement ("Fairness Hearing"); and

(d) directing notice to class members of the settlement and the Fairness Hearing, in a form substantially similar to the proposed and agreed upon Notice of Class Action Settlement (a true and correct copy of which is attached hereto as Exhibit B) (the "Notice") and setting corresponding requirements for the distribution of the Notice, the opt-out and objection procedures for potential class members, and all other such requirements as are necessary for the final approval of the proposed class settlement.

I.
SUMMARY OF FACTS

A. PROCEDURAL BACKGROUND

1. For many years, SuperMedia has provided health and welfare benefits to former employees of SuperMedia and its predecessor entities pursuant to benefits plans maintained pursuant to the Employee Retirement Security Act of 1974 ("ERISA") (collectively, the "Plans").

2. Due to the increasing costs of healthcare and competitive pressure in the marketplace, SuperMedia made the difficult decision to reduce or eliminate health and welfare benefits for affected retirees. On June 25, 2012, SuperMedia amended its retiree health and welfare benefit Plans in a manner that changed the Plans to access-only plans (without company

contributions to premium costs) for the majority of retirees under the age of 65 and that terminated benefits for the majority of retirees at or above the age of 65.

3. More than 1,000 retirees initially objected to the amendments, disputed SuperMedia's right to amend, modify, or terminate the Plans, and made a claim for benefits. *See, e.g.*, Dkt. No. 23, Exhibits AA-AS.

4. To resolve this dispute, SuperMedia initiated this suit on June 26, 2012, seeking a declaratory judgment declaring that it has the right to amend, modify, or terminate its retiree medical benefits Plans and that its amendments to the Plans are legally enforceable and effective under applicable law. *See* SuperMedia's Original Class Action Complaint for Declaratory Judgment (the "Original Complaint") (Dkt. No. 1).

5. In response to the Complaint, Defendants filed Counterclaims, asserting violations of ERISA Sections 404 and 510. (Dkt. No. 73). The Counterclaims were dismissed by Order of the Court on August 7, 2013. (Dkt. No. 98).

6. On August 30, 2013, the Court ordered that SuperMedia and Defendants (collectively, the "Parties") participate in a mediation to resolve this dispute with Court-appointed mediator Jeffrey Abrams. (Dkt. No. 105). After extensive arms-length negotiations, including an exchange of documents and proposals, the Parties agreed to settlement of this action (the "Settlement"). While Defendants initially objected to the amendments and asserted SuperMedia did not have the right to make the changes at issue, Defendants and their counsel now agree that SuperMedia had the right to make the changes to the Plans contained in the amendments, pursuant to federal ERISA law, as repeatedly interpreted by the federal courts. *See, e.g., Nichols v. Alcatel USA, Inc.*, 532 F.3d 364, 373 (5th Cir. 2008). After approval of the Agreement by all Parties, and pursuant to approval by SuperMedia's Board of Directors, all of

the Parties finally executed the Agreement on October 30, 2013. The Parties seek preliminary approval of the Settlement, as set forth in the Agreement.

B. SUPERMEDIA'S HEALTH AND WELFARE PLANS

7. By way of background, in 2008, SuperMedia (f/k/a Idearc, Inc.) adopted the plan documents that govern its provision of retiree health and welfare benefits and make explicit its right to amend and terminate. Specifically, SuperMedia provided retiree health and welfare benefits to eligible retirees of SuperMedia and its predecessor entities through three Plans.[2] In accordance with ERISA, SuperMedia communicated the key provisions of the Plans, including its retiree health and welfare benefits, to eligible employees and retirees through the following three ERISA Summary Plan Descriptions:

a. The Retiree Health & Welfare Summary Plan Descriptions: Pre-65 ("Pre-65 SPD"), a true and correct copy of which is attached hereto as Exhibit G);

b. The Retiree Health & Welfare Summary Plan Descriptions: 65+ Medicare ("65 Med SPD"), a true and correct copy of which is attached hereto as Exhibit H; and

c. The Retiree Health & Welfare Summary Plan Descriptions: Mid-Atlantic Plan ("Mid-Atlantic SPD"), a true and correct copy of which is attached hereto as Exhibit I.[3]

8. These SPDs became effective on January 1, 2008, and applied to all eligible retirees and their spouses or dependents. The Plans and the 2008 SPDs are hereinafter referred to as the "Plan Documents." The Plan Documents describe various health and welfare benefits,

[2] The Plans include: (i) the SuperMedia Management and Non-Union Hourly Plan for Group Insurance ("Management Plan"), a true and correct copy of which is attached hereto as Exhibit C; (ii) the SuperMedia Plan for Group Insurance for Mid-Atlantic Associates ("Mid-Atlantic Plan"), a true and correct copy of which is attached hereto as Exhibit D; and (iii) the SuperMedia Plan for Group Insurance for New York and New England Associates ("New York Plan"), a true and correct copy of which is attached hereto as Exhibit E. SuperMedia also provides a Medicare Part B reimbursement, pursuant to Internal Revenue Code 401(h), under the SuperMedia Pension Plan for Collectively-Bargained Employees, a true and correct copy of which is attached hereto as Exhibit F.

[3] These three ERISA Summary Plan Descriptions are hereinafter collectively referred to as the "2008 SPDs."

including medical, prescription drug, dental, vision, basic life insurance, and supplemental life insurance. Under the Plan Documents, SuperMedia has the right to amend, modify, revoke, or terminate retiree health and welfare benefits because: (1) the Plan Documents do not contain vesting provisions; (2) the Plan Documents expressly state that no retiree benefits vest; and (3) the Plan Documents expressly reserve the right to amend, modify, revoke, or terminate the Plans.

9. For example, section 7.4 of the Management Plan states:

> **7.4 No Vested Rights**
>
> To the maximum extent permitted by law, no person shall acquire any right, title, or interest in or to any portion of a Trust, an Insurance Contract, an HMO Contract, or Medicare Plan Contract otherwise than by the actual payment or distribution of such portion under the provisions of the Plan or a Component Benefit, or acquire any right, title, or interest in or to any benefit referred to or provided for in the Plan or any Component Benefit otherwise than by actual payment of such benefit.

Exhibit C, at § 7.4 (emphasis added).[4]

10. The Pre-65 SPD states:

> **The Company and the Plan Administrator reserve the right to amend, modify, revoke, or terminate these Plans in whole or in part at any time**, except to the extent limited by an applicable collective bargaining agreement as to retirees covered by the collective bargaining agreement. **If a plan is terminated, you will not have any further rights other than payment of expenses you had incurred before the Plan was terminated.**

Exhibit G at 2 (emphasis added).[5] Like the other 2008 SPDs, the Pre-65 SPD reiterates these rights numerous times throughout the SPD:

> [T]he Company and the Plan Administrator reserve the right to amend, modify, revoke, or terminate the benefits […]

[4] *See also*, Exhibit D, at § 7.4 (stating identical language to Exhibit C, at § 7.4); *see also*, Exhibit E, at § 7.4 (stating identical language to Exhibit C, at § 7.4).

[5] *See also*, Exhibit H, at 4 ("the Company and the Plan Administrator reserve the right to amend, modify, revoke, or terminate the benefits") and 23 (identifying termination of the plan as an event that causes coverages to end); *see also*, Exhibit I, at 4 ("the Company and the Plan Administrator reserve the right to amend, modify, revoke, or terminate the benefits") and 23 (identifying termination of the plan as an event that causes coverages to end).

> [Circumstances] When Coverages End . . . termination […]
>
> [T]he Company reserves the right to – at any time and for any reason – change or discontinue the Plan, or increase or decrease contributions under the Plan at its sole discretion […]
>
> Idearc reserves the right to amend, modify, or terminate these plans.

Id. at 4, 23, 35, and non-paginated section.

11. With the exception of a GTE plan discussed below, earlier plan documents adopted by predecessors of SuperMedia also expressly reserve the broad right to unilaterally amend or terminate plan benefits at any time. For example, a 2004 Verizon SPD states, "the Verizon Employee Benefits Committee (VEBC) also reserves the **right to amend, modify, suspend or terminate** the plans at any time, at its discretion, with or without advance notice to participants, subject to any duty to bargain collectively." *See* the 2004 Verizon Medical Expense Plan for New York and New England Post-1986 Associate Retirees SPD, at 5 (emphasis added), a true and correct copy of which is attached hereto as Exhibit J.

C. THE AMENDMENTS

12. SuperMedia's administration and payment of retiree health and welfare benefits resulted in tremendous expenses and liability for SuperMedia. Due to rising healthcare costs and a trend towards the reduction or elimination of retiree health and welfare benefits among SuperMedia's competitors, extreme financial pressure on SuperMedia exists to reduce the costs associated with retiree benefits. In fact, as of December 2011, SuperMedia carried an unfunded net liability of more than approximately $315 million for retiree health and welfare benefits under the Plans. As a result of these circumstances, SuperMedia re-evaluated its retiree health and welfare benefit plans.

13. Based on its express right to amend, modify, or terminate, SuperMedia amended the benefits to: (i) reduce its liability; (ii) reduce expenses required to operate its business; (iii) increase efficiency, while meeting customer needs; and (iv) effectively provide for the maintenance of its financial stability and the needs of current and former employees. Specifically, on June 25, 2012, by unanimous written consent of the SuperMedia EBC of the Board of Directors, SuperMedia amended each of the three Plans. *See* Exhibit K, a true and correct copy of the June 25, 2012 Amendments. On October 15, 2012, by unanimous written consent of the Board of Directors of SuperMedia, SuperMedia issued subsequent amendments to the Plans to clarify the intent of the prior amendments with regard to the rights and benefits of certain current and former bargained-for employees. *See* Exhibit L, a true and correct copy of the October 15, 2012 Amendments. On April 23, 2013 through April 30, 2013, by resolution of the SuperMedia EBC, SuperMedia amended the Plans to incorporate changes as part of the Dex Media merger transaction. *See* Exhibit M, a true and correct copy of the April 23, 2012 Amendments. The changes enacted in June 2012, October 2012, and April 2013 (collectively, the "Amendments") generally modify the Plans by reducing or eliminating SuperMedia's contribution to premium costs (and thereby increasing retiree responsibility for premium costs), modifying co-pay amounts, and/or modifying deductible amounts. The October 2012 amendments effectively reiterated the changes made in the June 2012 amendments, while clarifying that the Amendments are not applicable to certain bargained for employees of Locals 1301, 1302, and 2213, who are subject to collective bargaining, as described below. The April 2013 amendments make no substantial changes to the benefits provided under the Plans or to the previous June or October amendments, but rather clarified the rights of former employees of Dex One and SuperMedia, Inc. as part of the merger transaction. The Amendments contain

provisions that apply differently to retirees depending on whether they meet the conditions of three groups: (i) the majority of retirees; (ii) GTE retirees subject to specific "Change in Control" provisions; and (iii) retirees who were former bargaining unit members of certain unions and who retired prior to December 7, 2008.

14. The sections of the Amendments applicable to the majority of SuperMedia retirees generally changed the Plans by: (1) eliminating eligibility of retirees over the age of 65; (2) eliminating SuperMedia's premium contributions for retirees under age 65 as of January 1, 2014; and (3) eliminating Medicare Part B reimbursements. Exhibits K, L. However, under the Amendments, SuperMedia continues to provide important benefits to the majority of its eligible retirees, including eligibility to participate in a number of medical, dental, and vision plans, sponsored by SuperMedia for retirees under 65. *Id.* Thus, the Amendments create an "access-only" plan for retirees under age 65 that continues to facilitate the current Plans without the company-paid premium subsidies.

15. Next, specific sections of the Amendments apply to certain retirees of GTE who retired prior to 1999 or who were within five years of retirement eligibility by 1999, per the terms of the GTE "Change in Control" ("GTE Retirees").[6] *See* the GTE Retiree Medical Choices SPD at p. 3, a true and correct copy of which is attached hereto as Exhibit N. In conformity with the Change in Control provision from the GTE SPD, the Amendments

[6] Retirees who are subject to the GTE Change in Control are retirees who (i) were participants in the GTE Retiree Choices Medical Plan as of May 18, 1999 and (ii) either (a) retired from GTE before May 18, 1999 (other than with a deferred vested pension) or (b) retired (other than with a deferred vested pension) from GTE or any successor after May 18, 1999 and were within five years of reaching eligibility for retirement (not including eligibility for a deferred vested pension) under the applicable GTE pension plan as of May 18, 1999, as set forth in the "Amendments to the Plan for Group Insurance, the Plan for Bargained Retired Group Insurance, All Other Group Life Insurance and Group Medical Insurance Plans that Provide Benefits to Retired Employees and Summary Plan Descriptions" that was adopted by GTE on May 7, 1999. *See* Exhibit N.

applicable to GTE Retirees modify co-pays, deductibles, and other administrative costs, but continue to provide retirees access to retiree medical benefits. According to the GTE Change in Control, a "change in control" of GTE occurred on May 18, 1999, and a successor is restricted from making certain amendments or discontinuing the retiree benefits, subject to certain reserved rights. *Id.* at 3. Notwithstanding this prohibition, a successor has the right to modify the costs and administration of the plan: "any successor to GTE may in the ordinary course of business […] (ii) change, increase or decrease co-payments, deductibles and other requirements for coverage and benefits; and/or (iii) make other changes in administration or changes in the Plan's design and its coverage and benefits." *Id.*[7] (emphasis added). Thus, the Amendments contain specific sections applicable to the GTE Retirees and make changes that are consistent with both SuperMedia's rights under the SuperMedia Plan Documents and the terms of the GTE Change in Control. *See id.;* Exhibits K, L.

16. Finally, the Amendments contain sections that make clear that the retiree medical benefits of certain former bargaining unit members are not affected by the Amendments. The Amendments *exclude* former bargaining unit employees who: (i) retired on or after December 7, 2008 and (ii) were formerly bargaining unit employees represented by one of the following three labor unions: (a) the International Brotherhood of Electrical Workers, AFL-CIO Local 2213 ("Local 2213"), a party to the Collective Bargaining Agreement between Idearc Media North Greenbush, NY – Directory Clerical Unit and International Brotherhood of Electrical Workers, AFL-CIO Local 2213 that became effective on December 7, 2008; (b) Communications Workers of America, AFL-CIO Local 1301 ("Local 1301"), a party to the Collective Bargaining

[7] Of note, the GTE SPD "Change in Control" provision is unique to GTE Retirees and is not included in other Plan Documents. Therefore, this provision does not apply to the majority of retirees, as described herein, or former bargaining members of the Defendant Unions.

Agreement between Idearc Media and Communications Workers of America, AFL-CIO Local 1301 Directory Sales that became effective on December 7, 2008; or (c) Communications Workers of America, AFL-CIO Local 1302 ("Local 1302"), a party to the Collective Bargaining Agreement between Idearc Media New England Directory Clerical Unit and Communications Workers of America, AFL-CIO Local 1302 that became effective on December 7, 2008 (collectively, the "NYNE Unions") (the retirees, collectively the "Post 2008 NY/NE Retirees"). *See* Exhibit L. Unlike the majority of SuperMedia's collective bargaining agreements ("CBAs"), the 2008 CBAs of Locals 2213, 1301, and 1302 contain sections pertaining to retiree medical benefits. Additionally, SuperMedia intends to engage in collective bargaining regarding the retiree benefits of current employees who are members of Locals 1301, 1302, and 2213. Therefore, the benefits of Post 2008 NY/NE Retirees are not affected by the Amendments.

II.
ARGUMENT AND AUTHORITIES

Pursuant to arms-length negotiations, the Parties agreed to finally and completely resolve this action under the terms of the Agreement. The Parties jointly move for preliminary approval of the proposed Class Settlement, as described therein. The Settlement is fair and just because it seeks declarations that are consistent with SuperMedia's rights under federal law and the terms of its Plan Documents, provides a benefit to the Settlement Class in the form of payment of attorney's fees and costs (in the amount of $140,000) by SuperMedia, and resolves this action in an expeditious and efficient manner for all Parties and Settlement Class Members. Therefore, the Parties request that the Court preliminarily approve the Settlement and enter an order consistent with this motion and the proposed order, which is attached as Exhibit A to the Agreement (Motion Exhibit A).

A. THE PROPOSED SETTLEMENT

a. The Proposed Settlement Class

The putative settlement class (the "Settlement Class" or "Class", each a "Member") consists of all retirees and spouses or dependents of retirees who were participants in SuperMedia's Plans and whose rights to benefits were affected by the Amendments.

The following persons are EXCLUDED from the Settlement Class:

- current employees of SuperMedia;
- Post 2008 NY/NE Retirees; and
- the following persons who are participants in the Medical Executive Replacement Plan ("MERP"): Joseph Porter, Charles Higgins, Wayne Kauffman, Donald Marinari, Al Dilorenzo, Audrey Tracey, Adeline Feltmann and Lester Luedecker.

Additionally, any potential Settlement Class Member who opts-out of the Settlement using the below described procedure will be excluded from the Settlement Class (all, collectively, the "Excluded Persons").

b. The Proposed Settlement

(1) *Payment of Class Counsel's Attorneys' Fees and Costs*

Under the Settlement, SuperMedia will pay reasonable and necessary attorneys' fees and costs to counsel for Defendants and the Settlement Class, Curtis Kennedy and Robert Goodman ("Class Counsel") in the amount of $140,000.00 (one hundred forty thousand dollars and no cents).

(2) *Declarations of SuperMedia's Right to Modify, Amend or Terminate*

The Court will issue the following declarations (the "Declarations"), which Class Counsel agrees are consistent with SuperMedia's rights under applicable law:

1. The June 25, 2012 amendments, the October 15, 2012 amendments, and the April 30, 2013 amendments (collectively, the "Amendments") enacted by SuperMedia are legal, valid, binding, and enforceable;

2. The Amendments enacted by SuperMedia do not violate, conflict with, or breach any provision of or obligation under the retiree health and welfare benefits plans, collective bargaining agreements, or any other operative agreements;

3. As to retirees who (i) are not subject to the GTE Change in Control[8], (ii) are not subject to the MERP[9], and (iii) are not Post 2008 NY/NE Retirees[10], SuperMedia has the unilateral right to modify, amend, revoke or terminate the plans or any provisions therein at any time;

4. As to GTE retirees who are subject to the provisions of the GTE Change in Control, SuperMedia has the unilateral right to modify or amend: (i) the co-payments, deductibles, and other requirements for coverage and benefits; and (ii) the administration, design, coverage, and benefits of the plans.

(3) *Release*

Finally, the Settlement includes a Release by Settlement Class Members of all actual or potential claims relating to the Amendments or to the claims in the Action. The Release would thus bar Settlement Class Members from filing additional lawsuits relating to the Amendments or to the claims in the Action. This Settlement has no effect on any retiree's claims made in the separately pending suit *Murphy, et al. v. Verizon Communications, et al.* (Civil Action No. 3:09-

[8] Retirees who are subject to the GTE Change in Control are retirees who (i) were participants in the GTE Retiree Choices Medical Plan as of May 18, 1999 and (ii) either (a) retired from GTE before May 18, 1999 (other than with a deferred vested pension) or (b) retired (other than with a deferred vested pension) from GTE or any successor after May 18, 1999 and were within five years of reaching eligibility for retirement (not including eligibility for a deferred vested pension) under the applicable GTE pension plan as of May 18, 1999, as set forth in the "Amendments to the Plan for Group Insurance, the Plan for Bargained Retired Group Insurance, All Other Group Life Insurance and Group Medical Insurance Plans that Provide Benefits to Retired Employees and Summary Plan Descriptions" that was adopted by GTE on May 7, 1999.

[9] Retirees who are subject to the MERP are: Joseph Porter, Charles Higgins, Wayne Kauffman, Donald Marinari, Al Dilorenzo, Audrey Tracey, Adeline Feltmann and Lester Luedecker.

[10] Post 2008 NY/NE Retirees are those who (i) were formerly bargaining unit employees represented by one of the following three labor unions: (a) the International Brotherhood of Electrical Workers, AFL-CIO Local 2213, a party to the Collective Bargaining Agreement between Idearc Media North Greenbush, NY – Directory Clerical Unit and International Brotherhood of Electrical Workers, AFL-CIO Local 2213 that became effective on December 7, 2008; (b) Communications Workers of America, AFL-CIO Local 1301, a party to the Collective Bargaining Agreement between Idearc Media and Communications Workers of America, AFL-CIO Local 1301 Directory Sales that became effective on December 7, 2008; or (c) Communications Workers of America, AFL-CIO Local 1302, a party to the Collective Bargaining Agreement between Idearc Media New England Directory Clerical Unit and Communications Workers of America, AFL-CIO Local 1302 that became effective on December 7, 2008; and (ii) retired on or after December 7, 2008. The benefits of Post 2008 NY/NE Retirees are not affected by the Amendments.

CV-2262-G) suit in the United States District Court for the Northern District of Texas, Dallas Division) ("Murphy Suit"). If the Settlement is approved, the Declarations and Release will be binding on all Settlement Class Members.

B. STANDARD FOR PRELIMINARY APPROVAL

Rule 23(e) provides that a settlement of class claims or defenses must be approved by the Court. To finally approve a class settlement, a court must find that the settlement satisfies the general class requirements of Rule 23(a) and (b) and also that the Settlement is fair, reasonable, and adequate under Rule 23(e). *See In re Heartland Payment Sys.*, 851 F. Supp. 2d 1040, 1051-1052 (S. D. Tex. 2012). Before this final approval, the Court must direct notice to all prospective class members. Fed. R. Civ. P. 23(e)(1).

Although Rule 23 does not expressly provide for a preliminary fairness evaluation, an initial review of a proposed class action settlement is common in the Fifth Circuit and affords the court an opportunity to review the proposed settlement and approve the notice of the proposed certification, settlement, and final fairness hearing before it is distributed to class members. *See, e.g., Silvercreek Mgmt. v. Banc of Am. Secs. LLC,* 534 F.3d 469, 471 (5th Cir. Tex. 2008); *see also* Manual for Complex Litigation (Fourth) § 21.6 (2004) ("The two-step process for evaluation of proposed settlements has been widely embraced by the trial and appellate courts."). "At the stage of preliminary approval, the questions are simpler, and the court is not expected to, and probably should not, engage in analysis as rigorous as is appropriate for final approval." Manual for Complex Litigation § 21.63; *see also In re Chinese-Manufactured Drywall Prods. Liab. Litig.*, 2012 U.S. Dist. LEXIS 5223 at 19-21. "Where the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class and falls within the reasonable range of approval, preliminary approval is granted." *Id.*; *see also*

DeHoyos, et al. v. Allstate Corp., No,. SA-01-CA-1010-FB, 2006 U.S.Dist. LEXIS, *4-5 (W.D. Tex. June 2, 2006) (preliminarily approving settlement based upon extensive investigation and arm's length negotiations between experienced counsel).

Therefore, while final approval requires that all requirements are met under Rule 23(a)-(b) and also that the settlement is fair, reasonable, and adequate, preliminary approval is generally granted where the parties have negotiated without fraud or collusion and the proposed class settlement is not obviously deficient. *See* Manual for Complex Litigation § 21.63; *cf. In re Heartland Payment Sys.*, 851 F. Supp. 2d 1040, 1051-1052 (S. D. Tex. 2012). The Court should preliminarily approve the Settlement and provide for the Notice to be distributed because (i) the Settlement Class is not deficient under Rule 23(a)-(b), and (ii) the proposed Settlement resulted from arms-length negotiations and is fair, reasonable, and adequate.

C. PRELIMINARY APPROVAL IS PROPER

a. The Proposed Settlement Class is Proper Under Rule 23(a)

First, preliminary approval of the Settlement is proper because the proposed Settlement Class, as defined above, satisfies the general class action requirements of Rule 23(a) and is not obviously deficient. Courts have long recognized the benefits and efficiencies derived from resolving disputes in the form of a single class action, rather than numerous isolated, separate suits. *Shaw v. Toshiba Am. Info. Sys.*, 91 F. Supp. 2d 942, 948 (E. D. Tex. 2000). "In order to facilitate the adjudication of disputes involving common questions and multiple parties in a single action, the English Court of Chancery developed the bill of peace [. . .]" which provided that "one person, called the adversary, might bring suit in equity against several persons, called the multitude, with separate but similar interests, or the multitude might sue to resolve in one action common questions of law or fact in dispute between the adversary and each member of the multitude." 7A Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, Federal Practice

and Procedure § 1751 (1986); 3 Herbert B. Newberg & Alba Conte, Newberg on Class Actions § 1.09, n. 83 (3d ed. 1992) (citing How v. Tenants of Brooms Grove, 1 Vern. 22, 23 Eng. Rep. 277 (1681)).

Based upon the precedent of the English Bill of Peace, Federal Rule of Civil Procedure 23 provides for the certification and settlement of class actions characterized by (1) numerosity, (2) commonality, (3) typicality, and (4) adequate representation. Fed. R. Civ. P. 23(a); *Shaw v. Toshiba Am. Info. Sys.*, 91 F. Supp. 2d 942, 948 (E. D. Tex. 2000). These requirements are satisfied because:

(1) The Settlement Class is comprised of approximately 3,685 former bargaining and non-bargaining unit employees who were participants in SuperMedia's Plans. Thus, joinder of all class members is impracticable.

(2) Questions of law and fact exist that are common to the Settlement Class. All 3,685 Class Members were participants in SuperMedia's three health and welfare benefits Plans, which contain nearly identical anti-vesting and reservations of rights provisions. *See* Exhibits C-E. Additionally, all Settlement Class Members were affected by the Amendments. Therefore, questions regarding the validity of the Amendments and SuperMedia's rights and obligations under ERISA and the Plan Documents are common to the Class.

(3) Defendants Noe, Ohnstad and Palmer will serve as class representatives for the Defendant Class (the "Class Representatives"). Because they were similarly situated participants in the Plans and initially objected to the Amendments, the Class Representatives will likely have defenses and claims, if any, that are typical of the defenses and claims, if any, of the Settlement Class.

(4) The Class Representatives will fairly and adequately protect the interests of the Defendant Class. Representatives Noe and Palmer adequately served as Class Representatives of a similar class of SuperMedia retirees in the Murphy Suit. Defendant Ohnstad is also a similarly situated retiree and will be an adequate and fair representative. Furthermore, Class Counsel for Defendants Curtis L. Kennedy and Robert E. Goodman, Jr. satisfy the requirements for appointment as class counsel under Rule 23. Class Counsel are familiar with class actions, familiar with the Class Members in this actions, and familiar with the legal and factual issues related to the validity of the Amendments and SuperMedia's rights under ERISA.

b. The Proposed Class Satisfies 23(b)

Additionally, Rule 23(b) provides for the maintenance of three types of class actions: (1) where separate adjudication would create a risk of individual judgments that vary or conflict or that would be dispositive of another member's interests; (2) where the opposing party's actions apply generally to the class as a whole such that declaratory relief is appropriate to the class as a whole; and (3) where common questions of law and fact predominate. Fed. R. Civ. P. 23(b)(1)-(3); *Shaw v. Toshiba Am. Info. Sys.*, 91 F. Supp. 2d 942 at 951. The proposed Class Settlement is proper under either type (1), (2) or (3).

(1) The Proposed Class Satisfies 23(b)(1)

First, because this suit seeks a declaratory judgment, rather than monetary damages, any adjudication will necessarily be determinative of SuperMedia's rights as to all Class Members, rather than an individual Class Member. The requested declarations relate to the validity of the Amendments and the proper interpretation of Plan Documents, which govern SuperMedia's provision of retiree welfare benefits to all Class Members. Therefore, an adjudication of SuperMedia's rights and obligations respecting one individual participant in SuperMedia's Plans

would necessarily be dispositive of SuperMedia's rights and obligations regarding all other participants, since SuperMedia's Plans govern the health and welfare benefits of all Class Members and the Plan Documents contain the same or nearly identical terms (including the reservation of the right to amend, modify, or terminate). Conversely, separate judgments regarding SuperMedia's right to amend its Plans, if conflicting, would create incompatible standards of conduct for SuperMedia. Fed. R. Civ. P. 23(b)(1). Therefore, the Settlement Class satisfies Rule 23(b)(1).

(2) Alternatively, the Proposed Class Also Satisfies 23(b)(2)

Second, in enacting the Amendments, SuperMedia acted on grounds that apply generally to the Settlement Class, so that corresponding declaratory relief is appropriate with respect to all participants who were affected by the Amendments. Fed. R. Civ. P. 23(b)(2). Therefore, the Settlement Class satisfies Rule 23(b)(2).

(3) Alternatively, the Proposed Class Also Satisfies 23(b)(3)

Third, common questions of law and fact include whether SuperMedia had a right to amend or terminate retiree health and welfare benefits under the Plans and whether, therefore, the Amendments are valid and enforceable against participants. These questions are common to the Settlement Class Members and predominate over any questions affecting individual members. Fed. R. Civ. P. 23(b)(3). Indeed, the relevant terms of the Plan Documents—which reject vesting and provide reservations of rights to SuperMedia—are nearly identical in each Plan Document and provide SuperMedia with the right to amend under ERISA.[11]

[11] *See, e.g.*, Exhibit G at 4 ("the Company and the Plan Administrator reserve the right to amend, modify, revoke, or terminate the benefits") and 23 (identifying termination of the plan as an event that causes coverages to end); *see also* Exhibit H at 4 ("the Company and the Plan Administrator reserve the right to amend, modify, revoke, or terminate the benefits") and 23 (identifying termination of the plan as an event that causes coverages to end).

Additionally, participants for whom separate, relevant questions may have applied have been excluded from the Class. For example, Post 2008 NY/NE Retirees' post-employment benefits are impacted by collective bargaining; therefore, they are excluded from the Settlement Class. Likewise, participants in the separate MERP benefit plan are subject to specific provisions therein and, thus, are also excluded from the Settlement Class. As a result, the remaining Class Members consist entirely of individuals who (i) were participants in almost identical Plans that provided SuperMedia the unilateral right to enact the Amendments and (ii) were affected by the Amendments.[12]

Rule 23(b)(3) also requires that the Court find a class action is "superior to other available methods for fairly and efficiently adjudicating the controversy." *Id.* Pertinent considerations include: (A) the class members' interests in individually controlling the defense of separate actions, (B) the extent of any litigation already begun, and (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum.[13] *Id.* No other litigation related to SuperMedia's Amendments to its health and welfare benefit Plans has begun, and this is the only forum handling any relevant litigation. Additionally, the Class Members' interests are best served by representation by the Class Representatives and Class Counsel, who are familiar with the claims and defenses at issue in this litigation, the terms of the Plan Documents, and the likely outcomes of a trial on the merits.

[12] Additionally, to the extent individual questions exist for GTE Retirees, Post-2008 NY/NE Retirees, or the Majority Retirees, the Court may approve sub-classes for these groups.

[13] Although Rule 23(b)(3) also directs the Court to consider the "likely difficulties in managing a class action", this consideration is not necessary where a settlement class is presented. *See Amchem Prods. v. Windsor, 521 U.S. 591, 620 (1997)* ("Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems, see Fed. Rule Civ. Proc. 23(b)(3)(D), for the proposal is that there be no trial."); *see also Schwartz v. TXU Corp.*, 2005 U.S. Dist. LEXIS 27077, 55 (N.D. Tex. Nov. 8, 2005). Nevertheless, managing a class action would not prove too difficult given the proposed Class definition and the common effect of the reservation of rights in the Plan Documents common to all Class Members and will effectively resolve the rights and obligations of SuperMedia with respect to the entire Settlement Class.

Therefore, the proposed Class Settlement satisfies the requirements of Rule 23(a) and (b), such that preliminary approval and temporary class certification for the purpose of settlement is warranted.

D. THE PROPOSED SETTLEMENT IS FAIR, REASONABLE AND ADEQUATE

Additionally, preliminary approval is proper because the proposed Settlement is fair and adequate, or at least within the range of fairness and adequacy. Fed. R. Civ. P. 23(e)(2); *see also In re Corrugated Container Antitrust Litigation*, 1979 U.S. Dist. LEXIS 12096, 8, 1979-1 Trade Cas. (CCH) P62,690 (S. D. Tex. 1979) (finding "the proposed settlements appear on their face and from the extensive materials documenting their reasonableness to be well within the range of fairness and adequacy and to provide sufficient benefits to all class members that the class should be given notice and an approval hearing be set")*; see also See In re Heartland Payment Sys.*, 851 F. Supp. 2d 1040, 1063 (S. D. Tex. 2012). The proposed Class Settlement is within the range of fairness because (i) it is the result of arms-length negotiations by qualified and competent counsel, (ii) it provides a fair and reasonable benefit to the Settlement Class Members by precluding additional expenses likely to result from continued litigation and a trial on the merits and also by providing for payment of reasonable and necessary attorneys' fees and costs to Class Counsel such that the Settlement Class incurs no costs in this action, and (iii) it resolves this dispute with a declaratory judgment that is consistent with federal law under ERISA and the terms of the Plan Documents, and which would almost certainly have resulted from a more costly trial on the merits.

a. The Settlement Resulted from Competent Arms-Length Negotiations

As an initial matter, the settlement was negotiated at arms-length by experienced and well-informed counsel, leading up to and during mediation before Court-appointed mediator Jeffrey Abrams. Counsel for the Parties entered into the Agreement only after extensive

investigation into the relevant documents (including the Plans, the 2008 SPDs, predecessor plan documents, CBAs, and the Amendments) and applicable law. The Parties have reviewed all relevant documents, which were also attached to the Original Complaint. (Dkt No. 1). Additionally, Class Counsel has significant experience with and knowledge of the interests of the Settlement Class based upon their handling of numerous Class Members' initial objections and claim forms and also through their representation of many of the same retirees in Murphy Suit. Counsel for the Parties communicated and exchanged proposals in the weeks leading up to the mediation and settlement. The Settlement is not the result of collusion or fraud.

b. The Settlement Benefits the Settlement Class

Also, the Settlement will benefit the Settlement Class by providing for an effective resolution to this action without the need for Class Members to incur expenses associated with continued litigation and trial. Moreover, the Settlement provides a benefit to Class Members because SuperMedia has agreed to pay all reasonable and necessary attorneys' fees and costs to Class Counsel in the agreed amount of $140,000. This compensation is not excessive and is an accurate calculation of reasonable and necessary attorneys' fees and costs incurred by Class Counsel. Class Counsel Curtis L. Kennedy will submit a declaration that this compensation is not excessive and is an accurate calculation of the reasonable value of reasonable and necessary attorneys' fees, costs, and expenses incurred in representing the Defendants and Class in this Action.

c. The Settlement and Declarations are Consistent with Federal Law

Finally, the Declarations are consistent with federal law under ERISA and the unambiguous terms of the Plan Documents, which plainly reserve to SuperMedia the right to modify, amend, or terminate. Therefore, it is almost certain that the Court would enter a declaratory judgment consistent with SuperMedia's right to modify, amend, or terminate after a

trial on the merits, if Settlement were not reached and approved. Because of the likelihood of SuperMedia's success on the merits, the benefits to the Settlement Class in obtaining payment of attorneys' costs and fees to Class Counsel and in avoiding continued, costly litigation are great. *See In re Heartland Payment Sys.*, 851 F. Supp. 2d 1040, 1065 (S.D. Tex. 2012) ("The likelihood of success, in turn, provides a gauge from which the benefits of the settlement must be measured.").

Federal law is clear that, unlike pension benefits plans, retiree health and welfare benefits do not vest under ERISA and are instead subject to modification and termination. *See, e.g.*, *Inter-Modal Rail Emps. Ass'n v. Atchison, Topeka & Santa Fe Ry. Co.*, 520 U.S. 510, 515 (1997) ("unless an employer contractually cedes its freedom, it is generally free under ERISA, for any reason at any time, to adopt, modify, or terminate its welfare plan"); *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78 (1995) ("Nor does ERISA establish any minimum participation, vesting, or funding requirements for welfare plans as it does for pension plans."); *Nichols v. Alcatel USA, Inc.*, 532 F.3d 364, 373 (5th Cir. 2008). Through this distinction between pensions, on the one hand, and health and welfare benefit plans, on the other, Congress intentionally recognized an employer's inherent need for flexibility in administering health and welfare plans, which, unlike pension plans, are subject to the ever-fluctuating costs of medical care. *See Wise v. El Paso Natural Gas Co.*, 986 F.2d 929, 935 (5th Cir. 1993) ("Congress has conspicuously chosen to exempt welfare benefit plans from the full breadth of ERISA's extensive requirements . . . The disparate treatment accorded welfare plans is not accidental. . ."); *see Moore v. Metro. Life Ins. Co.*, 856 F.2d 488, 492 (2d Cir. 1988) ("With regard to an employer's right to change medical plans, Congress evidenced its recognition of the need for flexibility in rejecting the automatic vesting of welfare plans. Automatic vesting was rejected because the costs of such

plans are subject to fluctuating and unpredictable variables."). Therefore, health and welfare benefits do not vest unless an employer explicitly agrees to provide contractually vested benefits.

SuperMedia and its predecessors have never intended for the retiree health and welfare benefits provided under the Plans to vest, and no language in any of the Plan Documents suggests these benefits vested. To the contrary, the Plan Documents expressly preclude the vesting of any benefits under the Plans and instead reserve SuperMedia's right to modify, amend, or terminate at its discretion. *See, e.g.,* Exhibit C, at § 7.4 ("No Vested Rights"); Exhibit G at 2 ("The Company and the Plan Administrator reserve the right to amend, modify, revoke, or terminate these Plans in whole or in part at any time"). Therefore, the Settlement reflects the law of the Fifth Circuit and is within a range of fairness, reasonableness, and adequacy for the resolution of this action.

E. CLASS NOTICE

Federal Rule 23(e)(1) requires that the Court direct notice "in a reasonable manner." The Parties request that the Court approve the proposed Notice. *See* Exhibit B. The Parties further request that the Court direct the mailing and distribution of the Notice to Class Members, as set forth in the Agreement and pursuant to Rule 23(e)(1). *See* Exhibit A. Finally, the Parties request that the Court set the procedure for potential Class Members to opt-out, object, or otherwise take action related to the Settlement and the Fairness Hearing as described in the Notice and the Agreement. *See* Exhibits A, B.

The proposed Notice provides potential Class Members with information regarding the lawsuit, the Settlement, and the Fairness Hearing in a clear and understandable manner. Additionally, the Notice directs Members to a website for more information and to see the full terms of the Agreement. The Notice further provides class members with an opportunity and procedure to opt-out of the Settlement Class, to object to the Settlement, and to attend the

Fairness Hearing. Plaintiffs shall cause a copy of the Notice to be mailed by First-Class Mail to all Settlement Class Members. Because the Settlement Class consists of approximately 3,685 members who can be reasonably identified by name and address through SuperMedia's internal records of its participants, the proposed method of distribution will likely be sufficient to provide individual notice in a timely and reasonable manner. Therefore, the proposed content and manner of notice satisfies the requirements of Rule 23(e). *See In re Heartland Payment Sys.*, 851 F. Supp. 2d 1040, 1061 (S. D. Tex. 2012) (finding a notice that summarized the settlement in easy-to-understand plain English and provided a website for more information complied with Rule 23(e)(1)).

F. SETTLEMENT FAIRNESS HEARING

Finally, the Parties request that the Court set a Fairness Hearing to finally approve the Settlement. *See* Fed. R. Civ. P. 23(3)(2) ("If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable and adequate."). The Parties will file and serve briefs in support of the Settlement twenty-one (21) days prior to the deadline for Defendant Class Members to object to the Settlement; and reply briefs or other papers supporting the settlement or attorneys' fees and expenses shall be filed and served seven (7) calendar days before the Settlement Hearing. The Notice will provide information regarding the Fairness Hearing to potential Class Members.

III.
CONCLUSION AND PRAYER

The Parties reached a Settlement Agreement that is fair, reasonable, and adequate and will finally resolve this action in a manner that is consistent with the terms of the Plan Documents and the law under ERISA. After conducting a reasonable investigation into their claims and defenses and analyzing the relevant Plan Documents, the Parties participated in

extensive arms-length negotiations leading up to and during Court-ordered mediation. The proposed Settlement provides for a final declaratory judgment, consistent with federal law and the unambiguous terms of the Plan Documents, provides for payment of attorneys' fees and costs of Class Counsel in the agreed amount of $140,000, and finally resolves this controversy. It is proper for the Court to preliminarily approve the Settlement and direct notice of the Settlement to be sent to prospective Class Members because (i) the proposed Settlement Class complies with the requirements of Rule 23(a) and (b) and is not facially deficient; and (ii) the proposed Settlement resulted from arms-length negotiations and is within a range of fairness, reasonableness, and adequacy in light of the Plan terms and the law under ERISA.

For these reasons, the Parties hereby request that the Court enter an order, which (i) preliminarily certifies the class for the purposes of settlement; (ii) preliminarily approves the Settlement, (iii) sets a Fairness Hearing, (iv) directs notice of the Settlement and Fairness Hearing to be sent to the Settlement Class Members, (v) protects the jurisdiction of the Court, and (vi) makes such other findings and procedural requirements as necessary for final approval of the Settlement. The Parties pray for any such other relief to which they may be entitled at law or in equity.

December 12, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 12, 2013, I electronically filed the foregoing document with the clerk of court for the U.S. District Court, Northern District of Texas, using the electronic case filing system of the court. The electronic case filing system sent a "Notice of Electronic Filing" to all attorneys of record who have consented in writing to accept this Notice as service of this document by electronic means.

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