

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION**

**CAROLYN NOLEN, WINDY
KELLEY, CARA KELLEY and
PAULA LITTON,**

Plaintiffs,

v.

Case No: 6:20-cv-330-PGB-EJK

**FAIRSHARE VACATION
OWNERS ASSOCIATION,**

Defendant.

_____ /

ORDER

This cause is before the Court on Plaintiff's Motion for Approval of Class Notice (Doc. 106) and Plaintiff's Motion for Approval of Class Notice Administrator (Doc. 114). Defendant responded, opposing only the description of the claim, defenses, and relief sought. The Class Notice is now due to be approved, subject to the following modifications.

I. BACKGROUND

This case involves a timeshare exchange program. Consumers, such as Plaintiffs, purchase timeshare interests which are then placed into Defendant's Trust. Once subject to the Trust—also known as Club Wyndham Plus or the Fairshare Program—timeshare purchasers can use their points to book stays at other resort locations affiliated with the Fairshare Program, rather than just at their home resort. Plaintiffs filed their original class action complaint alleging *inter*

alia Defendant breached its fiduciary duties to class members on February 25, 2020. (Doc. 1).

On March 18, 2021, the Court entered an order granting in part Fairshare's motion to dismiss several counts in Plaintiff's original complaint. (Doc. 67). The Court then struck portions of Plaintiff's subsequent amended complaint. (Doc. 69). Plaintiff then moved for class certification on its remaining claims. (Doc. 82).

On July 12, 2021, the Court certified Plaintiffs' Rule 23(b)(3) class and directed the parties to file a motion seeking approval of the proposed notice to class members. (Doc. 95). Plaintiffs proposed the form and content of Short Form and Long Form notices on August 2, 2021, in accord with Federal Rule of Civil Procedure 23(c)(2)(B) to apprise absent class members of the nature of the claim, advise of them their rights, and provide them an opportunity to opt out of participation in the class. (Doc. 106). Defendant responded in opposition on August 5, 2021, objecting to Plaintiff's description of the claim and Defendant's case against it. (Doc. 107). Plaintiff proposed the following claim description in the Short Form notice:

Four Club Wyndham Plus Members—referred to here as Class Representatives—sued Fairshare Vacation Owners Association (“Fairshare”) alleging that Fairshare violated its fiduciary duties to Club Wyndham Plus Members (“Club Members”). Most Wyndham timeshare owners join Club Wyndham Plus. To join Club Wyndham Plus, Club Members assign their Timeshare Use Interests to the Fairshare Vacation Plan Use Management Trust Agreement (the “Trust”). Fairshare acts as Trustee for the Trust, and, as such, it owes fiduciary duties to Club Members. Class Representatives allege that Fairshare violated those fiduciary duties by, among other things, paying other Wyndham-

related entities to perform various services for Club Members without sufficient due diligence or oversight related to those costs and without seeking competitive bids from other potential vendors, and alleging that Fairshare has maintained a multi-million-dollar surplus sum of money in the Trust's Fund account that it should have returned to Club Members.

If the Class Representatives are successful, changes to the operations of Club Wyndham Plus could occur.

Fairshare denies the allegations against it. It does not believe it violated any fiduciary duties. Fairshare has alleged other defenses to the Class Representatives' legal claims. The Court has not decided whether Fairshare did anything wrong. There is no money available now and no certainty there will be. However, your legal rights are affected, and you have a choice to make now[.]

(Doc. 106-1, p. 2). Defendant countered with the following claim description:

Four Club Wyndham Plus Members—referred to here as Class Representatives—sued Fairshare Vacation Owners Association (“Fairshare”) alleging that Fairshare violated its fiduciary duties to Club Wyndham Plus Members (“Club Members”). Most Wyndham timeshare owners join Club Wyndham Plus. To join Club Wyndham Plus, Club Members assign their Timeshare Use Interests to the Fairshare Vacation Plan Use Management Trust (the “Trust”). Fairshare acts as Trustee for the Trust, and, as such, it owes fiduciary duties to Club Members. Class Representatives allege that Fairshare violated those fiduciary duties by, among other things, entering into transaction with related entities and maintaining a surplus sum of money in the Trust's Fund account (a “Fund Balance”) that it should have returned to Club Members.

If the Class Representatives are successful, changes to the operations of Club Wyndham Plus could occur.

Fairshare denies the allegations against it. It does not believe it violated any fiduciary duties. Fairshare maintains that its handling of the Fund Balance prevented higher Program Fees, and all relationships with other entities were expressly disclosed in the timeshare and trust documents provided to timeshare purchasers. Fairshare has alleged other defenses to the Class Representatives' legal claims. The Court has not decided whether Fairshare did anything wrong. There is no

money available now and no certainty there will be. However, your legal rights are affected, and you have a choice to make now[.]

(Doc. 107, p. 7).

While the Motion to Approve Class Notice was pending, Plaintiffs moved unopposed for Approval of Class Notice Administrator after selecting Epiq Class Action & Claims Solution, Inc. (“**Epiq**”) to serve as notice administrator.

II. STANDARD OF REVIEW

A Rule 23(b)(3) class requires that “the court . . . direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort.” FED. R. CIV. PRO. 23(c)(2)(B). This notice is essential to give absent class members an opportunity to opt out of the Rule 23(b)(3) class. *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 617 (1997). Giving a class action judgment binding effect with respect to absent class members that were not provided sufficient notice violates constitutional due process protections. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). This is so, in part, because due process requires that the language of the class notice establish the parameters of preclusive effects against absent class members. *See Twigg v. Sears, Roebuck & Co.*, 153 F.3d 1226–27 (11th Cir. 1998).

As such, Rule 23 requires that:

[t]he notice must clearly and concisely state in plain, easily understood language: (i) the nature of the action; (ii) the definition of the class certified; (iii) the class claims, issues, or defenses; (iv) that a class member may enter an appearance through an attorney if the member so desires; (v) that the court will exclude from the class any member who requests

exclusion; (vi) the time and manner for requesting exclusion; and (vii) the binding effect of a class judgment on members.

FED. R. CIV. PRO. 23(c)(2)(B). “The method and manner of the notice process is ‘left to the discretion of the [district] court subject only to the broad ‘reasonableness’ standards imposed by due process.’” *Florida Educ. Ass’n v. Dep’t of Educ.*, 447 F. Supp. 3d 1269, 1274–75 (N.D. Fla. 2020) (quoting *Grunin v. Int’l House of Pancakes*, 513 F.2d 114, 121 (8th Cir. 1975)).

III. DISCUSSION

On the whole, the parties are in agreement about the proposed form and substance of the class notice. Accordingly, the Court approves of the undisputed portions of Plaintiff’s proposed notice in both form and substance. (Doc. 106).

As for their disagreement, Defendant levies two charges against Plaintiffs’ description of the nature of the action, the class claims, and the proffered defenses. (Docs. 106-1, 106-2, 107). First, Defendant argues the description is overly broad because it includes claim theories relating to a lack of trustee “due diligence” that the Court struck in Plaintiff’s amended complaint. (Doc. 107, p. 2). The Court agrees that this description attempts to bootstrap in theories the Court has previously cautioned Plaintiff against including. (*See* Doc. 76, p. 7 n.5).

Second, Defendant argues an asymmetry in description length and detail between Plaintiffs’ claims and Defendant’s defenses unfairly suggests the Court favors Plaintiff. Defendant cites no case law in support of this proposition, only arguing the alleged discrepancy cuts against the Eleventh Circuit’s requirements

that the descriptions be “objective” and “neutral.” *See Twigg*, 153 F.3d at 1227 (citing *In re Nissan Motor Corp. Antitrust Litig.*, 552 F.2d 1088, 1103–05 (5th Cir. 1977)).¹ Without persuasive support for such a tenuous inference, the Court rejects the premise that detail or length imply a bias towards one side or foretell a likely outcome. As such, the Court will not adopt that portion of Defendant’s proposed description.

The result of these objections is that the Court approves of the proposed class notice, subject to the following modifications of the Short Form notice:

Four Club Wyndham Plus Members—referred to here as Class Representatives—sued Fairshare Vacation Owners Association (“Fairshare”) alleging that Fairshare violated its fiduciary duties to Club Wyndham Plus Members (“Club Members”). Most Wyndham timeshare owners join Club Wyndham Plus. To join Club Wyndham Plus, Club Members assign their Timeshare Use Interests to the Fairshare Vacation Plan Use Management Trust (the “Trust”). Fairshare acts as Trustee for the Trust, and, as such, it owes fiduciary duties to Club Members. Class Representatives allege that Fairshare violated those fiduciary duties by, among other things, entering into transactions with Wyndham-related entities and maintaining a significant surplus sum of money in the Trust’s Fund account (a “Fund Balance”) that it should have returned to Club Members.

If the Class Representatives are successful, changes to the operations of Club Wyndham Plus could occur.

Fairshare denies the allegations against it. It does not believe it violated any fiduciary duties. Fairshare has alleged other defenses to the Class Representatives’ legal claims. The Court has not decided whether Fairshare did anything wrong. There is no money available now and no certainty there will be.

¹ In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit handed down before October 1, 1981.

However, your legal rights are affected, and you have a choice to make now[.]

The Court further notes this modified claim description should be incorporated into the appropriate sections of the Long Form notice.

Finally, Defendant's lack of opposition to Plaintiff's Motion to Approve Class Notice Administrator and Epiq's extensive experience handling class action administration assure the Court that Epiq will ably discharge its duties in ensuring notice is efficiently and timely provided to absent class members. (*See* Doc. 114).

IV. CONCLUSION

It is therefore **ORDERED AND ADJUDGED** as follows:

1. Plaintiffs' Motion for Approval of Class Notice (Doc. 106) is **GRANTED IN PART AND DENIED IN PART.**
2. Plaintiffs' Motion for Approval of Notice Administrator (Doc. 114) is **GRANTED.**
3. The Court approves the form and substance of Plaintiffs' proposed Class Notice Plan and its attendant exhibits (Docs. 106, 106-1, 106-2), subject to the implementation of the revisions outlined in this order. The Court finds that, as will be revised, Plaintiffs' proposed Class Notice Plan provides the best notice practicable under the circumstances and provides for individual notice to all class members who can be identified through reasonable effort. FED. R. CIV. P. 23(c)(2)(B). The Court further finds that the exhibits, as will be revised, clearly and concisely state the requisite matters set forth in

Rule 23(c)(2)(B)(i)-(vii) in plain, easily understood language. Thus, the proposed Class Notice Plan, as will be revised, meets due process requirements.

4. Defendant is **DIRECTED** to provide the Class Administrator with the necessary Class List information to notice the class.
5. Class members shall be given at least forty-five (45) days from the date the notice is mailed to opt out or request exclusion from the Class.

DONE AND ORDERED in Orlando, Florida on October 15, 2021.


PAUL G. BYRON
UNITED STATES DISTRICT JUDGE

Copies furnished to:

Counsel of Record
Unrepresented Parties