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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

In re LinkedIn ERISA Litigation

Case No.: 5:20-CV-05704-EJD

PLAINTIFFS' NOTICE OF MOTION AND UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT AND APPROVAL OF CLASS NOTICE, AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Date:	June 15, 2023
Time:	9:00 a.m.
Location:	San Jose Courthouse, Courtroom 4—5th Floor 280 South 1st Street, San Jose, CA 95113
Judge:	Hon. Edward J. Davila

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NOTICE OF MOTION AND MOTION

PLEASE TAKE NOTICE that Plaintiffs, Douglas G. Bailey, Jason J. Hayes, and Marianne Robinson (collectively, "Plaintiffs"), on behalf of the proposed Settlement Class and the LinkedIn Corporation 401(k) Profit Sharing Plan and Trust (the "Plan"), hereby move (the "Motion"), before the Honorable Edward J. Davila and pursuant to Federal Rule of Civil Procedure 23, for entry of an Order that: (1) preliminarily approves the Settlement Agreement with Defendants, LinkedIn Corporation, the Board of Directors of LinkedIn Corporation, and the 401(k) Committee a/k/a LinkedIn Corporation 401(k) Committee (collectively, "Defendants," and with Plaintiffs, the "Parties");[1] (2) preliminarily certifies the proposed Settlement Class; (3) approves the proposed notice plan ("Notice Plan") in the Settlement Agreement and proposed Preliminary Approval Order; and (4) sets a final approval hearing on a date convenient for the Court at least 140 calendar days after the entry of a preliminary approval order. A proposed Preliminary Approval Order is attached as Exhibit C to the Settlement Agreement.

The proposed Settlement Class is defined as follows:

> All persons who participated in the LinkedIn Plan at any time during the Class Period, including any Beneficiary of a deceased Person who participated in the LinkedIn Plan at any time during the Class Period, and any Alternate Payee of a Person subject to a QDRO who participated in the LinkedIn Plan at any time during the Class Period.
>
> The Class Period is August 14, 2014, through July 1, 2020, and the Class excludes all Defendants, including the individual members of the Board of Directors of LinkedIn Corporation, and the LinkedIn Corporation 401(k) Committee, and their Beneficiaries.

Plaintiffs propose the following schedule associated with the Notice Plan and Fairness Hearing:

[1]The Settlement Agreement and its exhibits are attached to the accompanying Tang Declaration. Terms not defined herein shall have the same meaning as in the Settlement Agreement.

Event	Reference to Preliminary Approval Order	Proposed Deadline
Preliminary approval hearing		If the Court deems necessary, on June 15, 2023 at 9:00 a.m., or another date convenient for the Court
Settlement Administrator to set up settlement website and toll-free number	¶ 8	Within 45 days of entry of Preliminary Approval Order
Send Settlement Notice and Former Participant Claim Form to Class Members	¶ 8	Within 45 days of entry of Preliminary Approval Order
Final approval motion and applications for attorneys' fees, expenses, and case contribution awards	¶ 9	45 days before Fairness Hearing
Independent Fiduciary report	Settlement Agreement ¶ 2.1	Not later than 21 days before the Fairness Hearing
Deadline for filing of objections	¶ 11	Not later than 30 days before the Fairness Hearing
Deadline for Parties to respond to objections or file any additional papers in support of Settlement	¶ 11	Not later than 7 days before Fairness Hearing
Fairness Hearing	¶ 6	On a date convenient for the Court no sooner than 140 days after the date the Preliminary Approval Order is entered

The Motion is based on this Notice of Motion, the incorporated memorandum of points and authorities, the supporting Declaration of Kolin C. Tang ("Tang Declaration"), and all supporting papers, as well as the record in this litigation, and any other matters the Court may consider. Plaintiffs respectfully submit that the proposed settlement memorialized in the Settlement Agreement (the "Settlement") is fair, reasonable, and adequate, and should be preliminarily approved so that notice can be provided to the Settlement Class.

The Settlement is the product of arm's-length negotiations between the Parties and their counsel, all of whom comprehensively litigated this matter, are well-informed regarding all the issues in this litigation, and have significant experience in complex litigation of this type.

Accordingly, Plaintiffs respectfully request that the Court enter the proposed Preliminary Approval Order and, if the Court deems necessary, hold a preliminary approval hearing on June 15, 2023, at 9:00 a.m. or at another date convenient for the Court.

Pursuant to the inquiries provided in the Procedural Guidance for Class Action Settlements of this District,[2] Plaintiffs responds as follows:

a. Any differences between the settlement class and the class proposed in the operative complaint (or, if a class has been certified, the certified class) and an explanation as to why the differences are appropriate.

There are no material differences between the class proposed in the operative Second Amended Complaint ("SAC") [ECF No. 99] and the proposed Settlement Class. For purposes of clarity, the SAC's definition capturing "[a]ll participants and beneficiaries in the [Plan]" (SAC, ¶ 49) was expanded to "[a]ll persons who participated in the [Plan] . . . including any Beneficiary of a deceased Person who participated in the [Plan]" as well as any "Alternate Payee of a Person subject to a QDRO who participated in the [Plan]."

b. Any differences between the claims to be released and the claims in the operative complaint (or, if a class has been certified, the claims certified for class treatment) and an explanation as to why the differences are appropriate.

In addition to the claims in the operative SAC, the Settlement Agreement releases potential claims arising out of recordkeeping and other administrative fees associated with the LinkedIn Plan. Although potential claims related to the LinkedIn Plan's recordkeeping and administrative fees were not pled in the SAC, such potential claims arise out of the same conduct as the claims pled in the SAC and, in some respects, are associated with overlapping damages. The "Released Claims" set forth in Section 1.41 of the Settlement Agreement otherwise covers the specific claims alleged therein and any other claims based on the same allegations.

c. The class recovery under the settlement (including details about and the value of injunctive relief), the potential class recovery if plaintiffs had fully prevailed on each of their claims, claim by claim, and a justification of the discount applied to the claims.

[2] https://www.cand.uscourts.gov/forms/procedural-guidance-for-class-action-settlements/.

The class recovery under the settlement will be $6,750,000, which represents just less than 68% of the midpoint of the range of realistically recoverable losses. Further detail regarding the figures and justification of the discount is provided in the supporting memorandum. See Memorandum of Law in Support, Section IV.C.1.

d. Any other cases that will be affected by the settlement, an explanation of what claims will be released in those cases if the settlement is approved, the class definitions in those cases, their procedural posture, whether plaintiffs' counsel in those cases participated in the settlement negotiations, a brief history of plaintiffs' counsel's discussions with counsel for plaintiffs in those other cases before and during the settlement negotiations, an explanation of the level of coordination between the two groups of plaintiffs' counsel, and an explanation of the significance of those factors on settlement approval. If there are no such cases, counsel should so state.

None.

e. The proposed allocation plan for the settlement fund.

The amount paid to each Class Member will be determined by the proposed Plan of Allocation that is based on the average account balance of each Class Member's account during the relevant period. Further details are provided in the supporting memorandum and the proposed Plan of Allocation document attached thereto. *See* Memorandum of Law in Support, Section IV.C.2; Tang Decl. ¶ 2, at Exhibit 1-B).

f. If there is a claim form, an estimate of the expected claim rate in light of the experience of the selected claims administrator and/or counsel based on comparable settlements, the identity of the examples used for the estimate, and the reason for the selection of those examples.

Participants, and Beneficiaries and Alternate Payees with Active Accounts in the Microsoft Corporation Savings Plus 401(k) Plan, do not need to do anything affirmative to receive payment under the Settlement, as their accounts will automatically be credited the amount due to them under the Settlement. Only Authorized Former Participants, and Beneficiaries and Alternate Payees who no longer have Active Accounts will need to submit a Former Participant Claim. Based on the settlement administrator and counsel's experience in similar cases involving ERISA breach of fiduciary duty claims, the expected claim rate is 25%. (Tang Decl. ¶ 8, at Exhibit 3).

g. In light of Ninth Circuit case law disfavoring reversions, whether and under what circumstances money originally designated for class recovery will revert to any defendant, the expected and potential amount of any such reversion, and an explanation as to why a reversion is appropriate.

There is no reversion.

Plaintiffs, Douglas G. Bailey, Jason J. Hayes and Marianne Robinson (collectively, "Plaintiffs"), on behalf of the proposed Settlement Class and the LinkedIn Corporation 401(k) Profit Sharing Plan and Trust (the "Plan"), respectfully submit this Memorandum of Points and Authorities in Support of their Unopposed Motion for Preliminary Approval of Class Action Settlement (the "Motion"), requesting the Court issue an Order that: (1) preliminarily approves the Settlement Agreement with Defendants, LinkedIn Corporation, the Board of Directors of LinkedIn Corporation, and the 401(k) Committee a/k/a LinkedIn Corporation 401(k) Committee (collectively, "Defendants," and with Plaintiffs, the "Parties");[3] (2) preliminarily certifies the proposed Settlement Class; (3) approves the proposed notice plan ("Notice Plan") in the Settlement Agreement and proposed Preliminary Approval Order; and (4) sets a final approval hearing on a date convenient for the Court at least 140 calendar days after entry of the proposed Preliminary Approval Order.

[3]The parties' executed Settlement Agreement and its exhibits are attached to the accompanying Declaration of Kolin C. Tang. Terms not defined herein shall have the same meaning as in the Settlement Agreement.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The Parties have agreed to a proposed settlement ("Settlement") of this putative class action lawsuit (the "Action"), brought under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001, *et seq.*, for total relief of $6,750,000. Based on the substantial relief provided by the Settlement and the risks of continued litigation, Plaintiffs and Class Counsel believe the Settlement is fair, reasonable, and adequate, and in the best interests of the Settlement Class.

Plaintiffs and Class Counsel have vigorously pursued relief on behalf of the Plan, and Defendants' Counsel have vigorously defended against Plaintiffs' allegations. The Parties agreed to the Settlement after extensive motion practice, discovery, and arm's-length negotiations by experienced counsel, including at a private mediation session with an experienced and highly respected neutral mediator and follow-up negotiations under the auspices of the mediator. Resolving the Action at this juncture allows the Parties to avoid continued and costly litigation that would deplete resources which could otherwise be used for the resolution of the Action, and which could result in a recovery less than that provided by the Settlement, or no recovery at all.

As set forth below, all prerequisites for preliminary approval of the Settlement and certification of the Settlement Class are satisfied. As such, Plaintiffs respectfully submit that the Motion should be granted, and notice should be provided to the Settlement Class in accordance with the proposed Notice Plan.

II. RELEVANT BACKGROUND

Plaintiffs allege that Defendants are fiduciaries of the Plan and breached duties owed to the Plan and its participants and beneficiaries by: (1) failing to appropriately monitor the Plan's investments, resulting in the retention of imprudent investments instead of readily available suitable alternative investments; and (2) causing the Plan to pay unreasonable expenses. *See* Second Amended Complaint ("SAC") (ECF No. 99), ¶6. Plaintiffs' allegations are set forth in full in the SAC, which Plaintiffs filed on December 16, 2021. Defendants moved to dismiss the

SAC on January 27, 2022 (ECF No. 107). While Defendants' motion to dismiss was pending, the Parties engaged in substantial discovery efforts, including written discovery requests, voluminous document productions, depositions, third party discovery, and disclosure of expert reports, and as well as briefing on Plaintiffs' motion for class certification. The Parties moved to stay proceedings pending mediation on June 21, 2022, with the Court granting the motion on the same day (ECF Nos. 124, 125).

In preparation for the mediation, the Parties communicated their positions regarding the merits of Plaintiffs' claims and Defendants' defenses, and the potential associated damages. The Parties held a mediation session with Robert A. Meyer, Esquire, of JAMS, a well-respected, neutral mediator who is experienced in mediating claims of the kind at issue in the Action, on September 23, 2022. The Parties exchanged briefs and follow-up information prior to and during the mediation and reached an agreement in principle to resolve the Action on October 12, 2022. The Parties worked to formally document their agreement in the Settlement Agreement.

The Settlement provides that, in exchange for dismissal of the Action and a release of claims, Defendants will pay the aggregate amount of $6,750,000 into a Qualified Settlement Fund to be allocated to Current Participants,[4] Former Participants, Beneficiaries, and Alternate Payees of the Plan pursuant to the Plan of Allocation. *See* Settlement Agreement, §§ 1.27, 4.5-4.6, 5.2-5.4; Tang Decl., Ex. B. The Settlement Agreement and the proposed Preliminary Approval Order set forth the Notice Plan and describe Plaintiffs' anticipated requests for payment of attorneys' fees and litigation expenses to Class Counsel and for case contribution awards, all of which are subject to the Court's approval. *See* Settlement Agreement, §§ 1.4, 1.9, 5.2.1-5.2.2, 6.1; Tang Decl., Ex. A. In addition, the Settlement Agreement provides for the approval of the Settlement and related applications by an Independent Fiduciary on behalf of the Plan. *See* Settlement Agreement, § 2.1.

[4]As defined in the Plan of Allocation (Settlement Agreement, Exhibit B, Tang Decl. ¶ 2, at Exhibit 1-B), and otherwise aligning with the definitions in the Settlement Agreement, a "Current Participant" means an individual with an Active Account in the Microsoft Corporation Savings Plus 401(k) Plan, into which the Plan merged during the Class Period.

III. THE PROPOSED SETTLEMENT

A. Class Definition

The Settlement Class is defined as:

> All persons who participated in the LinkedIn Plan at any time during the Class Period, including any Beneficiary of a deceased Person who participated in the LinkedIn Plan at any time during the Class Period, and any Alternate Payee of a Person subject to a QDRO who participated in the LinkedIn Plan at any time during the Class Period.
>
> The Class Period is August 14, 2014 through July 1, 2020, and the Class excludes all Defendants, including the individual members of the Board of Directors of LinkedIn Corporation, and the LinkedIn Corporation 401(k) Committee, and their Beneficiaries.

B. Released Claims

If the Court grants Final Approval of the Agreement, the Settlement Class will be deemed to have released Defendants from all claims as described in Section 1.41 of the Agreement, which is incorporated herein by reference. (*See* Tang Decl. ¶ 2, at Exhibit 1, Section 1.41). These claims include the claims in the operative SAC and potential claims arising out of record keeping and other administrative fees associated with the Plan, which arise out of the same conduct as the claims pled in the SAC and, in some respects, are associated with overlapping damages.[5]

C. Class Relief

1. Settlement Fund

Based upon the claims remaining in the case, Plaintiffs' experts have estimated the average range of realistic and supportable damages to be from $3,943,016.50 million to $15,940,213.00 million depending upon the methodology and assumptions employed, with a midpoint of $9,941,637.25. (*See* Tang Decl. ¶ 13). While figures in this range are defensible, the likelihood of establishing the higher figure obviously faces more challenges than the lower

[5]In recognition of the fact that this case was actively and extensively litigated with fulsome discovery regarding Defendants' acts and omissions with respect to the Plan, the claims released as part of the Settlement as set forth in Section 1.41 of the Agreement are, in essence, any actual or potential claims that were or could have been asserted in the Actions related to the conduct alleged in the complaints, as well as the conduct of the Independent Fiduciary in reviewing the Settlement.

figure. Indeed, if the Class Action proceeded through trial, Defendants would likely challenge the loss calculation methodology and interest rates applied (not to mention challenges to causation and other elements of Plaintiffs' claims). Accordingly, the Settlement provides monetary relief of approximately 68% of the mid-point of the range of realistically recoverable losses. (*See* Tang Decl. ¶ 13).

Defendants have agreed to pay a Settlement Amount of $6,750,000 to resolve Plaintiffs' claims. The Settlement Fund will be used to pay the following amounts associated with the Settlement: (1) compensation to current and authorized former participants of the Plan as described in Section 5.2.5 of the Agreement; (2) all claims for attorneys' fees and expenses approved by the Court; (3) all costs arising from evaluation of the settlement by the Independent Fiduciary as described in Section 5.1.3 of the Agreement; (4) all costs necessary to administer the Settlement, including, among other things, payment for the services of the Settlement Administrator and any related taxes and tax-related costs; and (5) payment of Case Contribution Awards to Plaintiffs not to exceed $12,500 each, subject to Court approval. (*See* Tang Decl. ¶ 2, at Exhibit 1, Section 5).

2. Distribution of Settlement Funds to Class Members

The amount paid to each Class Member will be determined by the proposed Plan of Allocation that is based on the average size of each Class Member's account during the relevant period. (*See* Tang Decl. ¶ 2, at Exhibit 1-B). Participants, and Beneficiaries and Alternate Payees with Active Accounts in the Microsoft Corporation Savings Plus 401(k) Plan, into which the Plan merged during the Class Period, do not need to do anything affirmatively to receive payment under the Settlement, as their accounts will automatically be credited the amount due to them under the Settlement. As for Authorized Former Participants, and Beneficiaries and Alternate Payees who no longer have Active Accounts, these individuals need only submit a Former Participant Claim Form to be eligible for payment under the Settlement, which, at their election, will be made either by check or rollover to an individual retirement account or other eligible employer plan. (Tang Decl. ¶ 2, at Exhibit 1-B).

3. Payment of Case Contribution Awards

At Final Approval, Plaintiffs will ask the Court to approve Case Contribution Awards of up to $12,500 to be paid out of the Settlement Fund to compensate Plaintiffs for their time and efforts serving as class representatives, subject to the approval of the Court. Plaintiffs have actively participated in the litigation and assisted Class Counsel in drafting the respective complaints and other documents, consulted with Class Counsel as needed, answered discovery-related requests for information and participated in settlement and strategy discussions. Consistent with awards regularly granted under similar circumstances, Plaintiffs believe that they should be compensated for their work done in support of the litigation and for assisting Class Counsel in achieving a strong settlement on behalf of the Class, as well as the reputational and other risks they undertook in bringing this Action. (*See* Tang Decl. ¶ 2, at Exhibit 1, Section 5).

4. Payment of Attorneys' Fees, Costs, and Expenses

At Final Approval, Class Counsel anticipates seeking an award of attorneys' fees of up to one-third of the common fund established by the Settlement, plus all reasonable and necessary expenses advanced by Class Counsel and carried for the duration of the litigation (which will not exceed $150,000), subject to the Approval of the Court. Class Counsel prosecuted the Class Action on a contingent basis and advanced all associated costs with no expectation of recovery in the event the litigation did not result in a recovery for the Settlement Class. (*See* Tang Decl. ¶ 15). Class Counsel estimate that such an award would only result in a small multiplier of less than 1.25 based upon the time devoted and to be devoted to this engagement.

5. Any Uncashed Checks Will Be Distributed to the Settlement Fund

All checks issued pursuant to this Plan of Allocation shall expire one hundred eighty (180) calendar days after their issue date. All checks that are undelivered or are not cashed before their expiration date shall revert to the Settlement Fund to be utilized as set forth in the Plan of Allocation. (*See* Tang Decl. ¶ 2, at Exhibit B, Section 1.13). There shall be no reversion to Defendants.

D. Approval Of Settlement Terms By Independent Fiduciary

As an additional means of confirming the fairness, reasonableness, and adequacy of the Settlement, and to facilitate the Plan's release of claims under the Department of Labor's regulations pertaining to prohibited transactions, pursuant to the Settlement Agreement, Defendants shall retain an Independent Fiduciary to approve and authorize the Settlement on behalf of the Plan and Class Members. (Tang Decl. ¶ 2, at Exhibit 1, Section 2.1). Defendants, Defendants' Counsel, Plaintiffs, and Class Counsel shall provide the Independent Fiduciary with sufficient information so that the Independent Fiduciary can review and evaluate the Settlement and each of the related applications. (*Id.*). The Independent Fiduciary's review will include interviews with Class Counsel and Defendants' Counsel, respectively, and a review of confidential information exchanged in connection with the mediation process. Furthermore, the Independent Fiduciary shall comply with all relevant conditions set forth in Prohibited Transaction Class Exemption 2003-39, "Release of Claims and Extensions of Credit in Connection with Litigation," issued December 31, 2003, by the United States Department of Labor, 68 Fed. Reg. 75,632, as amended ("PTE 2003-39"), in making its determination, for the purpose of Defendants' reliance on PTE 2003-39. (*Id.*)

E. Settlement Administration

The Settlement Administrator, whom Class Counsel selected and the Parties have agreed upon, shall be Strategic Claims Services ("SCS"), a settlement administrator with over 20 years of experience administering class action settlements. (Tang Decl. ¶ 7). Lead Class Counsel has worked with SCS on a number of other ERISA, securities, and other class action cases over the past ten years. (*Id.*) SAC estimates administration costs at around $100,000, which is only 1.48% of the Settlement Fund from which the expense will be paid out. (*Id.*)

SCS has successfully administered a number of complex ERISA class action settlements in an efficient and effective manner, including class settlements of similar ERISA claims, its projected expense is in line with those settlements and, unlike some of its competitors in Class Counsel's experience, SCS consistently stays within its proposed budget. Tang Decl. ¶ 10; *see e.g.*, *Blackmon v. Zachary Holdings, Inc.*, No. SA-20-CV-00988-JKP, 2022 WL 2866411, at *1

(W.D. Tex. July 21, 2022) (approving appointment of SCS to administer settlement of similar ERISA claims); *Jones v. Coca-Cola Consolidated, Inc.*, No. 320CV00654FDWDSC, 2022 WL 703605, at *4 (W.D.N.C. Mar. 8, 2022) (same). SCS also has robust procedures for handling class member data and sufficient insurance coverage. (Tang Decl. ¶ 7, at Exhibit 2). Accordingly, based upon Class Counsel's experience working with SCS in similar cases, Class Counsel is confident that SCS will perform its work in an efficient, secure, and cost-effective manner, while ensuring a high claims rate among Class Members. (Tang Decl. ¶ 8, at Exhibit 3).

The Settlement Administrator shall administer the Settlement subject to the supervision of Class Counsel, Defendants' Counsel, and the Court as circumstances may require. (Tang Decl. ¶ 3). The Settlement Administrator will be responsible for providing Notice to the Class, as described below, and for maintaining the Settlement Website providing information regarding the Settlement as well as a toll-free telephone number via which Class Members can direct questions about the Settlement. (Tang Decl. ¶ 2, at Exhibit 1, Section 2.6). The complete responsibilities of the Settlement Administrator are detailed in the Agreement.

F. Dissemination Of Notice To The Class

Within 45 days of the entry of the Preliminary Approval Order, or as may otherwise be determined by the Court, the Settlement Administrator shall provide Notice of the Settlement to Class Members by electronic mail (if available) or first-class mail. (Tang Decl. ¶ 2, at Exhibit 1, Section 2.6). The Notice shall include Class Counsel's contact information and the Settlement Website information, which will list key deadlines and links to the Notice, Former Participant Claim Form, the Preliminary Approval Order, motions for preliminary approval, final approval, and applications for attorneys' fees, expenses, and case contribution awards, the SAC, and other important documents in the case. (Tang Decl. ¶ 2, at Exhibit 1, Exhibit A.) In addition, the Notice will include instructions on how to access the case docket via PACER or in person at any of the court's locations, the date and time of the final approval hearing, and a note advising Class Members that the hearing date may change without further notice to the Class and instructions to check the settlement website or the Court's PACER site to confirm that the date has not changed. *See id.*

Defendants shall use all reasonable efforts to provide necessary information to the Settlement Administrator so that it may effectuate Notice, implement the Plan of Allocation, and distribute the Settlement Funds. (Tang Decl. ¶ 2, Exhibit 1, at Section 4.1). The Settlement Administrator shall update mailing addresses through the National Change of Address database before mailing (with all returned mail skip-traced and promptly re-mailed). (*Id*., at Section 2.6). The Settlement Administrator shall use commercially reasonable efforts to locate any Class Member whose Notice is returned and re-mail such Notice one additional time if an updated location is identified. (*Id*.). As many Class Members are expected to have Active Accounts, a significant number of Settlement Class members will be easily reached through their contact information associated with those accounts, while Class Members without Active Accounts should be reachable through the forwarding information provided to the Plan's recordkeeper when their accounts were closed.

No later than 10 calendar days after the filing of the motion for preliminary approval of the Settlement, Defendants will serve the Class Action Fairness Act Notice on the Attorney General of the United States, the Secretary of the Department of Labor, and the attorneys general of all states in which Class Members reside, as specified by 28 U.S.C. § 1715. (*Id*., at Section 2.5(b); and Tang Decl. ¶ 2, Exhibit 1-E). The Settlement Administrator also shall establish a toll-free telephone number to which Class Members can direct questions about the Settlement. (Tang Decl. ¶ 2, at Exhibit 1, Section 2.6(b)).

G. Opportunity to Object

Class Members shall be permitted to object to the Settlement and/or Plaintiffs' forthcoming Motion for Attorneys' Fees and Expenses and Award of Case Contribution Fees. The Class Notice shall provide instructions and requirements for Class Members to object to the Settlement. (*Id*., at Section 2.5; Tang Decl. ¶ 2, at Exhibits 1-B-1). Class Members shall be provided with as much as 95 days to file written objections and any supporting papers prior to the Final Approval hearing, which will be held no earlier than 140 days after the entry of the Preliminary Approval Order. (*Id*.).

H. The Court Retains Jurisdiction

Pursuant to Section 14.11 of the Agreement, the Court shall retain jurisdiction as to all matters relating to administration, enforcement, and interpretation of the Agreement after the Effective Date.

IV. ARGUMENT

Under Federal Rule of Civil Procedure 23, when the Court is presented with a proposed settlement, it must determine whether the proposed settlement class satisfies the requirements for class certification under Rule 23. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613-14 (1997). Class certification under Rule 23 has two primary components: a proposed class must meet the four requirements of Rule 23(a) and the requirements of at least one subsection of Rule 23(b). *See id.*; Fed. R. Civ. P. 23; *see also Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019-1022 (9th Cir. 1998).

Approval of a settlement under Rule 23 involves "a two-step process": "First, the Court decides whether the class action settlement deserves preliminary approval. Second, after notice is given to class members, the Court determines whether final approval is warranted." *Vikram v. First Student Mgt., LLC*, No. 17-CV04656-KAW, 2019 WL 1084169, at *3 (N.D. Cal. Mar. 7, 2019).

In addition, the Court must preliminarily determine whether the Settlement is fair, reasonable, and adequate. "At the preliminary approval stage, 'the settlement need only be potentially fair.'" *Johnson v. Serenity Transp., Inc.*, No. 15-CV02004, 2021 WL 3081091, at *4 (N.D. Cal. July 21, 2021) (citation omitted). "The Court cannot, however, fully assess such factors until the final approval hearing." *De Leon v. Ricoh USA, Inc.*, No. 18-CV-03725, 2019 WL 6311379, at *10 (N.D. Cal. Nov. 25, 2019).

A. The Court Will Be Able to Certify the Class for Purposes of Settlement

While ERISA representative actions are ideally suited for class action treatment, when "[c]onfronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems . . . ." *Amchem*, 521 U.S. at 620. In any event, the class action device is the prevailing procedural

vehicle by which retirement plan participants bring representative actions under ERISA § 502(a)(2), and courts routinely grant certification of ERISA breach of fiduciary duty actions. Additionally, the Court "must consider whether the Settlement Agreement 'provides preferential treatment to any class member.'" *Philips v. Munchery Inc.*, No. 19- CV-00469, 2020 WL 6135996, at *7 (N.D. Cal. Oct. 19, 2020) (quoting *Villegas v. J.P. Morgan Chase & Co*., No. CV 09- 00261, 2012 WL 5878390, at *7 (N.D. Cal. Nov. 21, 2012)).

1. The Settlement Class Satisfies Rule 23(a)

a. Numerosity

The numerosity requirement of Rule 23 requires that a putative class must be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). However, "[i]mpracticability is not impossibility, and instead refers only to the 'difficult or inconvenience of joining all members of the class.'" *Foster v. Adams & Assocs., Inc.* 2019 WL 4305538, at *3 (N.D. Cal. Sept. 11, 2019) (finding that this factor was "easily satisfied" with 2,766 vested plan participants) (citing *Harris v. Palm Springs Alpine Estates, Inc.*, 329 F.2d 909, 913-14 (9th Cir. 1964)). While no specific number is needed to maintain a class action, courts in this Circuit have routinely found that a class greater than 40 often satisfies the requirement, let alone with thousands of putative class members. *See id.* (citing *Rites v. Ariz. Beverages USA LLC, 287 F.R.D. 523, 526* (N.D. Cal. 2012)). Here, Class Counsel estimates that there are approximately 17,000 Settlement Class members, based on the number of accounts in the Plan during the Class Period. (Tang Decl. ¶ 6). Thus, the proposed Class easily meets Rule 23(a)'s numerosity requirements.

b. Commonality

The commonality prerequisite of Rule 23 requires "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2).[6] Commonality involves "the capacity of a class[-]wide

[6]"The commonality and typicality requirements of Rule 23(a) tend to merge." *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 157 n.13 (1982) (noting also that these requirements often merge with adequacy of representation). While this memorandum discusses the requirements separately, the discussions of each element are related and arguments supporting one requirement frequently support the others.

proceeding to generate common *answers* apt to drive resolution of the litigation." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011) (internal quotations omitted). This occurs when there is at least one common question, the determination of which "will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.* Courts in this Circuit find "[t]he existence of shared legal issues with divergent factual predicates is sufficient [to meet the commonality requirement], as is a common core of salient facts coupled with disparate legal remedies within the class." *Foster*, 2019 WL 4305538, at *3 (citations omitted). Ultimately, commonality only asks the court to look "for some shared legal issue or common core of facts" and "requires the plaintiff to demonstrate the class members have suffered the same injury." *Id.* (citing *Evon v. Law Offices of Sidney Mickell*, 688 F.3d 1015, 1029 (9th Cir. 2012)).

Plaintiffs claim Defendants breached fiduciary duties owed to the Plan under ERISA § 404, 29 U.S.C. § 1104, and brought the Action in a representative capacity under ERISA §§ 409 and 502(a)(2), 29 U.S.C. §§ 1109, 1132(a)(2). Thus, Plaintiffs' Plan-wide claims involve legal and factual questions that inherently affect all participants and beneficiaries in the Plan. Indeed, Plaintiffs' "br[ought] suit on behalf of participants in the Plan [], the centralized administration of which is common to all class members." *Cunningham v. Cornell Univ.*, 2019 WL 275827, at *5 (S.D.N.Y Jan. 22, 2019). "Because the fiduciary duties are owed to the [Plan] . . . common questions of law and fact are central to the case." *Id.*; *see* 29 U.S.C. § 1104(a)(1) ("a fiduciary shall discharge his duties with respect to a *plan*") (emphasis added).

The core questions in this Action are common to all Plan participants and include, *inter alia*: (i) whether Defendants breached their fiduciary duties by maintaining the challenged investments in the Plan; (ii) whether the Plan suffered resulting losses; (iii) the manner in which to calculate the Plan's losses; and (iv) what equitable relief, if any, is appropriate in light of these alleged breaches. *See Kanawi v. Betchtel Corp.*, 254 F.R.D. 102, 109 (N.D. Cal. 2008) (finding commonality where injury stemmed from whether defendants breached their fiduciary duties to the Plan by making imprudent investment decisions); *see also Clark v, Duke Univ.*, 2018 WL 1801946, at *5 (M.D.N.C. Apr. 13, 2018). While a single common question is sufficient to meet this standard, the common questions here are numerous. *See Wal-Mart*, 564 U.S., at 359. Here,

as in *Kanawi* and *Clark*, Plaintiffs' claims and each putative Class member's claims are based on the same events and legal theory, *i.e.*, breaches of fiduciary duty stemming from the Defendants' alleged disloyal and imprudent process for selecting, administering, and monitoring the Plan's investments, along with the Plaintiffs' remedial theory, which is identical for the named Plaintiffs and the proposed Class members. *Kanawi*, 254 F.R.D. at 109; *Clark*, 2018 WL 1801946, at *5. Since the central allegations here concern Defendants' administration of the Plan, they are common to all Plan participants who are empowered to bring an action on behalf of the Plan. *Kanawi*, 254 F.R.D. at 109.

c. Typicality

The typicality prerequisite of Rule 23 requires that the claims of the representative plaintiffs be typical of the claims of the class. *See* Fed. R. Civ. P. 23(a)(3). Typicality is met when "other members have the same or similar injury, . . . the action is based on conduct which is not unique to the named plaintiffs, and . . . other class members have been injured by the same course of conduct." *See Kanawi*, 254 F.R.D. at 110 (citing *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir.1992) (internal quotation marks omitted)). Like commonality, typicality is a "permissive" standard and "the focus should be on the defendants' conduct and plaintiff's legal theory, not the injury caused to the plaintiff." *Id*. Since claims under ERISA § 502(a)(2) are inherently representative claims, any participant's claim is necessarily typical of the claims of the Class; this is because every participant is asserting the Plan's claim. Indeed, Plaintiffs brought this Action on behalf of the Plan, such that "[a]ny recovery of lost benefits will go to the Plan and will be held, allocated, and ultimately distributed in accordance with the requirements of the Plan and ERISA." *Tatum v. R.J. Reynolds Tobacco Co.*, 254 F.R.D. 59, 66 (M.D.N.C. 2008).

Courts routinely find a retirement plan participant's breach of fiduciary duty claim to be typical of the claims of all participants in such a plan. *See Cunningham*, 2019 WL 275827, at *7 (typicality requirement met where plaintiffs "sufficiently alleged that the defendants' failure to manage the Plans affected all proposed members of the class *Sacerdote v. New York Univ.,* 2018 WL 840364 at *3 (S.D.N.Y. Feb. 13, 2018) (noting that analysis of the typicality factor is

similar to the commonality analysis and finding because "[e]ach named plaintiff is asserting a claim on behalf of the Plans . . . [t]he adjudication of the breach of fiduciary duty claims will not turn on any individual class member's circumstance."); *Kanawi*, 254, F.R.D. at 110 (typicality met for fiduciary breach claims because "[n]one of the facts or legal claims are unique to the named Plaintiffs[]" since "[t]he complaint is based on allegations and recovery that address the Plan as a whole, not individual claimants").[7] The circumstances in this Action, in which Plaintiffs alleged fiduciary breaches arising out of Defendants' purported management and administration of the Plan, are no exception. Defendants' Plan-wide alleged conduct at issue in this Action, of employing a "disloyal and imprudent process for selecting, administering and monitoring the Plan's . . . investments," is of a kind routinely found to support determinations of typicality. *Clark*, 2018 WL 1801946 at *5. Likewise, the remedial theory asserted by Plaintiffs here is identical among all members of the proposed Class. *See id*. In sum, Plaintiffs' claims on behalf of the Plan are typical of all Class members' claims.

d. Adequacy

Representative plaintiffs must also show that they will "fairly and adequately protect the interests of this class." Fed. R. Civ. P. 23(a)(4). This inquiry analyzes "whether any conflicts of interest exist between the named plaintiffs and the class members" and "whether the named Plaintiffs' counsel will adequately protect the interests of the class." *Kanawi*, 254 F.R.D. at 109.

Plaintiffs' interests are tightly aligned with all other members of the proposed Class by virtue of the very nature of the claims that they bring. Plaintiffs, acting in a representative capacity, seek to enforce the duties that Defendants owed to the Plan and to recover the damages and equitable relief due to them. *See* 29 U.S.C. §§ 1109(a), 1132(a)(2); *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S 134, at 142 n.9 (1985) "There is no reason to doubt that the name[d] plaintiffs will 'fairly and adequately protect the interests of the class,' as they have

[7]Since the commonality and typicality requirements "tend to merge," *Wal-Mart*, 564 U.S. at 349 n.5, Plaintiffs' claims are typical for many of the same reasons that commonality is satisfied. In short, because Defendants' actions were directed to and affected the Plan as a whole, without distinction among individual participants, the claims of all members of the proposed Settlement Class arise out of the same conduct. Likewise, Plaintiffs and all members of the proposed Settlement Class have the same claims under the same legal and remedial theory.

identical financial interests in this action as to the proposed class members." *Sacerdote*, 2018 WL 840364, at *4 (internal citation omitted) (quoting Fed. R. Civ. P. 23(a)(4)). "The general rule that there is 'a relatively low likelihood of intra-class conflicts in cases of excessive fee claims' because the recovery is to the Plan, not to individual Plaintiffs, holds true here." *Beach v. JPMorgan Chase Bank, N.A.*, 2019 WL 2428631, at *8 (S.D.N.Y. June 11, 2019) (quoting *Leber v. Citigroup 401(k) Plan Inv. Comm.,*323 F.R.D. 145, 164 (S.D.N.Y. 2017)); *see also Kanawi*, 254 F.R.D. at 111. Since Plaintiffs are pursuing claims on behalf of the Plan, there are no conflicts between Plaintiffs' individual interests and the interests of the proposed Class. Indeed, Plaintiffs and Class members all share the same objectives, the same factual and legal positions, and the same interest in establishing Defendants' liability. *See Kanawi*, 254 F.R.D. at 110 *see also Moreno v. Deutsche Bank Ams. Holding Corp,* 2017 WL 3868803, at *7 (Sept. 5, 2017); *West v. Continental Automotive, Inc.*, 2017 WL 2470633, at *2 (W.D.N.C. June 7, 2017) ("[T]here is no evidence of a direct conflict of interests between named Plaintiffs and the class they seek to represent.").

A class representative needs only a basic understanding of the claims and a willingness to participate in the case, requirements that Plaintiffs here easily surpass. *See Surowitz v. Hilton Hotels Corp.*, 383 U.S. 363, 373 (1966). Plaintiffs have demonstrated their commitment to pursuing this Action on behalf of a Settlement Class and have achieved a very favorable result, which does not favor any member of the Settlement Class at the expense of others. *See* Tang Decl., at ¶ 5. Plaintiffs clearly have, and will continue to, adequately represent all members of the Settlement Class. In addition, Plaintiffs have retained qualified and competent counsel, whose adequacy is discussed in greater detail below. *See Bailey v. Verso Corp.*, 337 F.R.D. 500, 507 (S.D. Ohio 2021), *judgement entered*, No. 3:17-cv-332, 2021 WL 5815727 (S.D. Ohio Dec. 6, 2021) (finding that the adequacy requirement satisfied by class counsel who were "experienced ERISA litigators" and had "administered the settlement of numerous retiree-benefit class actions").

2. The Settlement Class Satisfies Rule 23(b)(1)

In addition to satisfying the requirements of Rule 23(a), Plaintiffs need only satisfy one subsection of Rule 23(b). *See Amchem*, 521 U.S. at 613-14. Courts routinely grant certification under Rule 23(b)(1) in ERISA fiduciary breach cases. *See Karpik v. Huntington Bancshares Inc.*, 2021 WL 757123, at *11 (S.D. Ohio Feb. 18, 2021) (noting that cases involving allegations of fiduciary breaches to a trust or plan[] are precisely the type of cases that are encompassed by" Rule 23(b)(1); *Ortiz v. Fireboard Corp.*, 527 U.S. 815, 833-34 (1999) (calling breach of trust actions a "classic example" of a Rule 23(b)(1) class); *Shirk v. Fifth Third Bancorp,* 2008 WL 4425535, at *4 (S.D. Ohio Sept. 30, 2008) ("courts have routinely found that class certification is appropriate under Rule 23(b), and most usually 23(b)(1)" in ERISA breach of fiduciary duty cases). Actions under ERISA §§ 409 and 502(a)(2) for breach of fiduciary duty present a "paradigmatic example" of a Rule 23(b)(1) class. *Kanawi*, 254 F.R.D. at 111-12 (citations omitted); *see also Foster*, 2019 WL 4305538, at *7 ("Certification under Rule 23(b)(1) is particularly appropriate in cases involving ERISA fiduciaries who must apply uniform standards to a large number of beneficiaries.") (citations omitted). Certification is appropriate under either subpart of Rule 23(b)(1). *See Clark*, 2018 WL 1801946, at *9-*10 (finding that plaintiffs established basis for certification under Rule 23(b)(1)(A) and Rule 23(b)(1)(B)).

3. Miller Shah and Capozzi Adler Should Be Appointed as Class Counsel

In appointing Class Counsel, this Court should consider the Rule 23(g)(1)(A) factors:

(i) the work counsel has done in identifying or investigating potential claims in this action;

(ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in this action;

(iii) counsel's knowledge of the applicable law; and

(iv) the resources counsel will commit to representing the class.

Fed. R. Civ. P. 23(g)(1)(A). Proposed Class Counsel, Miller Shah LLP and Capozzi Adler, P.C. (collectively, "Class Counsel"), are exceedingly qualified under these factors. *See* Tang Decl., ¶¶ 9-10. To date, Class Counsel have leveraged their experience and resources to vigorously

pursue recovery on behalf of the Plan and protect the interests of all Class Members, including by comprehensively investigating the claims forming the basis if the Action, filing detailed pleadings, briefing several motions, and engaging in the discovery process. *Id.* ¶ 4. Class Counsel also have extensive experience litigating ERISA fiduciary breach cases and overseeing the administration of settlements in ERISA actions. *See id.* ¶¶ 9-10. Class Counsel will continue to leverage their wealth of relevant experience and resources on behalf of the Settlement Class through final resolution, including addressing inquiries from members of the Settlement Class and supervising the work of the Settlement Administrator. Accordingly, the Court should appoint Miller Shah LLP and Capozzi Adler, P.C. as Class Counsel.

B. The Settlement, Notice Plan, And Plan Of Allocation Warrant Preliminary Approval

1. The Settlement Should Be Preliminarily Approved

"To preliminarily approve a proposed class-action settlement, Rule 23(e)(2) requires the Court to determine whether the proposed settlement is fair, reasonable, and adequate." *Urakhchin v. Allianz Asset Mgt. of Am., L.P.*, SACV151614, 2018 WL 3000490, at *5 (C.D. Cal. Feb. 6, 2018) (citing Fed. R. Civ. P. 23(e)(2)). In determining whether a settlement meets these requirements, courts look to factors including the strength of the claims and defenses, the risk, expense, and complexity of continued litigation, the stage of proceedings and extent of discovery completed, and the experience and views of class counsel. *See id.* The relative importance of these factors depends upon the unique facts and circumstances of a given case, and "[i]t is the settlement taken as a whole, rather than the individual component parts, that must be examined for overall fairness . . . ." *Id.* (citations and alterations omitted). "[T]here is a strong judicial policy that favors settlements, particularly where complex class action litigation is concerned." *In re Syncor ERISA Litig.*, 516 F.3d 1095, 1101 (9th Cir. 2008); *Campbell v. Facebook, Inc.*, 951 F.3d 1106, 1121 (9th Cir. 2020) (same).

As a preliminary matter, although Plaintiffs believe there is strong legal and factual support for their claims, there is inherent risk in continued litigation of these complex ERISA claims. The Parties have engaged in significant motion practice, and additional dispositive and

expert exclusion motions likely would have followed the conclusion of expert discovery. Trial presentations would rely heavily on competing expert testimony and likely given way to a complex appeal. Accordingly, the Settlement is a product of an extensive arm's-length process in recognition of these risks. *See Urakhchin*, 2018 WL 3000490, at *4. "An initial presumption of fairness is usually involved if the settlement is recommended by class counsel after arm's-length bargaining." *Viceral v. Mistras Grp., Inc*., No. 15-CV-02198, 2016 WL 5907869, at *8 (N.D. Cal. Oct. 11, 2016); *see also Slezak v. City of Palo Alto*, No. 16-CV-03224-LHK, 2017 WL 2688224, at *5 (N.D. Cal. June 22, 2017) (finding the "likelihood of fraud or collusion [wa]s low . . . because the Settlement was reached through arm's-length negotiations, facilitated by an impartial mediator."). Further, Class Counsel and Defendants' counsel are experienced in ERISA litigation, and each possess a thorough understanding of the factual and legal issues involved in the Action. *See Tadepalli v. Uber Techs., Inc.*, No. 15-CV-04348-MEJ, 2015 WL 9196054, at *9 (N.D. Cal. Dec. 17, 2015) ("Settlements are entitled to 'an initial presumption of fairness' because they are the result of arm's-length negotiations among experienced counsel.").

Class Counsel conducted substantial investigation and analysis of thousands of pages of documents. *See* Tang Decl. ¶¶ 6, 9. "Discovery can be both formal and informal" and, here, Plaintiffs and Class Counsel engaged in significant investigation of the Parties' claims and defenses even before filing the initial complaint, and since then have undertaken significant formal fact and expert discovery. *See Urakhchin*, 2018 WL 3000490, at *4. Indeed, the Parties were engaged in vigorous litigation when they agreed to the Settlement and further litigation promised to be similarly lengthy and complex, involving numerous competing experts on liability issues concerning Plaintiffs' claims and Defendants' defenses as well as the Plan's alleged losses. As already discussed, the Parties likely would have filed dispositive motions and pretrial motions. Thus, Plaintiffs faced meaningful challenges in their ability to obtain a recovery on behalf of the Plan, even setting aside the additional complexity and delay of likely appeals, which strongly supports the preliminary approval of the Settlement. *See Urakhchin*, 2018 WL 3000490, at *4.

Class Counsel has significant experience in class action litigation generally and ERISA breach of fiduciary duty litigation in particular, and are of the opinion that the Settlement is fair and reasonable. "'The recommendations of plaintiffs' counsel should be given a presumption of reasonableness.'" *Urakhchin*, 2018 WL 3000490, at *5 (quoting *In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1043 (N.D. Cal. 2008) and granting preliminary approval). This presumption is especially warranted based on the opinion of "experienced plaintiffs' advocates and class action lawyers." *Does I v. Gap, Inc.*, No. CV-01-0031, 2002 WL 1000073, at *13 (D.N. Mar. Is. May 10, 2002); *Walsh v. CorePower Yoga LLC*, No. 16-CV-05610, 2017 WL 589199, at *10 (N.D. Cal. Feb. 14, 2017) (holding that settlements that are "the result of arms'-length negotiations among experienced counsel" weigh in favor of preliminary approval.). The Settlement provides a substantial monetary recovery of $6,750,000. Further, the Parties will submit the Settlement and related applications for fees and expenses to an independent fiduciary retained on behalf of the Plan, which will provide an opinion on the Settlement's fairness before the final fairness hearing.

"Preliminary approval is thus appropriate 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 range of possible approval.'" *Johnson v. Serenity Transp., Inc.*, No. 15-CV02004, 2021 WL 3081091, at *4 (N.D. Cal. July 21, 2021) (citation omitted); *Etter v. Allstate Ins. Co.*, No. C 17-00184, 2018 WL 5761755, at *1 (N.D. Cal. May 30, 2018) (stating same). Plaintiffs' experts have estimated the average range of realistic and supportable damages to be from $3,943,016.50 million to $15,940,213.00 million depending upon the methodology and assumptions employed, with a midpoint of $9,941,637.250. While figures in this range are defensible, the likelihood of establishing the higher figure faces more challenges than the lower figure. Indeed, if the Action proceeded through trial, Defendants would likely challenge the loss calculation methodology and interest rates applied (not to mention challenges to causation and other elements of Plaintiffs' claims). Accordingly, the Settlement provides monetary relief of approximately 68% of the midpoint of the most likely range of losses, which is well within and

significantly exceeds the accepted range of recovery in class action settlements across the country and in this district. *See* (Tang Decl. ¶ 8, Exhibit 3) (collecting cases); *see also Fleming v. Impax Lab'ys Inc*., 2021 WL 5447008, at *10 (N.D. Cal. 2021) (settlement recovery representing 12.5% of total recoverable damages is "in a range consistent with the median settlement recovery in class actions"); *In re MyFord Touch Consumer Litig*., 2019 WL 1411510, at *10 (N.D. Cal. 2019) (approving settlement providing for 5.7% of total possible recovery); *Deaver v. Compass Bank*, 2015 WL 8526982, at *7 (N.D. Cal. 2015) (10.7% of total damages); *In re Lithium Ion Batteries Antitrust Litig*., 2017 WL 1086331, at *4 (N.D. Cal. 2017) (overruling objections to settlement amount representing between 2.2% and 11.2% of total possible damages).

In sum, the Settlement is the product of vigorous litigation and arm's-length negotiation by experienced and well-informed counsel, adequately reflects the strength of the parties' claims and defenses, is based on sufficient discovery and information, and provides significant relief to the Settlement Class. Accordingly, the Court should find the Settlement is fair, reasonable, and adequate, and merits preliminary approval.

2. The Notice Plan Should Be Preliminarily Approved

In addition to preliminarily approving the proposed Settlement, the Court must approve the proposed means of notifying Settlement Class members. *See* Fed. R. Civ. P. 23(I)(2). Due process and Rule 23(e) do not require that each Class Member receive notice, but rather that class notice must be "reasonably calculated, under the circumstances, to apprise interested parties of the pendency of the action and afforded them an opportunity to present their objections." *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306, 314 (1950). "Individual notice must be provided to those class members who are identifiable through reasonable effort." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 175 (1974). "Notice is satisfactory if it 'generally describes the terms of the settlement in sufficient detail to alert those with adverse viewpoints to investigate and to come forward and be heard.'" *Churchill Village, L.L.C. v. Gen. Elec*., 361 F.3d 566, 575 (9th Cir. 2004).

The Notice Plan is designed to reach the largest number of Settlement Class members possible. The Settlement Notice will be sent by email and/or first-class mail to the last known address of each Settlement Class member prior to the Fairness Hearing. *See Peters v. Nat'l R.R. Passenger Corp.*, 966 F.2d 1483, 1486 (D.C. Cir. 1992) ("It is beyond dispute that notice by first class mail ordinarily satisfies Rule 23(c)(2)'s requirement that class members receive 'the best notice practicable under the circumstances.'"). Notably, all Settlement Class members had Plan accounts, so the Plan's recordkeeper has forwarding addresses and other identifying information for a substantial portion of the Settlement Class. In addition, the Notice, Settlement Agreement, preliminary and final approval motions and related applications, and other litigation documents will be posted on the Settlement Website, and the Settlement Administrator will establish and monitor a toll-free number to field Settlement Class member inquiries. The Notice will also provide Class Counsel's contact information and include instructions on how to access the case docket via PACER or in person at any of the court's locations, the date and time of the final approval hearing, and a note advising Class Members that the hearing date may change without further notice to the Class and instructions to check the settlement website or the Court's PACER site to confirm that the date has not changed.

The Notice Plan satisfies all due process considerations and meets the requirements of Rule 23(e). The Notice Plan clearly describes: (i) the terms and operation of the Settlement; (ii) the nature and extent of the Released Claims; (iii) the maximum attorneys' fees, litigation expenses, and case contribution awards that may be sought; (iv) the procedure and timing for objections; and (v) subject to the Court's schedule, the date and location of the Fairness Hearing.

3. The Plan of Allocation Should Be Preliminarily Approved

The Plan of Allocation provides recovery to members of the Settlement Class on a *pro rata* basis, with no preferential treatment for the Class Representatives or any segment of the Settlement Class. A *pro rata* distribution based on each class member's loss relative to that of the class as whole "has frequently been determined to be fair, adequate, and reasonable." *Hefler v. Wells Fargo & Co.*, No. 16-CV-05479, 2018 WL 6619983, at *12 (N.D. Cal. Dec. 18, 2018) (collecting cases). This is substantially similar to plans approved by this Court in analogous

ERISA litigation in this District and around the country. *See, e.g.*, *Terraza v. Safeway Inc.*, No. 16-cv-03994-JST, Dkt. 268 (N.D. Cal. Sept. 8, 2020) ("Settlement Scores will be determined by calculating the Class Member's year-end asset amounts in the Plan during the Class Period . . . ."); *see also Barcenas v. Rush Univ. Medical Ctr.*, No. 22-cv-00366, Dkt. 73 (N.D. Ill. Jan. 19, 2023) (approving substantially similar *pro rata* plan of allocation in analogous ERISA breach of fiduciary duty action); *Karpik*, 2021 WL 757123, at *2 (approving a plan of allocation distributing the settlement fund on a *pro rata* basis). Additionally, courts within this District hold that "[a] plan of allocation need only have a reasonable, rational basis, particularly if recommended by experienced and competent counsel." *In re Nexus 6P Prods. Liab. Litig.*, No. 17-CV-02185, 2019 WL 6622842, at *9 (N.D. Cal. Nov. 12, 2019) (citation omitted). In light of the equitable treatment of Class Members and the competence of Class Counsel, the Court should find that the Plan of Allocation is also fair, reasonable, and adequate.

V. CONCLUSION

Plaintiffs respectfully submit that the Court should preliminarily approve the Settlement, Notice Plan, and Plan of Allocation, preliminarily certify the Settlement Class, and set a date for the Fairness Hearing. A proposed Preliminary Approval Order is attached to the contemporaneously-filed Settlement Agreement.

Dated: March 3, 2023

Respectfully submitted,

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