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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

BRIAN SMITH, JACQUELINE MOONEY, ANGELA BAKANAS, and MATTHEW COLÓN, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

VCA, INC., and THE PLAN COMMITTEE FOR THE VCA, INC. SALARY SAVINGS PLAN, and JOHN AND JANE DOES 1-50,

Defendants.

Case No. 2:21-cv-09140-GW-AGR

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

Hearing: February 16, 2023
Time: 8:30 a.m.
Judge: Hon. George Wu
Ctrm: 9D

[Concurrently filed Declarations of Andrew W. Ferich, Erich P. Schork, and Richard W. Simmons]

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I. INTRODUCTION

Plaintiffs[1] Brian Smith, Jacqueline Mooney, Angela Bakanas, and Matthew Colón, through their undersigned counsel, hereby move for preliminary approval of a Class Action Settlement Agreement (the "Settlement") (a copy of the Settlement Agreement is attached as **Exhibit 1**) with the Defendants VCA, Inc. and the Plan Committee for the VCA, Inc. Salary Savings Plan (collectively, the "Parties").

In this lawsuit, Plaintiffs allege that Defendants breached fiduciary duties they owed to them and Class members under the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), resulting in Plaintiffs' and Class members' payment of excessive recordkeeping and administrative ("RK&A") fees. Plaintiffs allege these breaches cost the Plan participants millions of dollars in excessive fees, costs, and lost investment opportunity.

The Settlement creates a non-reversionary common fund of $1,500,000 to resolve these allegations.[2] The parties reached the Settlement after extensive, arm's-length negotiations between experienced class action counsel and with the assistance of David Geronemus of JAMS, a highly-experienced mediator in ERISA class action cases. The Settlement was reached after an all-day mediation session with Mr. Geronemus on November 9, 2022, followed by weeks of continued negotiations to finalize the terms of the Settlement. Prior to attending mediation with Mr. Geronemus, the Parties began informally negotiating over a period of months. The Parties also engaged in extensive pre-mediation discovery to inform and facilitate settlement negotiations, including VCA's production and Plaintiffs' review of 1,829 pages of Plan and Plan-related documents. Prior to the mediation, the Parties submitted detailed mediation briefs to the mediator.

[1] Unless otherwise noted, all capitalized terms not separately defined here have the meaning ascribed to them in the Settlement Agreement.

[2] The Plan no longer exists and has been merged into a successor plan operated by Mars, Incorporated ("the Mars Plan"), obviating the need for injunctive relief measures.

In sum, the Settlement is well-informed, fair, and reasonable, and an excellent result for the Class given the attendant risks of continued litigation. Accordingly, Plaintiffs request that the Court (1) grant preliminary approval of the Settlement, (2) certify the proposed Class for settlement purposes only, (3) appoint Analytics Consulting LLC ("Analytics Consulting") to serve as the Settlement Administrator, (4) approve the agreed upon Settlement Notice and notice plan, (5) appoint the Plaintiffs as Class Representatives, (6) appointing Robert Ahdoot and Andrew W. Ferich of Ahdoot Wolfson, PC, and Michael L. Roberts and Erich P. Schork of Roberts Law Firm as Class Counsel, (7) approve the Plan of Allocation, and (8) set the relevant deadlines for the Final Approval Hearing.

II. FACTUAL AND PROCEDURAL OVERVIEW

A. Litigation History

In this class action lawsuit, Plaintiffs claim that VCA breached fiduciary duties in violation of ERISA, 29 U.S.C. §§ 1001-1461. Specifically, Plaintiffs allege that, as the sponsors and administrators of the Plan, Defendants were responsible for selecting, monitoring, and retaining third parties to provide recordkeeping and other administrative services, and that Defendants were responsible for monitoring Plan costs—namely RK&A costs—to ensure those charges were fair, reasonable, and appropriate, but failed to do so.

Plaintiffs filed this class action lawsuit on November 22, 2021. ECF No. 1. Defendants sought to stay this litigation by filing a motion to stay pending the Supreme Court's decision in the ERISA litigation in *Hughes et al. v. Northwestern Univ.*, No. 19-1401, 141 S. Ct. 2882 (U.S. July 2, 2021). ECF No. 25. Plaintiffs opposed this motion. ECF No. 28. *Hughes* was decided during the pendency of (and thus mooted) the motion to stay, resulting in VCA's withdrawal of the motion. ECF No. 36.

On February 17, 2022, VCA moved to dismiss this litigation in its entirety. ECF No. 40. Plaintiffs opposed the motion to dismiss. ECF No. 47. The Court denied the motion to dismiss in its entirety. ECF Nos. 55, 56. On April 28, 2022, VCA answered the Complaint. ECF No. 57.

B. Mediation and the Settlement Negotiations

In July 2022, with discovery underway, and during a meet and confer telephone discussion concerning discovery and case management matters, the parties discussed the prospect of early resolution. Declaration of Andrew W. Ferich ("Ferich Decl."), submitted as **Exhibit 2**, at ¶ 14; Declaration of Erich P. Schork ("Schork Decl."), submitted as **Exhibit 3**, at ¶ 13. As a result of this discussion, the Parties mutually agreed to mediate this matter. *Id.* An all-day mediation session was reserved with David Gereonemus of JAMS for November 9, 2022. Ferich Decl. ¶ 15; Schork Decl. ¶ 14. In the meantime, the Parties began engaging in settlement negotiations and preparing for the November 9, 2022 mediation. *Id*.

To prepare for the mediation, the Parties participated in multiple calls about the structure of a classwide settlement and informal pre-mediation discovery, including the exchange of information and documents necessary to facilitate settlement negotiations. Ferich Decl. ¶ 17; Schork Decl. ¶ 16. Plaintiffs drafted and provided VCA with a detailed letter requesting the production of 21 categories of pertinent documents and information. *Id.* In response to Plaintiffs' demand VCA produced 1,829 pages of documents, which Plaintiffs' counsel thoroughly reviewed and analyzed. *Id.* The Parties also submitted detailed mediation briefs to Mr. Geronemus laying out their respective positions on the merits of the litigation and framework for a potential classwide settlement. Ferich Decl. ¶ 18; Schork Decl. ¶ 17.

On November 9, 2022, the Parties participated in an all-day mediation session with Mr. Geronemus. Ferich Decl. ¶ 19; Schork Decl. ¶ 18. The negotiations were hard-fought. *Id*. During the mediation, the Parties communicated their respective positions on the litigation and the Parties' claims and defenses with each other and the mediator. *Id*. With Mr. Geronemus's guidance, the parties had a productive mediation session characterized by zealous advocacy by counsel for both sides. *Id.* Late in the day, the Parties reached an agreement in principle to settle the litigation, having agreed to the creation of a Qualified

Settlement Fund consisting of a Gross Settlement Amount of $1,500,000. Ferich Decl. ¶ 20; Schork Decl. ¶ 19.

Following the mediation, the Parties continued to work together to finalize the Settlement's terms. Ferich Decl. ¶ 22; Schork Decl. ¶ 21. During this time, the Parties exchanged numerous drafts of the Settlement Agreement and its exhibits, negotiating numerous details to maximize the benefits to the Class Members. *Id.* These efforts included (among other things) the Plan of Allocation, how to best provide the Settlement Notice and notice to the Class Members and developing a notice plan, and the selection of the Settlement Administrator. *Id*.

During the settlement negotiations, the Parties deferred discussions concerning the maximum Service Payments to be sought on behalf of the proposed Class Representatives and the amount of Attorneys' Fees and Costs to be sought by Plaintiffs' counsel until after reaching an agreement on all material terms of the Settlement. Ferich Decl. ¶ 21; Schork Decl. ¶ 20. Negotiations regarding the Settlement have been conducted at arm's length, in good faith, and under the supervision of Mr. Geronemus. Ferich Decl. ¶ 19; Schork Decl. ¶ 18. After comprehensive negotiations and diligent efforts, Plaintiffs and VCA finalized the terms of the Settlement and executed the Settlement on January 30, 2023. Ferich Decl. ¶ 25; Schork Decl. ¶ 24.

III. THE TERMS OF THE SETTLEMENT

A. The Settlement Class

The Settlement Class is defined as follows: "all persons who participated in the Plan at any time during the period from November 22, 2015 through July 24, 2020, including any Beneficiary of a deceased Person who participated in the Plan at any time during the Class Period, and any Alternate Payee of a Person subject to a QDRO who participated in the Plan at any time during the period from November 22, 2015 through July 24, 2020." Settlement Agreement ("SA") ¶ 1.44. Excluded from the Class are Defendants and their Beneficiaries, any Plan fiduciaries, and the Judges assigned to this case. *Id*.

B. Settlement Consideration and Plan of Allocation

The Settlement provides significant monetary benefits to the Class. It establishes a non-reversionary Qualified Settlement Fund in the amount of $1,500,000. SA ¶¶ 1.24, 1.33.

The Settlement will result in payments to all Class Members under the proposed Plan of Allocation. *Id.* ¶ 5.3 and at Exhibit B. The exact amount proposed to be paid to each Class Member from the Net Settlement Amount is based upon the following plan: 1) Calculate the sum of each Class Member's account balances for each year of the Class Period based on the data as of the dates above. This amount shall be that Class Member's "Balance"; 2) Sum the Balance for all Class Members; 3) Allocate each Class Member a share of the Net Settlement Amount in proportion to the sum of that Class Member's Balance as compared to the sum of the Balance for all Class Members, i.e., where the numerator is the Class Member's Balance and the denominator is the sum of all Class Members' Balances. *Id*. at Exhibit B.

The amounts resulting from this initial calculation shall be known as the "Preliminary Entitlement Amount." Class Members who are entitled to a distribution of less than $10.00 will receive a distribution of $10.00 (the "De Minimis Amount") from the Net Settlement Amount. The Settlement Administrator shall progressively increase Class Members' payments falling below the De Minimis Amount until the lowest participating Class Member award is the De Minimis Amount, i.e., $10.00. The resulting calculation shall be the "Final Entitlement Amount" for each Settlement Class Member. The sum of the Final Entitlement Amount for each remaining Settlement Class Member must equal the dollar amount of the Net Settlement Amount. *Id*.

Class Members who have an individual investment account in the Mars Veterinary Health 401(k) Savings Plan ("Mars Plan") with a balance greater than $0 as of January 1, 2023 ("Active Account") will receive their Settlement payment via a direct deposit into their Mars Plan account by the Recordkeeper. SA at Exhibit B. Class Members without an Active Account will be paid directly by the Settlement Administrator by check. *Id*. Checks

issued to Former Participants under the terms of the Settlement will be valid for 180 days from the date of issue. *Id*.

C. Attorneys' Fees and Costs and Class Representative Service Payments

The Settlement provides for payment of any Attorneys' Fees and Costs, and Class Representative Service Payments awarded by the Court, to be paid from the Qualified Settlement Fund. SA ¶¶ 1.4, 5.1, 6.1. Plaintiffs will file a separate motion for an award of Attorneys' Fees, and Costs and Class Representatives' Service Payments. *Id*. ¶ 6.2. Class Counsel intends to seek up to thirty-three and one-third percent (33 1/3%) of the Settlement Fund as payment for attorneys' fees. *Id.* ¶¶ 1.4, 6.1, 6.2; Ferich Decl. ¶ 37; Schork Decl. ¶ 36. As Plaintiffs will establish in their fee motion, one-third fee awards are standard in similar ERISA recordkeeping fee breach of fiduciary duty cases where a settlement fund is obtained, both in this Court and across the country. *Marshall v. Northrop Grumman Corp.*, No. 16-CV-6794 AB (JCX), 2020 WL 5668935, at *8 (C.D. Cal. Sept. 18, 2020) (collecting cases); *Weil v. Cigna Health & Life Ins. Co.*, No. CV157074MWFJPRX, 2017 WL 10345373, at *4 (C.D. Cal. Apr. 19, 2017) ("The Court agrees with counsel that the 33% fee is justified in this case and preliminarily approves that figure.").

Class Counsel will also seek an award of $3,000 as Service Payments to each of the four named Class Representatives, for a total of $12,000. SA ¶¶ 1.39, 6.1, 6.2. The Settlement would not have been possible without the Class Representatives' participation in and attention to this matter. Ferich Decl. ¶ 38; Schork Decl. ¶ 37. These payments, if awarded, will also be paid from the Settlement Fund. SA ¶¶ 1.39, 5.1, 6.1.

D. Settlement Administration and Notice Costs

Administrative Expenses also will be paid from the Qualified Settlement Fund. *Id*. ¶¶ 1.2, 5.1. Counsel for the Parties solicited competing bids and negotiated with three separate third-party administrators for settlement notice and administration. Ferich Decl. ¶ 23; Schork Decl. ¶ 22. The Parties ultimately negotiated an agreement with Analytics Consulting. Analytics Consulting is a nationally recognized leader in class action settlement administration and has administered hundreds of class action settlements.

Declaration of Richard W. Simmons ("Simmons Decl."), submitted as **Exhibit 4**, at ¶¶ 1-6, 9, and Exhibits A-B. Analytics Consulting estimates that the total administration and notice charges in this matter will be between approximately $45,000 and $65,000. Simmons Decl. ¶ 23. This estimate is reasonable in the context of this proposed Settlement, and includes all costs associated with providing direct notice, class member data management, CAFA notification, telephone support, claims administration, creation and management of the Settlement website, disbursements and tax reporting, and includes postage. Ferich Decl. ¶ 23; Schork Decl. ¶ 22.

E. Review by Independent Fiduciary

The Settlement will also be subject to review by the Independent Fiduciary. SA, Article 2. 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. SA ¶ 2.1.1. The recommendation of the Independent Fiduciary shall be made to Defendants no later than 30 days before the Final Approval Hearing. *Id*. ¶ 2.1.2.

F. Release

In exchange for the above-described Settlement benefits, all Class Members and the Plan, subject to Independent Fiduciary approval, will release the Released Parties from the Released Claims. SA ¶¶ 1.35, 1.36, Article 7. Each Class Member will also release Defendants, "Defense Counsel, and Class Counsel from any claims, liabilities, and attorneys' fees and expenses arising from the allocation of the Gross Settlement Amount or Net Settlement Amount and for all tax liability and associated penalties and interest as well as related attorneys' fees and expenses." *Id*. ¶ 3.1.5.

G. The Notice Plan

A declaration from Richard Simmons, the President of Analytics Consulting, setting forth the Analytics Consulting experience and discussing the details of the Notice Plan and Settlement administration is filed herewith. *See* Simmons Decl., concurrently filed

herewith, and Exhibit A thereto. The Notice Plan requires direct notice to the Class. SA ¶ 2.4 and Exhibit A (long form and postcard notices). The Settlement Administrator shall be provided Class Member contact information by Defendants' Counsel. SA ¶¶ 8.2.1, 8.2.2, and Article 2. The Settlement Administrator will also post a copy of the Settlement Notice on the Settlement website. Simmons Decl. ¶¶ 12-13; SA at Exhibit A. Pursuant to the [Proposed] Preliminary Approval Order filed concurrently herewith as Exhibit C to the Settlement Agreement, the Settlement Administrator will mail the Settlement Notice by the date the Court sets in the Preliminary Approval Order. SA ¶ 2.4 and Exhibit C. The Settlement Notice will advise Class Members that they may object to the Settlement by filing an objection and any supporting documents at least thirty (30) days prior to the date the Court sets the Final Approval Hearing in the Preliminary Approval Order. *Id*. ¶ 2.2.7. The Settlement Administrator will also establish a Settlement website (www.VCAERISAsettlement.com), which it will operate. Simmons Decl. ¶¶ 28-30; SA at Exhibit A. The Settlement website will include copies of the operative Complaint, the Settlement Agreement and its exhibits, the Settlement Notice to Class Members, Plaintiffs' Motion for Final Approval, the Motion for Attorneys' Fees and Costs and Class Representative Service Payments, any Court Orders related to the Settlement Agreement, any amendments or revisions to these documents, and any other documents or information agreed upon by the parties. *Id.*

IV. THE COURT SHOULD PRELIMINARILY APPROVE THE SETTLEMENT

A. Conditional Certification of the Proposed Settlement Class is Appropriate Under Fed. R. Civ. P. 23

Plaintiffs seek conditional certification of a Settlement Class defined as: all persons who participated in the Plan at any time during the period from November 22, 2015 through July 24, 2020, including any Beneficiary of a deceased Person who participated in the Plan at any time during the Class Period, and any Alternate Payee of a Person subject to a QDRO who participated in the Plan at any time during the period from November 22, 2015 through July 24, 2020. SA ¶ 1.44. Excluded from the Settlement Class are Defendants and their

Beneficiaries, any Plan fiduciaries, and the Judges assigned to this case. *Id.* A party seeking certification of a settlement class must satisfy Rule 23(a)'s four prerequisites and demonstrate the action may be maintained under Rule 23(b)(1), (2), or (3). *Tom v. Com Dev USA, LLC*, No. CV161363PSGGJSX, 2017 WL 8236268, *2 (C.D. Cal. Sept. 18, 2017) (citing *Amchem Prods., Inc.*, 521 U.S. at 613-14).

1. The Settlement Class Satisfies the Prerequisites of Rule 23(a)

Rule 23(a) provides that a district court may certify a class if: "(1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the named plaintiff's claims or defenses are typical of the claims or defenses of the class, and (4) the named plaintiff will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a). The proposed Settlement Class satisfies these requirements.

a. The Class is Sufficiently Numerous

In the present case, there are approximately 24,000 Settlement Class Members. Ferich Decl. ¶ 27; Schork Decl. ¶ 26. The Rule 23(a)(1) numerosity requirement is readily satisfied. *See, e.g., Vinh Nguyen v. Radient Pharmaceuticals Corp.*, 287 F.R.D. 563, 569 (CD. Cal. 2012) ("[A] proposed class of at least forty members presumptively satisfies the numerosity requirement.").

b. There Are Common Questions of Law and Fact

The commonality requirement is satisfied if "there are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2); *see also Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 589 (9th Cir. 2012) (characterizing commonality as a "limited burden," which "only requires a single significant question of law or fact"). For the purposes of Rule 23(a)(2), "even a single common question" satisfies the requirement. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 359 (2011).

In this case, Plaintiffs' claims are based on the same common theory, and are thus capable of classwide resolution. Plaintiffs contend that Defendants breached fiduciaries duties to Class Members resulting in their payment of excessive RK&A fees. Whether

Defendants violated ERISA by failing to follow a proper fiduciary process and whether Defendants permitted the Plan and its participants to pay excessive fees are questions that apply uniformly to all putative class members. Here, common questions of law and fact include: which Plan fiduciaries are liable for the remedies provided by 29 U.S.C. § 1109(a); whether the Plan fiduciaries breached their fiduciary duties to the Plan; and what losses the Plan suffered as a result of each breach of fiduciary duty.

In such circumstances, courts have found that the Rule 23(a)(2) commonality requirement is satisfied for purposes of certifying a nationwide settlement class. *See, e.g.*, *Tom*, 2017 WL 8236268 at *3 (finding common questions of law regarding proper interpretation of an ERISA Plan, specifically whether the defendants violated ERISA through conduct involving calculation benefit options and failing to provide material disclosures to the class); *Colesberry v. Ruiz Food Products, Inc.*, 04-cv-5516-AWI-SMS, 2006 WL 1875444, *2 (E.D. Cal. June 6, 2006) (commonality found when question was whether stock sale violated ERISA and state law because it applied to all class members). The commonality requirement under Rule 23(a)(2) is readily satisfied.

c. The Class Representatives' Claims Are Typical

Rule 23(a)(3) requires that the Class Representatives' claims be typical of those of the Class. "The test of typicality is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other Class Members have been injured by the same course of conduct." *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 984 (9th Cir. 2011) (internal quotation marks and citation omitted).

Plaintiffs' claims are typical of the Class. Like all of the Class Members, Plaintiffs were participants in the Plan during the Class Period. Like all of the Class Members, Plaintiffs allege being harmed by Defendants' failure to use the Plan's bargaining power to obtain lower RK&A fees and take adequate measures to monitor, evaluate, or reduce such fees. Because Plaintiffs' claims are "reasonably co-extensive with" those of absent

class members, Rule 23(a)(3)'s typicality requirement is readily satisfied. *In re Countrywide Fin. Corp. Sec. Litig.*, 273 F.R.D. 586, 598 (C.D. Cal. 2009).

d. The Class Representatives and Proposed Class Counsel Adequately Represent the Class Members

Rule 23(a)(4) permits certification of a class action only if "the representative parties will fairly and adequately protect the interests of the class," which requires that the named plaintiffs (1) not have conflicts of interest with the proposed Class; and (2) be represented by qualified and competent counsel. *In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prod. Liab. Litig.*, 895 F.3d 597, 607 (9th Cir. 2018).

Plaintiffs and proposed Class Counsel are adequate. First, the proposed Class Representatives have demonstrated that they are well-suited to represent the Settlement Class, have actively participated in the litigation, and will continue to do so. Ferich Decl. ¶ 33; Schork Decl. ¶ 32. Plaintiffs do not have any conflicts of interest with the absent Class Members, as their claims are coextensive with those of the Class Members. Ferich Decl. ¶ 34; Schork Decl. ¶ 33; *see Kent v. Hewlett-Packard Co.*, No. 5:09-CV-05341-JF HRL, 2011 WL 4403717, at *1 (N.D. Cal. Sept. 20, 2011) (finding class representatives adequate where their claims coextensive were with those of absent class members, and they had no conflicts).

Second, proposed Class Counsel are highly qualified and experienced in class action and complex litigation. Ferich Decl. ¶¶ 32–35, 39–48 & Ex. A thereto; Schork Decl. ¶¶ 38–44 & Ex. A thereto. Proposed Class Counsel have been dedicated to the prosecution of this action and will remain so through final approval. Ferich Decl. ¶ 33; Schork Decl. ¶ 32. Among other actions, counsel identified and investigated the claims in this lawsuit and the underlying facts, engaged in motion practice, conducted discovery, spoke with numerous Class Members, engaged in an all-day mediation session and protracted negotiations with VCA, and successfully negotiated this Settlement. Ferich Decl. ¶¶ 11-13, 19, 22, 34; Schork Decl. ¶¶ 9–12, 15–19; *see also In re Emulex Corp. Sec. Litig.*, 210 F.R.D. 717, 720 (C.D. Cal. 2002) (a court evaluating adequacy of representation may examine "the

attorneys' professional qualifications, skill, experience, and resources . . . [and] the attorneys' demonstrated performance in the suit itself"); *Alvarez v. Sirius XM Radio Inc.*, No. CV 18-8605, 2020 WL 7314793, at *8 (C.D. Cal. July 15, 2020) (adequacy of counsel satisfied where class was "represented by Class Counsel who are experienced in class action litigation"). The adequacy requirement is satisfied.

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

In addition to satisfying the prerequisites imposed by Rule 23(a), the Settlement Class is maintainable under Rule 23(b)(1). "Most ERISA class action cases are certified under Rule 23(b)(1)." *Kanawi v. Bechtel Corp.*, 254 F.R.D. 102, 111 (N.D. Cal. 2008). Rule 23(b)(1) provides for class treatment where "(1) prosecuting separate actions by or against individual class members would create a risk of: (A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or (B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests." Fed. R. Civ. P. 23(b)(1).

ERISA cases are particularly appropriate for certification under Rule 23(b)(1) because issues concerning plan interpretation make individual litigation by class members unwieldy. *See Frazier v. Honeywell Savings and Pension Plan*, No. 2:10-cv-10618, Doc. No. 165, at p. 12 (D. Ariz. Nov. 20, 2012) (granting class certification in ERISA action under Rule 23(b)(1)(A)); *Humphrey v. United Way*, No. H-05-0758, 2007 WL 2330933 at *10 (S.D. Tex. Aug. 14, 2007) (certifying class of ERISA plan participants challenging the validity of a plan amendment pursuant to Rule 23(b)(1) because "[i]ndividual suits might lead to conflicting orders on the interpretation of the [. . .] Plan"); *In re Citigroup Pension Plan ERISA Litig.*, 241 F.R.D. 172, 180 (S.D.N.Y. 2006) (certifying under Rule 23(b)(1) a claim seeking reformation of an ERISA plan "because . . . inconsistent dispositions of these claims by different courts could create an untenable situation.") (internal quotation omitted).

Here, there are approximately 24,000 Class Members who, absent class treatment, "could individually file suit for damages arising from the same conduct." *Kanawi*, 254 F.R.D. at 111. "This would create a risk of 'inconsistent and varying' adjudications, resulting in 'incompatible standards of conduct' for Defendants." *Id.* Thus, for example, Defendants "could face differing adjudications regarding the prudent process for determining reasonable recordkeeping fees." *Wildman v. Am. Century Servs., LLC*, 4:16-cv-00737-DGK, 2017 WL 6045487, at *6 (W.D. Mo. Dec. 6, 2017). Thus "ERISA cases have become a primary form of Rule 23(b)(1)(A) class actions." 2 William B Rubenstein, Newberg on Class Actions § 4:7 (5th ed., June 2018 update). Certification under Rule 23(b)(1)(A) is appropriate because the primary issues presented here hinge on proper interpretation of the Plan. There is a risk that the prosecution of separate actions would result in inconsistent outcomes resulting from incompatible interpretations of the Plan. Inconsistent interpretations of the Plan in multiple individual actions could and would lead to an unclear set of standards of conduct.

Second, certification is appropriate under Rule 23(b)(1)(B) because the Court's adjudication of issues related to interpretation of the Plan and ERISA requirements in Plaintiffs' case would necessarily affect and be dispositive of the interests of other similarly situated litigants. Certification is thus appropriate under Rule 23(b)(1)(A) and (B). *Tom*, 2017 WL 8236268, at *5.

B. The Proposed Settlement Is Fair, Reasonable, and Adequate, and Warrants Preliminary Approval From the Court

"At the preliminary approval stage, a court determines whether a proposed settlement is within the range of possible approval and whether or not notice should be sent to class members." *True v. Am. Honda Motor Co.*, 749 F. Supp. 2d 1052, 1063 (C.D. Cal. 2010). Preliminary approval amounts to a finding that the terms of the proposed settlement warrant consideration by members of the class and a full examination at a final approval hearing. Manual for Complex Litigation (Fourth) § 13.14 at 173. In evaluating a proposed settlement, the district court's review is "limited to the extent necessary to reach a reasoned

judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable, and adequate to all concerned." *Bravo v. Gale Triangle, Inc.*, 16-cv-00347-BRO, 2017 WL 708766, at *4 (C.D. Cal. Feb.16, 2017) (quoting *Officers for Justice*, 688 F.2d at 625). In doing so, the Court '"ultimately consider[s] a number of factors, including: the strength of plaintiffs' case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed, and the stage of the proceedings; the experience and views of counsel; the presence of a governmental participant; and the reaction of the class members to the proposed settlement.'" *Peel v. Brooksamerica Mortg. Corp.*, 2014 WL 12589317, at *4 (C.D. Cal. Nov. 13, 2014) (quoting *Stanton v. Boeing Co.*, 327 F.3d 938, 959 (9th Cir. 2003)).

However, at the preliminary approval stage, "because class members will receive an opportunity to be heard on the settlement, a full fairness analysis is unnecessary. Preliminary approval . . . [is] appropriate where (1) the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, (2) has no obvious deficiencies, (3) does not improperly grant preferential treatment to class representatives or segments of the class, and (4) falls within the range of possible approval." *Peel*, 2014 WL 12589317, at *4 (internal quotation marks and citations omitted); *In re Tableware Antitrust Litig.*, 12-cv-02161-DOC, 2014 WL 360196, at *4 (C.D. Cal. Jan. 31, 2014) (same). Here, each of the applicable factors weighs in favor of preliminary approval of the Settlement.

1. The Settlement is the Product of Serious, Informed, and Non-Collusive Negotiations

The Settlement was obtained following a full-day mediation with David Geronemus of JAMS, a highly-experienced mediator with expertise in ERISA class action settlements. Ferich Decl. ¶¶ 15, 19; Schork Decl. ¶¶ 14, 18. At all times, the negotiations were

conducted at arm's length and in an adversarial manner with each side vigorously representing their clients' interests. *Id.*

The Settlement is also well informed as a result of Plaintiffs engaging in vigorous confirmatory discovery, extensive mediation briefing, reviewing pre-mediation document productions, and attending meditation with a well-respected mediator. Ferich Decl. ¶ 32; Schork Decl. ¶ 31. Plaintiffs consulted with ERISA experts on the reasonableness of RK&A fees for defined contribution 401(k) plans similar to the Plan and (f) Plaintiffs evaluated potential sources of recovery. *Id.*

Accordingly, this factor strongly weighs in favor of approval of the Settlement, and there is no evidence of any fraud or collusion. *See Peel*, 2014 WL 12589317, at *5 (finding this factor satisfied where settlement was reached before a well-respected mediator at JAMS); *G. F. v. Contra Costa Cnty.*, No. 13-cv-03667, 2015 WL 4606078, at *13 (N.D. Cal. July 30, 2015) ("[T]he assistance of an experienced mediator in the settlement process confirms that the settlement is non-collusive.") (internal quotation marks and citation omitted).

2. The Settlement Has No Obvious Deficiencies

The next factor at preliminary approval considers whether the settlement "has no obvious deficiencies." *Ma v. Covidien Holding, Inc.*, No. SACV 12-2161 DOC, 2014 WL 360196, at *4 (C.D. Cal. Jan. 31, 2014).

Here, the proposed Settlement has no obvious deficiencies. The Settlement maximizes the recovery to the Class. The Settlement obtains a $1.5 million cash Settlement Fund without the risk of further litigation. The fact that Plaintiffs obtained a settlement value representing an estimated 25% of their projected maximum damages demonstrates the excellence of the Settlement. Ferich Decl. ¶ 28; Schork Decl. ¶ 27. This factor weighs in favor of preliminary approval.

3. The Proposed Settlement Treats All Class Members Fairly and Does Not Provide Preferential Treatment

The proposed Settlement treats all Class Members fairly and does not offer preferential treatment to Plaintiffs or segments of the Class. All Class Members, including Plaintiffs, are entitled to their respective share of the Settlement Funds under the Plan of Allocation. SA at Exhibit B (Plan of Allocation). Plaintiffs will be seeking $3,000 Service Payments for each the Class Representatives, and the Ninth Circuit has recognized that such awards are permissible and do not render a settlement unfair or unreasonable. *See Stanton v. Boeing Co.*, 327 F.3d 938, 977 (9th Cir. 2003); *Rodriguez*, 563 F.3d at 958–59. Accordingly, this factor weighs in favor of granting preliminary approval of the proposed Settlement.

4. The Settlement Falls Within the Range of Possible Approval

In evaluating the terms of the settlement, "[t]he court's role is not to advocate for any particular relief, but instead to determine whether the settlement terms fall within a reasonable range of possible settlements, giving 'proper deference to the private consensual decision of the parties' to reach an agreement rather than to continue litigating." *In re Google Referrer Header Privacy Litig.*, 87 F. Supp. 3d 1122, 1133 (N.D. Cal. 2015), *aff'd,* 869 F.3d 737 (9th Cir. 2017) (quoting *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1027 (9th Cir. 1998)). "[I]t is well-settled law that a proposed settlement may be acceptable even though it amounts to only a fraction of the potential recovery that might be available to the class members at trial," *DIRECTV*, 221 F.R.D. at 527.

Here, the benefits of a $1,500,000 cash fund settlement outweigh the risks of pursuing a potentially greater, but uncertain, recovery. Even if Plaintiffs defeated Defendants' summary judgment motion and prevailed at trial—which they believe they could have—the Court could have awarded a wide range of damages to the class, including none at all. *See In re NVIDIA Corp. Deriv. Litig.*, 06-cv-06110-SBA, 2008 WL 5382544, at *3 (N.D. Cal. Dec. 22, 2008) ("even a favorable judgment at trial may face post-trial motions and even if liability was established, the amount of recoverable damages is

uncertain."). Damages calculations in 401(k) ERISA fiduciary breach cases are the subject of significant uncertainty. *See Tussey v. ABB, Inc.*, 850 F.3d 951, 958–61 (8th Cir. 2017), *cert. denied*, No. 17-265, 2017 WL 3594208 (U.S. Oct. 2, 2017) (remanding a second time, finding that the district court still did not adequately consider "other ways of measuring the plans' losses"). Here, Plaintiffs' estimate that maximum "excess fee" damages that could be obtained if this matter were taken through trial to a favorable judgment would be approximately $5-6 million. Ferich Decl. ¶ 28; Schork Decl. ¶ 27. Thus, the negotiated $1.5 million recovery exceeds 25% of the total estimated losses to the Plan. *Id*.

This recovery is at the high end of the "range of possible approval." *Peel*, 2014 WL 12589317, at *4; *see generally In re Rite Aid Corp. Sec. Litig.*, 146 F. Supp. 2d 706, 715 (E.D. Pa. 2001) (noting that since 1995, class action settlements have typically "recovered between 5.5% and 6.2% of the class members' estimated losses"); *Stott v. Capital Fin. Servs., Inc.*, 277 F.R.D. 316, 345 n.19 (N.D. Tex. 2011) (approving class settlement "estimated at about 2 to 3 percent of the each individual class member's total losses" based on the "risks involved in the litigation"); *In re Checking Account Overdraft Litig.*, 830 F. Supp. 2d 1330, 1350 (S.D. Fla. 2011) (recovery of 9 percent was reasonable).

5. Early Consideration of the Final Approval Factors Also Support That The Settlement is Within the Range of Approval

Although not necessary at the preliminary approval stage, consideration of the factors relevant to final settlement approval, now, further support that the Settlement falls within the range of fair, reasonable, and adequate. *See Peel*, 2014 WL 12589317, at *4. In determining whether a settlement agreement is fair, adequate, and reasonable, the Court may consider some or all of the following factors: (1) the strength of the plaintiffs' case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the risk of maintaining class action status throughout the trial; (4) the amount offered in settlement; (5) the extent of discovery completed, and the stage of the proceedings; (6) the experience and views of counsel; (7) the presence of a governmental participant; and (8) the reaction of class members to the settlement. *See, e.g., Churchill Village, L.L.C. v. General Electric*,

361 F.3d 566, 575 (9th Cir. 2004). Here, these factors weigh in favor of preliminary approval.

First, when evaluating the strength of a plaintiffs' case, a court should assess the likelihood of success on the merits and the range of possible recovery. *See Rodriguez v. West Publishing Corp.*, 563 F.3d 948, 964-65 (9th Cir. 2009). While Plaintiffs believe in the strength of their case, Defendants would vigorously dispute that they breached their fiduciary duties and vigorously dispute that Plaintiffs suffered any damages and that Plan RK&A fees were unreasonable, such that no breaches of fiduciary duty occurred. Thus, there is far from any guarantee that Plaintiffs and the Class would ultimately prevail in this case, which favors approving the Settlement.

Second, the risk, expense, complexity, and likely duration of further litigation all weigh in favor of approving the proposed Settlement. Generally, "unless the settlement is clearly inadequate, its acceptance and approval are preferable to lengthy and expensive litigation with uncertain results." *National Rural Telecommunications Cooperative v. DIRECTV, Inc.*, 221 F.R.D. 523, 526 (C.D. Cal. 2004). Settlements are encouraged in class actions where possible. *See Van Bronkhorst v. Safeco Corp.*, 529 F.2d 943, 950 (9th Cir. 1976) ("It hardly seems necessary to point out that there is an overriding public interest in settling and quieting litigation."). Here, Plaintiffs and the Class faced a risk of losing on liability. Continued litigation would have been expensive and lengthy. The Settlement provides immediate relief for Plan participants, and avoids these risks. In sum, this second factor weighs in favor of preliminary approval.

Third, assuming Plaintiffs were able to obtain certification in the first instance, the risk of maintaining class action status through trial weighs in favor of approving the Settlement. *See, e.g., In re Toys R Us-Delaware, Inc. Fair & Accurate Credit Transactions Act (FACTA) Litig.*, 295 F.R.D. 438, 452 (C.D. Cal. 2014) ("Avoiding the risk of decertification, especially where there are doubts concerning the viability of the class, favors approval of the settlement."). "[S]ettlement avoids all possible risk [of decertification]. This factor therefore weighs in favor of final approval of the settlement."

McKenzie v. Federal Exp. Corp., 10-cv-02420-GAF, 2012 WL 2930201, at *4 (C.D. Cal. July 2, 2012).

Fourth, the value attained in the settlement weighs in favor of preliminary approval. Plaintiffs obtained a $1.5 million non-reversionary cash fund. The Settlement Agreement confers a substantial benefit on the Class Members who would otherwise face a significant risk of obtaining no recovery at all if forced to proceed with litigation.

Fifth, the extent of discovery and the stage of the proceedings are also factors that weigh in favor of approval. Here, the Parties have begun discovery, and though class certification has not yet been briefed, the discovery conducted was sufficient to convince Defendants to settle for a substantial amount.

Sixth, the experience and views of Plaintiffs' counsel favor approval of the settlement. Plaintiffs' counsel are highly experienced in class action litigation. Ferich Decl. ¶ 35; Schork Decl. ¶ 34. Plaintiffs' counsel believe the settlement is fair, reasonable, and adequate, and an excellent result for Plaintiffs and the Class. Ferich Decl. ¶ 36; Schork Decl. ¶ 35. As the Ninth Circuit observed, "[p]arties represented by competent counsel are better positioned than courts to produce a settlement that fairly reflects each party's expected outcome in litigation." *In re Pacific Enterprises Securities Litigation*, 47 F.3d 373, 378 (9th Cir. 1995). For this reason, courts find "[t]he recommendations of plaintiffs' counsel should be given a presumption of reasonableness." *In re Toys R Us-Delaware*, 295 F.R.D. at 455 (quoting *Boyd v. Bechtel Corp.*, 485 F.Supp. 610, 622 (N.D. Cal. 1979)).

Seventh, the presence of a governmental participant factor "does not apply because no government entity participated in the case." *In re Toys R Us-Delaware*, 295 F.R.D. at 455.

Eighth, because the Settlement is at the preliminary approval stage, there has been no reaction by the Class, and no objections. This factor is not applicable at this time.

Accordingly, the final settlement approval factors demonstrate the proposed Settlement is well within the range of possible approval.

C. The Notice Plan Should Be Approved

For any class certified through settlement, "[t]he court must direct notice in a reasonable manner to all class members who would be bound by the proposal if giving notice is justified by the parties' showing that the court will likely be able to: (i) approve the proposal under Rule 23(e)(2); and (ii) certify the class for purposes of judgment on the proposal." Fed. R. Civ. P. 23(e)(1)(B). As the foregoing discussion of the Settlement demonstrates, the Court will be able to both approve the proposal under Rule 23(e)(2) and certify this action as a class for purposes of judgment. Thus, it is appropriate that the Court order notice of the Settlement to be sent to the Class.

"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 Vill., LLC v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir. 2004) (quoting *Mendoza v. Tucson Sch. Dist. No. 1*, 623 F.2d 1338, 1352 (9th Cir. 1980)). The Settlement Notice (SA at Exhibit A) sets forth in clear language (1) the nature of the action and the essential terms of the settlement agreement; (2) the meaning and nature of the Class; (3) Class Counsels' application for Attorneys' Fees and Costs and the proposed Service Payments for the Class Representatives; (4) the calculation and distribution of the Net Settlement Fund; (5) how to object to the settlement; (6) information concerning the Released Claims and parties; (7) the Court's procedure for final approval of the Settlement; and (8) how to obtain additional information regarding this case and the Settlement Agreement. Simmons Decl. ¶ 36. The notice is being sent directly to all Class Members, which is the best form of notice. *Id.* ¶ 34; SA at Article 2; *id.* ¶¶ 8.2.1, 8.2.2. As discussed herein, a Settlement website will also be created that contains the Settlement Notice and all relevant documents pertaining to the Settlement. Simmons Decl. ¶¶ 28-30; SA at Exhibit A. The proposed notice provides for the best notice practicable under the circumstances and meets the requirements of due process. *Id.* ¶ 11. Accordingly, the notice plan should be approved.

V. CONCLUSION

Plaintiffs request that this motion be granted and that the Court enter an order: (1) certifying the proposed class for settlement; (2) preliminarily approving the proposed class action Settlement; (3) appointing Plaintiffs as Class Representatives; (4) appointing Robert Ahdoot and Andrew W. Ferich of Ahdoot & Wolfson, PC and Michael L. Roberts and Erich P. Schork of Roberts Law Firm, U.S., P.C, as Class Counsel; (5) appointing Analytics Consulting LLC as the Settlement Administrator; (6) approving the proposed Notice Plan and related Settlement administration documents; and (7) approving the proposed class settlement administrative deadlines and procedures set forth at **Appendix A**, including setting a Final Approval Hearing date.

Dated: January 31, 2023

Respectfully submitted,

/s/ Andrew W. Ferich

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Proposed Class Counsel

CERTIFICATE OF COMPLIANCE PURSUANT TO L.R. 11-6.2

The undersigned, counsel of record for Plaintiffs certifies that this brief contains 6,958 words, excluding caption, the table of contents, the table of authorities, the signature block, and this certification, which complies with the word limit of L.R. 11-6.1.

/s/ Andrew W. Ferich
Andrew W. Ferich

APPENDIX A

Event	Date
Service of CAFA Notice	No later than **10 Days** after the Motion for Preliminary Approval is filed (SA ¶ 2.5)
Preliminary Approval Hearing	February 16, 2023
Entry of Preliminary Approval Order	To Be Determined
Settlement Administrator to Receive Settlement Class List	Within **10 Business Days** of the entry of the Preliminary Approval Order (SA ¶ 8.2.1)
Notice Date (U.S. Mail)	Within **30 Days** of entry of the Preliminary Approval Order
Deadline to File Motion for Final Approval	At least **30 Days** prior to the deadline for filing objections (SA ¶ 3.1)
Deadline to Submit Motion for Attorneys' Fees and Costs, and Service Payments	At least **28 Days** prior to the deadline for filing objections (SA ¶ 6.2)
Deadline for Objections to the Settlement	At least **30 Days** prior to the Final Approval Hearing (SA ¶ 2.2.7)
Deadline for Independent Fiduciary to deliver determination to Defendants	At least **30 Days** prior to the Final Approval Hearing (SA ¶ 2.1.2)
Final Approval Hearing	**To Be Determined**, but no earlier than **120 Days** after entry of the Preliminary Approval Order (SA ¶ 2.2.6)