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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CLIFTON W. MARSHALL, *et al.*,

Plaintiffs,

v.

NORTHROP GRUMMAN CORPORATION, *et al.*,

Defendants.

Case No. 16-CV-6794 AB (JCX)

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY APPROVAL OF CLASS SETTLEMENT

DATE: January 31, 2020
TIME: 10:00 a.m.
Courtroom 7B – 7th floor

Hon. André Birotte Jr.

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I. Introduction.

This Settlement marks the end of a prolonged battle between the parties that began thirteen years ago with the filing of a related case, *In re Northrop Grumman Corp. ERISA Litig.*, No. 06-6213 AB (JCx) (C.D. Cal.) ("*Grabek*").[1] The Settlement provides significant benefits to thousands of current and former participants of the Northrop Grumman Savings Plan (the "Plan"). The Settlement creates a $12,375,000 Settlement Fund, providing meaningful monetary relief to class members.

Under the Settlement's "Plan of Allocation," the Class will share in the Settlement based on a fair and equitable methodology that considers the alleged injury to each Class Member. The actual recovery per Class Member will depend on the number of Class Members who are eligible for an award and the Class Member's average account balances during the Class Period. Current Participants will automatically receive their distributions directly into their tax-deferred retirement account(s). Former Participants will be given the option to receive their distributions in the form of a check made out to them individually or, in most cases, as a roll-over into another tax-deferred account. As a result, most Class Members will receive their distributions tax-deferred, further enhancing the significant monetary recovery.

After the Court limited the *Grabek* damages discovery period to May 11, 2009, Plaintiffs filed this action on September 9, 2016 alleging continued unlawful payments to Northrop Grumman Corporation occurring after that date. Plaintiffs also brought claims alleging the Plan's fiduciaries allowed unreasonable recordkeeping fees to be charged to the Plan, and claiming that the fiduciaries failed

[1] The fully executed settlement agreement ("Settlement" or "Settlement Agreement") is attached as Exhibit A to the Joint Motion for Preliminary Approval of Class Settlement. All capitalized terms have the meaning assigned to them in Article 2 of the accompanying Settlement Agreement, unless otherwise specified herein.

to remove an underperforming actively managed Emerging Markets Equity Fund ("EM Fund") in the Plan. After Plaintiffs filed this case, the *Grabek* case did not settle for another six months, until March 2017.

Since the filing of this action, there has been two separate partial denials of Defendants' motions to dismiss, certification of the Class, a partial grant of summary judgment that dismissed Plaintiffs' unreasonable recordkeeping fee claim and other claims against certain defendants, and ultimately a settlement in principle just fourteen minutes before the trial was set to begin. But before this case was filed, Class Counsel extensively researched and investigated the alleged unlawful practices that continued after the class period in *Grabek*, the administration of the Plan, and the changes to the investment strategy of funds provided to Plan participants.

The Settlement was the product of extensive arm's-length negotiation. Ultimately, the parties reached a settlement after numerous mediation sessions and only after completing their trial preparations. In light of the litigation risks further prosecution of this action would inevitably entail, the parties jointly request that the Court: (1) preliminarily approve the proposed Settlement; (2) approve the proposed form and method of notice to the Settlement Class; and (3) schedule a hearing at which the Court will consider final approval of the Settlement.

II. The claims in the case.

Plaintiffs alleged that Defendants violated 29 U.S.C. §§ 1104 and 1106 by unlawfully paying Northrop for services provided to the Plan, allowing unreasonable recordkeeping fees to be charged by the Plan's recordkeeper at the time, Hewitt Associates LLC, and for failing to move the actively managed EM Fund to passive management until the end of 2014. Doc. 132. Plaintiffs further alleged that Northrop failed to monitor Plan fiduciaries. Following the Court's orders on Defendants' two motions to dismiss [Docs. 68, 146], and motion for

summary judgment [Doc. 264] dismissing certain claims, trial was scheduled to begin on October 15, 2019 against Northrop, the Northrop Grumman Savings Plan Administrative Committee, Northrop Grumman Savings Plan Investment Committee, Denise Peppard, Michael Hardesty, Kenneth L. Bedingfield, Kenneth N. Heintz, Prabu Natarajan, Mark A. Caylor, Mark Rabinowitz, Richard Boak, Debora Catsavas, Teri Herzog, Tiffany McConnell King, Christopher McGee, Gary McKenzie, Constance Soloway, Rajender Chandhok, Gloria Flach, James M. Myers, Sunil Navale, Eric Scholten, and Steven Spiegel concerning allegations that these Defendants unlawfully paid Northrop for services provided to the Plan and for failing to remove the EM Fund. Docs. 274, 284-1.

III. Case History.

A. Pre-filing investigation.

The initial complaint in this case was filed on September 9, 2016. Doc. 1. Class Counsel's investigation of this matter began long before the filing of this action. During years of representing the *Grabek* Class, Class Counsel developed a thorough understanding of the allegedly unlawful reimbursement practices that formed the basis of the common claim that was asserted in this action to recover payments made to Northrop after May 11, 2009. They also investigated and analyzed the administrative services provided by the Plan's former recordkeeper (Hewitt), the relationship between the recordkeeper and the Plan's investment advice provider (Financial Engines), and the investments offered in the Plan. The dedication Class Counsel has shown to the Class is amply demonstrated by over 26,000 hours of attorney and non-attorney time spent litigating *Grabek*. *In re Northrop Grumman Corp. ERISA Litig.,* No. 06-6213, 2017 WL 9614818, at *3 (C.D. Cal. Oct. 24, 2017). Those pre-filing hours directly benefitted Class Members in this case.

B. Complex pre-trial procedural history.

Plaintiffs filed their complaint after the damages period in *Grabek* was limited to May 11, 2009. Doc. 1, ¶ 101. On January 30, 2017, the Court granted in part and denied in part Defendants' motion to dismiss the initial complaint, with leave to amend. Doc. 68. Plaintiffs filed a first amended complaint on February 13, 2017. Doc. 46. On February 27, 2017, Northrop, the Northrop Committees, Peppard, Ziskin, Hardesty, Bedingfield, Heintz, Zobair, Natarajan, Hickey, Movius, Caylor, Rabinowitz, and Thomas answered that complaint. Doc. 75. On May 15, 2017, Plaintiffs moved for class certification. Doc. 83. Over Defendants' opposition, [Doc. 115], the Court granted class certification on November 2, 2017. Doc. 130.

On November 3, 2017, Plaintiffs filed a second amended complaint adding additional individuals who served on the fiduciary committees during the class period. Doc. 132. Northrop and the newly added defendants moved to dismiss the second amended complaint. Doc. 141. On February 15, 2018, the Court granted in part and denied in part Defendants' motion. Doc. 146.

On February 1, 2019, Defendants moved for partial summary judgment and *in limine* to exclude the testimony of two of Plaintiffs' expert witnesses, and later filed evidentiary objections to Plaintiffs' other expert. Docs. 167, 168, 196. On February 5, 2019, Plaintiffs moved to disqualify one of Defendants' experts, which was denied. Doc. 176; Doc. 257. On August 14, 2019, the Court granted in part and denied in part Defendants' motion for partial summary judgment and granted Defendants' evidentiary objections to preclude one of Plaintiffs' experts from offering certain opinions. Doc. 264. The record on summary judgment was extensive. *Id.* at 18, n.7.

In preparation for trial, Defendants again moved *in limine* to exclude Plaintiffs' experts on the remaining claims. Docs. 266, 267. Plaintiffs also moved to exclude testimony of one of Defendants' experts. Doc. 268. The Court denied those

motions. Docs. 308–310. Defendants also moved to exclude certain fact witness testimony. Doc. 271. The parties filed their proposed findings of fact and conclusions of law, trial brief, joint exhibit list, and joint witness list. Docs. 269, 270, 284-1, 289-1. Written direct testimony was submitted, along with evidentiary objections to that testimony. Docs. 279–282, 291–294. And the parties submitted Stipulated Facts. Doc. 311.

C. Previous unsuccessful attempts at mediation.

The parties attempted to mediate their claims on March 5, 2019 and October 2, 2019 with mediator Margaret A. Levy, but were unable to reach a settlement. Doc. 306. The parties continued discussions with the assistance of the mediator up to the start of trial.

D. Trial.

The parties designated 1135 exhibits for potential use at trial, and over 20 witnesses they intended to call, including 4 experts. Trial was set to commence on October 15, 2019 at 8:30 a.m. Doc. 311. Fourteen minutes prior to trial the parties reached a settlement in principle. Doc. 315.

IV. The terms of the proposed settlement.

In exchange for releases and for the dismissal of this action as provided for in the Settlement Agreement, Defendants will make available to Class Members the benefits described below (the "Settlement Benefits"). Class Counsel agrees to take any necessary enforcement action without additional cost to the Settlement Class.

A. Monetary Relief.

Defendants, or an entity acting on their behalf, will deposit $12,375,000 (the "Gross Settlement Amount") in an interest-bearing settlement account (the "Gross Settlement Fund"). The Gross Settlement Fund will be used to pay amounts to the participants as well as Class Counsel's Attorneys' Fees and Costs, Administrative Expenses of the Settlement, and Class Representatives' Compensation as described

in the Settlement Agreement.

B. Notice and Class Representatives' Compensation.

The notice costs and all costs of administration of the Settlement will come out of the $12,375,000 Gross Settlement Amount. Incentive payments to the six Class Representatives in an amount to be approved by the Court would also be paid out of the Gross Settlement Amount. Plaintiffs will seek $25,000 for each of the Class Representatives. This amount is well in line with precedent recognizing the value of individuals stepping forward to represent classes—particularly in a case like this one, where the potential benefit to any individual does not outweigh the cost of prosecuting the claim and there are significant risks, including the risk of no recovery, the risk of alienation from their employers and peers, and the risk of uncompensated time and energy devoted to a lawsuit with uncertain prospects for success. *E.g.*, *Grabek,* 2017 WL 9614818, at *7–8 (approving awards of $25,000 to each of the named plaintiffs); *Krueger v. Ameriprise Fin., Inc.*, No. 11-2781, 2015 WL 4246879, at *4 (D. Minn. July 13, 2015) (approving awards of $25,000 to each of the named plaintiffs); *Beesley v. Int'l Paper Co*., No. 06-703, 2014 WL 375432, at *4 (S.D. Ill. Jan. 31, 2014) (approving $25,000 to each of six surviving named plaintiffs in 401(k) fee settlement). The total award requested for the Named Plaintiffs represents just over one percent of the Settlement Fund.

C. Attorneys' Fees and Costs

Courts are authorized to use the percentage-of-funds method in awarding attorneys' fees in class actions. *Stanger v. China Elec. Motor, Inc.*, 812 F.3d 734, 738 (9th Cir. 2016); *see also In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 953 (9th Cir. 2015) ("The district court did not err in calculating the attorneys' fees award by calculating it as a percentage of the total settlement fund[.]"). "Under the percentage-of-fund method, the district court may award plaintiffs' attorneys a percentage of the common fund, so long as that percentage represents a reasonable

fee." *Stanger*, 812 F.3d at 738. Included within awards of percentages of common funds are cases which have authorized a one-third fee. *See, e.g.*, *In re Pacific Enters. Sec. Litig.*, 47 F.3d 373, 379 (9th Cir. 1995) (affirming attorneys' fees award of one-third of settlement); *Emmons v. Quest Diagnostics Clinical Labs., Inc.*, No. 13-474, 2017 WL 749018, at *7–8 (E.D. Cal. Feb. 27, 2017) (one-third of settlement fund was reasonable fee in light of relief obtained for the class, number of hours worked, risk of non-payment, and experience of counsel); *Deaver v. Compass Bank*, No. 13-222, 2015 WL 8526982, at *11–14 (N.D. Cal. Dec. 11, 2015) (approving fee equaling one-third of settlement, plus costs and expenses); *Grabek,* 2017 WL 9614818, at *3 (same).

In this case, Class Counsel will request attorneys' fees to be paid out of the Qualified Settlement Fund in an amount not more than one-third of the Gross Settlement Amount, or $4,125,000, as well as reimbursement for costs incurred of no more than $450,000. A one-third fee is consistent with the market rate in settlements concerning this particularly complex area of law. *Grabek,* 2017 WL 9614818, at *2–5; *see also, e.g., Cassell v. Vanderbilt Univ.*, No. 16-2086, Doc. 174 (M.D. Tenn. Oct. 22, 2019); *Tussey v. ABB, Inc.,* No. 06-4305, Doc. 870 (W.D. Mo. Aug. 16, 2019); *Sims v. BB&T Corp.,* No. 15-1705, 2019 WL 1993519, at *1–3 (M.D. N.C. May 6, 2019); *Clark v. Duke*, No. 16-1044, 2019 WL 2579201, at *1–5 (M.D. N.C. June 24, 2019); *Ramsey v. Philips N.A.,* No. 18-1099, Doc. 27 (S.D. Ill. Oct. 15, 2018); *Gordan v. Mass. Mut. Life Ins. Co.*, No. 13-30184, 2016 WL 11272044, at *1–3 (D. Mass. Nov. 3, 2016); *Abbott v. Lockheed Martin Corp.*, No. 06-701, 2015 WL 4398475, at *1–2 (S.D.Ill. July 17, 2015); *Beesley*, 2014 WL 375432, at *1–3 (same); *Nolte v. Cigna Corp.*, No. 07-2046, 2013 WL 12242015, at *1–4 (C.D. Ill. Oct. 15, 2013) (same). Importantly, this Court previously approved a one-third fee plus costs in the prior case. *Grabek,* 2017 WL 9614818, at *6. That is also what the Named Plaintiffs agreed to pay in this case. Schlichter Decl. ¶ 4.

V. Argument.

The first step in approving any proposed settlement in a class action is preliminary approval. *Spann v. J.C. Penney Corp.*, 314 F.R.D. 312, 319 (C.D. Cal. 2016). At this stage, the Court reviews the proposed settlement to determine whether it is sufficient to warrant public notice and a hearing. If so, the final decision on approval is made after a "fairness" hearing. *Id.*; *see also* Manual for Complex Litigation, Fourth, §13.14, at 172-73 (Fed. Jud. Ctr. 2004). The Court is not required at the preliminary stage to make any final determinations:

> The judge must make a preliminary determination on the fairness, reasonableness, and adequacy of the settlement terms and must direct the preparation of notice of the certification, proposed settlement, and date of the final fairness hearing.

Id. § 21.632, at 321.

In this case, the Court should preliminarily approve the Settlement because it: (1) is the result of arm's-length 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. *Spann*, 314 F.R.D. at 319; *see also Friedman v. Guthy-Renker, LLC*, No. 14-6009, 2016 WL 6407362, at *6 (C.D. Cal. Oct. 28, 2016) (same).

A. The Settlement is the product of extensive arm's length negotiations.

"An initial presumption of fairness is usually involved if the settlement is recommended by class counsel after arm's length bargaining." *Harris v. Vector Mktg. Corp.*, No. 08-5198, 2011 WL 1627973, at *8 (N.D. Cal. Apr. 11, 2011) (internal quotations and citation omitted). The extensive and complex history of this case alone should preclude any thought that the Settlement is the result of collusion or anything but arm's-length negotiations. The Settlement was reached after over

three years of litigation, and over thirteen years since the filing of *Grabek*, including the partial grant of multiple motions to dismiss and summary judgment, exhaustive pre-trial preparation, and just prior to the start of trial. *See Spann*, 314 F.R.D. at 324 (there was "no evidence of collusion or fraud leading to, or taking part in, the settlement negotiations between the parties" where the "matter was hard fought and contentiously litigated throughout") (internal quotation omitted); *G.F. v. Contra Costa Cnty.*, No. 13-3667, 2015 WL 4606078, at *12–13 (N.D. Cal. July 30, 2015) (settlement not the result of collusion where "[t]he action was vigorously litigated and involved significant discovery"); *Harris*, 2011 WL 1627973, at *8 (no evidence of collusion where "the parties arrived at the settlement after engaging in extensive discovery and after fully briefing their respective motions for summary judgment"). Moreover, settlement was only reached with the continued assistance of a mediator, Ms. Levy, through the date of trial, and "[s]ettlements reached with the help of a mediator are likely non-collusive." *La Fleur v. Medical Mgmt. Int'l*, No. 13-398, 2014 WL 2967475, at *4 (C.D. Cal. June 25, 2014).

B. The Settlement has no obvious deficiencies.

"Because it is provisional, courts grant preliminary approval where the proposed settlement lacks 'obvious deficiencies' raising doubts about the fairness of the settlement." *Gudimetla v. Ambow Educ. Holding*, No. 12-5062, 2014 WL 12594458, at *5 (C.D. Cal. Dec. 2, 2014) (citations omitted). There are no deficiencies, obvious or otherwise, with the Settlement in this case. The Settlement Agreement correctly defines the scope of the Class in this case, specifically identifies the parties to be released, fully explains how funds are to be distributed to Class Members, and correctly notes that any award of attorneys' fees or Class Representative incentive awards must be approved by the Court. Exhibit A, Settlement §§ 2.38, 6.1–6.13. 7.1. And the Settlement makes clear that once fees and costs are paid out, *all* funds are distributed to the Class—none of it goes back

to Defendants. *Id.*, Settlement §§ 2.29, 6.13; *cf. Lith v. iHeartMedia*, No. 16-66, 2017 WL 1064662, at *18 (E.D. Cal. Mar. 20, 2017).

C. The Settlement does not give preferential treatment to the Class Representatives or any portion of the Class.

"[T]he Ninth Circuit has recognized that service awards to named plaintiffs in a class action are permissible and do not render a settlement unfair or unreasonable." *Harris*, 2011 WL 1627973, at *9 (citing *Rodriguez v. W. Publ'g Corp.*, 653 F.3d 948, 958–69 (9th Cir. 2009) and *Staton v. Boeing Co.*, 327 F.3d 938, 977 (9th Cir. 2003)). The $25,000 incentive awards Class Counsel will request for the Class Representatives do not "rise to the level of unduly preferential treatment." *Spann*, 314 F.R.D. at 329. Here, Class Counsel will seek awards for six Class Representatives, which is entirely reasonable. *Compare In re Online DVD-Rental Antitrust Litig.*, 779 F.3d at 947–48 (approving incentive awards to 9 class representatives) *with Staton*, 327 F.3d at 977 (rejecting incentive awards for 29 named class representatives that would total nearly $900,000). Each individual award is less than .21% of the Settlement fund. *See, e.g.*, *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d at 948 (approving incentive awards that made up "a mere .17% of the total settlement fund"); *Spann*, 314 F.R.D. at 329 (approving settlement where counsel requested incentive award for named plaintiff "amounting to less than a quarter of one percent" of the settlement fund). Indeed, courts in this district have approved incentive awards much greater than Class Counsel will seek here. *See Trujillo v. City of Ontario*, No. 04-1015, 2009 WL 2632723, *5 (C.D. Cal. Aug. 24, 2009) (approving $10,000 awards to 10 persons named in original complaint plus $30,000 each to the 6 class representatives). Moreover, "because the parties agree that the Settlement Agreement shall remain in force regardless of any service awards, the awards here are unlikely to create a conflict of interest between the named plaintiffs and absent class members." *Spann*, 314 F.R.D. at 328–29.

D. The Settlement is within the range of possible approval.

The $12,375,000 Settlement represents significant "monetary relief to the class they might not otherwise obtain." *Schaffer v. Litton Loan Servicing, LP*, No. 05-7673, 2012 WL 10274679, at *12 (C.D. Cal. Nov. 13, 2012). It also appropriately values Plaintiffs' claims as "[e]stimates of what constitutes a fair settlement figure are tempered by factors such as the risk of losing at trial, the expense of litigating the case, and the expected delay in recovery (often measured in years)." *Id.* at *11. Prevailing at trial was far from certain, since "trials of class actions are inherently risky and unpredictable propositions." *Cervantez v. Celestica Corp.*, No. 07-729, 2010 WL 2712267, at *3 (C.D. Cal. July 6, 2010). Even if Plaintiffs did prove Defendants' liability, it was unclear whether they would actually be able to obtain the full amount of damages they sought. Regardless of what damages (if any) the Court awarded after trial, any actual payment to Class Members would have to wait until the conclusion of a lengthy appellate period. The $12,375,000 Settlement value appropriately takes these risks into account and ensures the Class will receive certain relief soon, not speculative and uncertain relief years in the future (if at all). *See Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 526 (C.D. Cal. 2004) ("In most situations, unless the settlement is clearly inadequate, its acceptance and approval are preferable to lengthy and expensive litigation with uncertain results.") (citation omitted).

Moreover, it is Class Counsel's opinion that the Settlement is fair and reasonable. Schlichter Decl. ¶ 2. The endorsement of a settlement as "fair, reasonable, and adequate" by experienced counsel "weighs in favor of preliminarily approving the Settlement Agreement." *Eddings v. Health Net, Inc.*, No. 10-1744, 2013 WL 169895, at *5 (C.D. Cal. Jan .16, 2013). Class Counsel is very experienced in class action litigation generally, and actually pioneered ERISA excessive fee class actions in particular. Class Counsel is intimately familiar with

this unique and complex area of law, as noted by this Court and other courts considering cases alleging ERISA breaches of fiduciary duty with respect to fees and investments in 401(k) plans. *Grabek*, 2017 WL 9614818, at *3–4 ("The Court finds that SBD is highly experienced in representing plaintiffs in class action litigation, particularly ERISA class actions); *Tussey v. ABB, Inc.*, No. 06-4305, 2012 WL 5386033, at *3 (W.D. Mo. Nov. 2, 2012) ("Plaintiffs' attorneys are clearly experts in ERISA litigation"); *Beesley*, 2014 WL 375432, at *2 ("The Court remains impressed with Class Counsel's navigation of the challenging legal issues involved in this trailblazing litigation and Class Counsel's commitment and perseverance in bringing this case to this resolution."); *Will v. General Dynamics Corp.*, No. 06-698, 2010 WL 4818174, at *3 (S.D. Ill. Nov. 22, 2010) ("Counsel's actions have led to dramatic changes in the 401(k) industry, including heightened disclosure and protection of employees' and retirees' retirement assets."); *Nolte*, 2013 WL 12242015, at *2 ("The law firm Schlichter, Bogard & Denton is the leader in 401(k) fee litigation."). As set forth above, the Settlement provides substantial monetary relief in the amount of $12,375,000. Finally, independent of Class Counsel's opinion as to the reasonableness of the Settlement, the parties also will submit the settlement terms to an Independent Fiduciary, which will provide an opinion on the Settlement's fairness before the final approval hearing.

VI. Conclusion.

For these reasons, the Joint Motion for Preliminary Approval of Class Settlement should be granted.

DATED: January 13, 2020

Respectfully submitted,

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