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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

BRANDON IMBER, individually and on behalf of all others similarly situated,
Plaintiff,
v.

BRUCE LACKEY, PAM LACKEY, LACKEY FAMILY TRUST, COLE SCHARTON, THE ADMINISTRATIVE COMMITTEE OF THE PEOPLE BUSINESS EMPLOYEE STOCK OWNERSHIP PLAN, MIGUEL PAREDES, RICK ROUSH, DEL THACKER, RICHARD DEYOUNG and RITCHIE TRUCKING SERVICE HOLDINGS, INC.,

Defendants,
and

PEOPLE BUSINESS EMPLOYEE STOCK OWNERSHIP PLAN,

Nominal Defendant.

Case No. 1:22-cv-004-HBK

PLAINTIFF'S MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

Complaint Filed: December 30, 2021

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I. INTRODUCTION

Plaintiff respectfully submits this Memorandum in support of his Motion for Preliminary Approval of the proposed Class Action Settlement with Defendants pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, to approve the proposed notice to the Class, and to set various dates related to the approval of the Settlement.

The Settlement proposes to resolve claims filed over three and half years ago and after negotiations, including mediation sessions with two experienced mediators. This Settlement would resolve the claims on behalf of the Class in exchange for (1) $485,000 cash to be paid into a Settlement Fund and (2) a reduction of the ESOP-related debt by $1.4 million. As a result of this reduction of the ESOP-related debt, the Settlement requires the release of 115,000 shares from the ESOP suspense account to the Plan accounts of the Class. Additionally, as the ESOP-related debt is also a debt on Ritchie Trucking Holdings, Inc. ("Ritchie"), the reduction of this debt will also immediately increase the value of Ritchie and therefore the value of the shares held by the ESOP and will also have beneficial future effects. Except for the costs of the Settlement Administrator, Ritchie has agreed to pay all costs of the Settlement Administration. The Settlement also ensures that the Class will not be charged for Ritchie's expense related to this Settlement. In exchange, the Class will dismiss with prejudice the Class Claims (Counts I-IV and VI-VIII) asserted in the Complaint against Defendants and release Defendants from any claims asserted in the Complaint or relating to or arising out of the same factual predicate alleged in the Complaint. Considering only $1.885 million (i.e. the $485,000 cash and $1,400,000 in debt reduction) and ignoring any future benefits of the debt reduction on the value of the shares, the Settlement represents between 21-30% of the maximum amount that the Class likely would recover. As the Settlement is a fair, reasonable, and adequate compromise, preliminary approval should be granted.

II. BACKGROUND

A. Factual Allegations of the Complaint

Plaintiff Brandon Imber is a former employee of Ritchie Trucking Service, Inc, a subsidiary of Ritchie Trucking Service Holdings, Inc. and a vested participant in its ESOP, the People Business Employee Stock Ownership Plan (the "Plan" or "ESOP"). ECF No. 1 ("Compl.") ¶ 7. In December 2018, the ESOP Trustee, Defendant Miguel Paredes, caused the Plan to purchase from the Lackey Family Trust 2,000,000 shares of common stock of Ritchie for $19.5 million (the "2018 Transaction"). *Id*. ¶¶ 1, 64.

Before the 2018 Transaction, Ritchie's largest client, General Electric ("GE") announced that it would, and ultimately did, make significant changes that would decrease Ritchie's market share and revenue. *Id*. After these changes were announced in 2016 but before they were implemented, Bruce Lackey and Pam Lackey, the then-owners of Ritchie offered in 2017 to sell the company for $10-12 million. *Id*. The Lackeys, and Richard DeYoung, Rick Roush and Del Thacker, were executives of Ritchie and the Plan's fiduciaries who failed to provide or provided incomplete information about GE's contemplated changes to the ESOP's advisors. *Id*. The 2018 valuation report by the Trustee's financial advisor does not appear to take this change into account in the 2018 Transaction (but did consider it in valuing Ritchie in 2019). *Id*. ¶ 67. Rather than discount the value of Ritchie based on the uncertainty of its business, the Trustee and his valuation advisor relied on aggressive forecasts from management (i.e. Defendants). *Id*. The post-Transaction financial results demonstrate the flaws in these projections. *Id*. ¶ 64. Had the Trustee performed adequate due diligence – the type that an arms-length buyer would have performed (such as calling a company's largest clients or even seeking the basis for these aggressive forecasts) – the Trustee would have realized that the fair market value of Ritchie was not $19.5 million, but more in line with the $10-12 million that

Lackey had previously estimated. *Id*. ¶ 67. As this material information was not considered for the purposes of the 2018 Transaction and/or evaluating in the 2018 Transaction price, the Plan paid more than fair market value for the stock. *Id*. ¶ 71.

B. Summary of the Claims

The Complaint alleges seven counts under ERISA on behalf of the ESOP and a Class of participants and beneficiaries challenging the conduct of the ESOP fiduciaries – the Trustee (Paredes) and the Committee Defendants (the Lackeys and Cole Scharton), the Director Defendants (DeYoung, Roush and Thacker) – and the Selling Shareholders (the Lackeys and the Lackey Trust) in connection with the 2018 Transaction:

Count I alleges the Trustee and the Committee Defendants caused the ESOP to engage in a transaction prohibited by ERISA § 406(a), 29 U.S.C. § 1106(a), and the Selling Shareholder Defendants (i.e. the Lackeys and the Lackey Trust) knowingly participated in that transaction;

Count II alleges that the Selling Shareholder Defendants engaged in transaction prohibited by ERISA §§ 406(b), 29 U.S.C. §§ 1106(b);

Count III alleges that the Trustee and the Committee Defendants breached their fiduciary duties under ERISA § 404(a)(1)(A), (B) & (D), 29 U.S.C. § 1104(a)(1)(A), (B) & (D) by causing the ESOP engage in the 2018 Transaction for more than fair market value;

Count IV alleges the Trustee and the Committee Defendants breached their fiduciary duties under ERISA § 404(a)(1)(A), (B) & (D), 29 U.S.C. § 1104(a)(1)(A), (B) & (D) to remedy or correct the 2018 Transaction;

Count VI[1] alleges the Director Defendants breached their fiduciary duties

[1] Count V is an individual claim brought by Imber against the Plan Administrator, the Committee Defendants, for failing to provide documents pursuant to his written request under ERISA § 104(b)(4), 29 U.S.C. § 1024(b)(4) and § 404(a)(1)(A), 29

under ERISA § 404(a)(1)(A), (B) & (D), 29 U.S.C. § 1104(a)(1)(A), (B) & (D) by failing to appropriately monitor the Trustee and the Committee;

Count VII alleges that the Director Defendants, Committee Defendants and Defendant Paredes each have co-fiduciary liability as a result of breaches by their co-fiduciaries;

Count VIII: alleges that purported indemnification provisions in the Plan Document and the Article of Incorporation that would require Ritchie to indemnify the ESOP fiduciaries violate ERISA's anti-indemnification provision, ERISA § 410(a), 29 U.S.C. § 1110(a), and that Defendant Paredes, the Director Defendants and Committee Defendants and Ritchie breached their fiduciary duties under ERISA § 404(a)(1)(A), (B) & (D), 29 U.S.C. § 1104(a)(1)(A), (B) & (D) by agreeing to such provisions.

C. Procedural History

Plaintiff and his counsel began investigating the claims in this case in early 2021, including by requesting certain documents from the Plan Administrator. *See* ECF No. 1 ¶¶ 79-82. After receiving some of the requested documents, Plaintiff filed this lawsuit on December 30, 2021. ECF No. 1. Defendant Paredes, the Committee Defendants and the Lackey Family Trust filed motions to dismiss all the claims against them. ECF Nos. 40, 42, 48. These motions are fully briefed and pending before the Court. *See* ECF Nos. 41, 42-1, 44, 48-1, 53, 56, 57, 59, 60, 72. Defendants Bruce Lackey, Pamela Lackey, Cole Scharton, The Administrative Committee of the People Business Employee Stock Ownership Plan, and Ritchie Trucking Service Holdings, Inc. filed Answers to the Complaint. ECF Nos. 51, 54, 63.

After the motions to dismiss were fully briefed, the Parties discussed the possibility of engaging in a mediation after some discovery, and the Court issued a

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U.S.C. § 1104(a)(1)(A), Compl. ¶ 122-135. This claim is not brought on behalf of the Class and is not released by the Settlement. Agmt. § XIV.5.

limited discovery order. ECF No. 80. Pursuant to that Order, Defendants were required to provide Plaintiff with the following discovery: (1) the 2018 Transaction documents; (2) reports/opinions valuing Ritchie stock during the Transaction and after; (3) resolutions and minutes of the Board or other ESOP fiduciaries; (4) the written instrument of the ESOP, and (5) insurance agreements. Barton Decl. ¶ 2. Consistent with that Order, Plaintiff also issued 9 total interrogatories to Defendants "Lackey individually and the Lackey Family Trust or Selling Shareholders," the "Committee Defendants," and the "Board of Director Defendants" and Ritchie Trucking Service Holdings, Inc. *Id.* ¶ 3. After receiving and reviewing that discovery, Plaintiff's counsel hired a valuation expert to analyze the valuation reports. *Id.* ¶ 4. Plaintiff's expert assessed that the valuation for the 2018 Transaction likely overvalued Ritchie between $6.2 million and $9 million. *Id.*

After selecting Martin Quinn of JAMS as the mediator, the Parties prepared and exchanged mediation statements. *Id.* ¶ 6. Counsel and the Parties participated in a remote mediation session with Mr. Quinn on January 23, 2023. *Id*. At the end of the mediation, Mr. Quinn made a mediator's proposal. *Id.* ¶ 7. Plaintiff agreed to the proposal (with some clarifications), but the proposal was not accepted by all Defendants. *Id.* Nonetheless, the Parties agreed to continue settlement discussions following the mediation session with Mr. Quinn for several months, and then after he became unavailable due to medical reasons, without his assistance. *Id.* ¶ 8. After the Parties had been unable to agree to either a term sheet or a settlement agreement, the Parties participated in a remote Voluntary Dispute Resolution Proceeding ("VDRP") with Rex Berry on April 2, 2024. *Id.* ¶ 9. After the initial VDRP session, the Parties agreed to participate in a further mediation session with Mr. Berry on May 7, 2024. *Id*. While final agreement was not reached on May 7, 2024, the Parties continued negotiations, and eventually reached the agreement reflected in this Settlement Agreement which was not finalized until March 2025. *Id.* ¶ 10.

D. The Settlement

The Settlement Agreement has several significant components of value to the Class: *First,* it requires Defendants to pay $485,000.00 into a Cash Settlement Fund which, less Court-approved expenses, attorney's fees, and service award, will be distributed to the Class according to a Court-approved Plan of Allocation. Settlement Agreement ("Agmt.") § IV.A. *Second,* the Lackey Defendants will reduce the principal balance of the ESOP-related debt by $1.4 million ("Loan Modification"). *Id*. § IV.B. *Third,* 115,000 shares of Ritchie Stock held in the Plan Suspense Account will be allocated to the Stock Accounts of Class Members pursuant to a Court-approved Plan of Allocation. *Id*. *Fourth,* both the Cash Settlement and the Stock Settlement will be paid through the Plan which ensures every Class Member will benefit from this Settlement and ensures the tax-favored treatment of the Settlement proceeds. *Id*. § V.A.5 & V.B. *Fifth,* the Settlement requires Defendants or Ritchie to bear the expenses of the Settlement and distribution (other than those of the class notice and the Settlement Administrator) and prohibits assessment of any fees or charges to receive distributions. *Id*. § V.C.1&2 & VII.4. For purposes of valuing the stock to be liquidated, the Settlement precludes reducing the value by the amount of the costs in the litigation or settlement. *Id*. § V.A.3(a)(2). *Finally,* the Settlement requires the Plan Administrator (i.e. the Committee) and the Trustee to provide Plaintiff's counsel with any valuation reports regarding the value of Ritchie stock, which allows oversight of the valuation of the stock. *Id*. § XVII.3.

In exchange, the Class will dismiss the class claims against Defendants with prejudice and release Defendants from claims arising out of the same factual predicate of those claims. *Id*. § XIV.1. Defendants will also release any claims that they have against Plaintiff and the Class as to the correctness of the amount in their Plan accounts. *Id*. § XIV.2. In other words, these Plan fiduciaries cannot later claim that any member of the Class received an incorrect allocation. *See id.*

III. ARGUMENT

A. The Proposed Settlement Merits Preliminary Approval.

The Ninth Circuit has a strong judicial policy favoring settlements, particularly where complex class action litigation is concerned. *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992). To protect the interests of the class, Rule 23(e) provides that a class action cannot be settled without court approval. Fed. R. Civ. P. 23(e). Review of a class action settlement proceeds in two phases – the preliminary approval stage and the final approval stage. *Aldapa v. Fowler Packing Co., Inc.,* No. 1:15-cv-00420-ADA-SAB, 2023 WL 169120, at *3 (E.D. Cal. Jan. 12, 2023) (granting preliminary approval). At preliminary approval, the court determines whether the proposed agreement is within the range of possible approval and whether notice should be sent to class members. *Id*.

Preliminary approval only requires an "initial evaluation" of the fairness of the proposed settlement. *Manual for Complex Litigation* § 21.632 (4th ed. 2004). The purpose of preliminary approval is to determine "whether to direct notice of the proposed settlement to the class, invite the class's reaction, and schedule a fairness hearing." William B. Rubenstein *et al.*, *Newberg on Class Actions* § 13:10 (5th ed. 2013). Preliminary approval only requires a limited review of the proposed settlement and "a full fairness analysis is unnecessary at this stage." *Dalton v. Lee Publ'ns, Inc.*, No. 08-CV-1072 GPC NLS, 2014 WL 5325698, at *2 (S.D. Cal. Oct. 17, 2014) (citing *Alberto v. GMRI, Inc.*, 252 F.R.D. 652, 665 (E.D. Cal. 2008)).

Preliminary approval of a settlement and notice to the class are appropriate if the settlement: "(1) 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 with the range of possible approval." *Ayala v. Valley First Credit Union*, No. 1:22-CV-00657-HBK, 2023 WL 7388870, at *5 (E.D. Cal. Nov. 8, 2023) (Barch-Kuchta,

J.) (granting preliminary approval); *Manzo v. McDonalds' Rests. of Ca., Inc., et al.*, No. 1:20-CV-1175-HBK, 2022 WL 183492, at *5 (E.D. Cal. Jan. 20, 2022) (Barch-Kuchta, J.) (same).[2] This Settlement satisfies the requirements for preliminary approval.

1. The Settlement is a Result of Serious, Informed, Non-Collusive Negotiations Aided by Experienced Mediators.

This factor considers whether the Settlement is the product of vigorous arm's-length negotiations and not the result of collusion or fraud. *Manzo,* 2022 WL 183492 at *6; *see Colesberry v. Ruiz Food Prods. Inc.*, No. CV F04-5516, 2006 WL 1875444, at *6 (E.D. Cal. June 30, 2006) (granting preliminary approval of ESOP settlement). Where the parties engaged in informal discovery, which served as the basis of their negotiations, that evidences informed arms-length negotiations. *Ayala,* 2023 WL 7388870, at *7 (discussing the exchange of informal discovery). The lack of formal discovery does not undermine preliminary approval as the parties should not "be faulted for their cooperation and desire to swiftly resolve the matter." *Manzo,* 2022 WL 183492, at *6. The presence of [] neutral and experienced mediators also supports the conclusion that the settlement was not the product of collusion. *See Ayala*, 2023 WL 7388870, at *6 (citing *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 948 (9th Cir. 2011)); *Manzo*, 2022 WL 183492, at *6.

This Settlement Agreement was the result of two years of negotiations and three separate mediation sessions with two different mediators. Barton Decl. ¶¶ 6-10; Agmt. at Recitals ¶¶ K, M. Prior to engaging in mediation, Plaintiff's counsel requested and was provided with sufficient information to assess the merits of the claims and Defendants' defenses. Barton Decl. ¶ 5. Only once Defendants had agreed

[2] As many of the considerations set forth in Rule 23(e) overlap, Plaintiff addresses those factors as part of the factors that this Court identified in these cases.

to provide that information and documents and had provided them, did Plaintiff's counsel agree to proceed to mediation. *Id.*

Even prior to filing the Complaint, Plaintiff had obtained the written instrument of the Plan and other formal plan documents. Imber Decl. ¶ 4. Prior to engaging in mediation, the Parties exchanged Rule 26(a) disclosures. *See* ECF No. 80; Barton Decl. ¶ 3. Prior to engaging in mediation, the Parties exchanged discovery consistent with this Court's Order. *See* ECF No. 80; Barton Decl. ¶ 2-3. Most importantly, through this discovery, Plaintiff's counsel obtained the most significant documents for assessing the claims in this case including (1) the 2018 Transaction documents; (2) reports/opinions valuing Ritchie stock. Barton Decl. ¶ 2. Plaintiff also received the insurance agreements that enabled Plaintiff's counsel to assess the amount of available insurance. *Id.* Plaintiff also issued 9 interrogatories to Defendants. *Id.* ¶ 3. Once Plaintiff's counsel obtained this discovery, Plaintiff's counsel hired an expert to assist with an evaluation of the valuations. *Id.* ¶ 4. As Plaintiff's counsel has litigated ESOP valuation cases for nearly 22 years, this discovery constituted sufficient information for Plaintiff's counsel to make an informed decision about the merits of the case. *Id.* ¶ 5.

Even before agreeing to mediation, Plaintiff also had the benefit of the arguments in Defendants' various motions to dismiss, which enabled Plaintiff's counsel to evaluate Defendants' arguments. *See* ECF Nos. 40, 42, 48. Additionally, the Parties exchanged mediation statements which allowed Plaintiff's counsel to further evaluate the strengths and weaknesses of the claims. Barton Decl. ¶ 6.

At the first mediation, the Parties utilized Martin Quinn who had significant experience litigating and mediating complex litigation. Agmt. at Recitals ¶ K; *see* https://www.jamsadr.com/martin-quinn/. At the conclusion of a full day of mediation, Mr. Quinn made a mediator's proposal, which was not accepted by all parties, but formed the basis for further negotiations. *Id.* ¶ K-L. Following that

mediation, counsel for the Parties continued to negotiate terms. Barton Decl. ¶ 8. After being unable to finalize a term sheet or a settlement agreement a year later, the Parties then engaged in a second mediation with Rex Berry, also an experienced mediator. Agmt. ¶ M; *see* https://signatureresolution.com/neutral-CPT/rex-darrell-berry/. The use of these neutral and experienced mediators, Martin Quinn and Rex Berry, supports the conclusion that the Settlement was not the product of collusion.

Finally, where Plaintiff's counsel has extensive experience litigating similar claims in class action litigation, courts find that "[t]he recommendations of plaintiffs' counsel should be given a presumption of reasonableness." *Urakhchin v. Allianz Asset Mgmt. of Am., L.P.,* No. SACV 15-1614-JLS (JCG), 2018 WL 3000490, at *5 (C.D. Cal. Feb. 6, 2018) (granting preliminary approval).

2. The Settlement Provides Significant Benefits to the Class and is Well Within the Range of Reasonableness.

To evaluate whether a settlement falls within the range of possible approval, "courts consider plaintiffs' expected recovery balanced against the value of the settlement offer." *Ayala*, 2023 WL 7388870, at *7 (citing *Rodriguez v. Danell Custom Harvesting, LLC*, 293 F.Supp.3d 1117, 1131 (E.D. Cal. 2018); *Campbell v. Facebook, Inc.*, 951 F.3d 1106, 1123 (9th Cir. 2020) (explaining that the "settlement's benefits must be considered by comparison to what the class actually gave up by settling")).

The Settlement achieves both meaningful monetary and non-monetary relief for the Class. The Settlement Agreement provides: (1) $485,000.00 paid into a Cash Settlement Fund and (2) a reduction of the principal balance of the ESOP-related debt by $1.4 million ("Loan Modification"). Agmt. § IV. A & § IV. B. In turn, the Loan Modification has both immediate positive effects and beneficial long-term effects for participants. *First,* the Settlement requires release of 115,000 shares from the ESOP suspense account to ESOP participant accounts. *Id.* § IV.B. According to

the 2023 Form 5500, as of 2023, there were 250,378 shares allocated to participant accounts with a fair value of $400,605 or $1.60 per share. Barton Decl. Ex. A. As a result, the Settlement will immediately increase the allocated shares by 46%. Barton Decl. ¶ 11. *Second,* the $1.4 million debt reduction will *increase the value of all* shares. *Id*. Using 2023 as an illustration, the equity value of the 2 million shares would increase from $3.7 million to $4.5 million or from $1.60 per share to $2.26 per share. *Id*. The immediate impact of the debt reduction means that allocation shares would immediately increase from $400,605 to $827,108. *Id*. *Finally,* there is the long-term impact that is even more important. *Id*. As a result of the $1.4 million reduction of debt, as the company makes contributions to the ESOP (assuming the same amount of contributions), the ESOP debt will be paid more quickly and a greater number of shares will be released from the suspense account, meaning that participants will receive their ESOP shares more quickly. *Id*.

Plaintiff's expert calculated that maximum overvaluation at between $6.2 million to $9 million. *Id*. ¶ 4. The $1.885 million represents between 21-30% of the maximum amount that could have been recovered for the Class if Plaintiff prevailed. *Id*. ¶ 12. Based on the publicly filed Form 5500s, Plaintiff's counsel estimates that there are fewer than 200 accounts entitled to an allocation under the settlement. *Id.* ¶ 13. Using just the $1.855 million (and ignoring the additional beneficial long-term effects), and even assuming 200 accounts, the estimated average gross recovery per Payee Class Member has a value of $9,425 per Payee Class member. *Id*.

This recovery is within the range of reasonableness for possible approval both by percentage and per participant. *See Manzo*, 2022 WL 183492, at *7 (finding a $2 million settlement that was about 13.75% of the total estimated liability to be within the range of possible approval); *Gamino v. KPC Healthcare Holdings, Inc.,* No. 5:20-cv-01126-SB-SHK, 2022 WL 20581948, at *3 (C.D. Cal. Nov. 18, 2022) (finding settlements representing between 7.1 and 7.3% of the Plan's total losses was

within range of possible approval); *see Cunningham v. Wawa, Inc.,* CV 18-3355, 2021 WL 1626482, at *6 (E.D. Pa. Apr. 21, 2021) (finding ERISA settlement where recovery was 18%-28% of maximum losses was in line with other cases); *Hurtado v. Rainbow Disposal Co., Inc.,* 817CV01605JLSDFM, 2021 WL 2327858, at *4 (C.D. Cal. May 21, 2021) (observing same where ERISA settlement was between 23% and 34% of maximum losses). The Class recovery valued at $9,425 per participant also compares favorably to other ERISA class action settlements. *E.g.*, *Gamino,* 2022 WL 20581948, at *3 (approving ESOP settlement that in the aggregate would provide $2,900 per participant); *Marshall v. Northrop Grumman Corp.*, No. 16-CV-6794 AB (JCX), 2020 WL 5668935, at *2 (C.D. Cal. Sept. 18, 2020) (describing ERISA settlement amounting to $77.34 average gross recovery as "exceptional"); *Sims v. BB&T Corp.*, No. 1:15-CV-732, 2019 WL 1995314, at *5 (M.D.N.C. May 6, 2019) (average gross award of $342 in ERISA settlement). Thus, this settlement is well within the range of potential approval.

a. The Class Faced Substantial Risk, Costs and Delay.

In the absence of a settlement, the Class faced significant litigation risk. Defendants would have argued that the Class could not be certified. *E.g.* ECF No. 51 at 32. The Class claims also faced risks on summary judgment, trial, and appeal.

Any decision on summary judgment and trial would have involved a battle of the experts on business valuation issues related to the amount of monetary relief, and the outcomes of such disputes are by nature difficult to predict. Business valuation is often described "as much an art as it is a science." *Henley Mining, Inc. v. Parton*, No. 617CV00092GFVTHAI, 2020 WL 4495466, at *3 (E.D. Ky. Aug. 3, 2020). This reality heightens the potential risks at trial. *In re Tyco Int'l, Ltd. Multidistrict Litig.*, 535 F.Supp.2d 249, 260-261 (D.N.H. 2007) (holding prospect of "confusing 'battle of the experts' over damages" favored approval). There are numerous examples of trials of ERISA fiduciary breach cases where defendants prevailed. *E.g. Walsh v.*

Bowers, 561 F.Supp.3d 973, 977 (D. Haw. 2021) (finding in favor of defendants against DOL after one week trial); *Reetz v. Lowe's Cos., Inc.,* No. 5:18-CV-00075, 2021 WL 4771535, at *1 (W.D.N.C. Oct. 12, 2021) (finding for defendant after 5-day trial). There was a risk as to what monetary relief Plaintiff could recover as illustrated by an ESOP case in which plaintiffs proved that defendants breached their fiduciary duties, but the courts found those breaches resulted in no harm or loss to the participants. *DeFazio v. Hollister, Inc.,* 854 F.Supp.2d 770, 816 (E.D. Cal. 2012) (finding after trial in ESOP case that "the fiduciaries' breaches of their duties did not cause a material harm" and "plaintiffs [were] not entitled to damages."), *aff'd*, 612 Fed. Appx. 439 (9th Cir. 2015).

Even if Plaintiff succeeded at trial, the Class faced a risk on appeal as illustrated by a Ninth Circuit decision reversing a trial decision for the class in an ERISA case after a ten-day bench trial. *Wit v. United Behav. Health*, 79 F.4th 1068 (9th Cir. 2023). Litigating to judgment would have been time-consuming as ERISA class actions sometimes extend for a decade or longer. *E.g. Amara v. Cigna Corp.*, 53 F.4th 241 (2d Cir. 2022) (describing ERISA pension case took almost 20 years of litigation to reach resolution); *Tibble v. Edison Int'l*, CV 07-5359 SVW (AGRx), 2017 WL 3523737, at *15 (C.D. Cal. Aug. 16, 2017) (outlining remaining issues ten years after suit was filed in 2007). Litigation to judgment and exhaustion of appeals would also have required significant attorney time and litigation expenses as ERISA cases are "enormously complex" involving law and facts that are "exceedingly complicated." *Conkright v. Frommert*, 559 U.S. 506, 509 (2010). ERISA actions generally are "notoriously complex," and "ESOP cases are often cited as the most complex of ERISA cases." *Pfeifer v. Wawa, Inc.,* No. 16-497, 2018 WL 4203880, at *7 (E.D. Pa. Aug. 31, 2018). The complexity, expense, and duration of ESOP class actions favor settlement. *Id.; Cunningham*, 2021 WL 1626482, at *4. As this

Settlement provides immediate and substantial relief to the Class, this favors approval.

b. The Method of Distribution Will Be Highly Effective.

The settlement proceeds will be distributed directly to Class members' ESOP accounts and to the extent they are entitled to an immediate distribution to transfer the money to another tax-favored vehicle. Agmt §§ V.A.4-5(a) & V.B.2 & V.B.3(a)(1). Courts approving other ESOP settlements negotiated by Plaintiff's counsel have found this a favorable structure for distribution of a settlement, and they approve such plans because they contain "an innovative element: it allows Class Members the opportunity to distribute their recovery to an IRA or other tax-qualified retirement plan." *Cunningham,* 2021 WL 1626482, at *7; *Hurtado*, 2021 WL 2327858, at *4 (noting that class counsel precured an additional benefit that preserved in the settlement "the tax advantages that Class Members would have enjoyed under their ESOP allocation"). Thus, unlike many class action settlements that require claim forms, the proposed method of distribution effectively ensures that all Class Members will receive payment.

c. The Attorney's Fees are Appropriate For An ERISA Class Action.

It is well-established that counsel who recovers a common fund for a class is entitled to reasonable attorney's fees and reimbursement of expenses out of the fund. *Indep. Living Ctr. of S. California, Inc. v. Kent*, 909 F.3d 272, 284 (9th Cir. 2018) (citing *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980)). Courts in this Circuit approve common fund settlements in ERISA class actions. *E.g. Reyes v. Bakery & Confectionery Union & Indus. Int'l Pension Fund*, 281 F. Supp. 3d 833, 850 (N.D. Cal. 2017)**.** Under the Settlement, Plaintiff's Counsel is entitled to file a motion requesting approval of the following to be paid from the Settlement Fund: (a) an award of attorney's fees; (b) reimbursement of litigation expenses. Agmt. § VIII.

As a percentage of the relevant common fund, common awards in the Ninth Circuit range from 20% to 30%. *Ayala*, 2023 WL 7388870, at *8 (citing *Taylor v. FedEx Freight, Inc.*, 1:13-cv-002237-DAD-BAM, 2016 WL 6038949, at *5 (E.D. Cal. Oct. 13, 2016)). Many courts have approved awards of one-third of the settlement fund. *Williams v. PillPack LLC,* No. 3:19-cv-05282-DGE, 2025 WL 1149710, at *3 (W.D. Wash. Apr. 18, 2025) (citing cases and observing that "fee awards of approximately 33⅓% are typical for settlements up to $10 million" in this Circuit). In complex ERISA cases, courts in this Circuit and across the country "routinely award attorneys' fees in the amount of one-third of the total settlement fund." *Molloy v. Aetna Life Ins. Co.,* No. 19-3902, 2024 WL 290283, at *6 n.41 (E.D. Pa. Jan. 25, 2024); *In re LinkedIn ERISA Litig.,* No. 5:20-cv-05704-EJD, 2023 WL 8631678, at *10 (N.D. Cal. Dec. 13, 2023) (awarding one-third of fund as on-par with complex ERISA class actions); *Foster v. Adams & Assocs., Inc.*, No. 18-CV-02723-JSC, 2022 WL 425559, at *10 (N.D. Cal. Feb. 11, 2022) (collecting cases and finding "a 33.3% recovery is on par with settlements in other complex ERISA class actions."); *Marshall,* 2020 WL 5668935, at *3. Determinations about the amount of fees to be awarded by the Court are best deferred until final approval. *Gamino*, 2022 WL 20581948, at *2. As the Settlement merely provides that Plaintiff's Counsel can seek fees and expenses from the Fund in an amount approved by the Court (and that decision will not prevent the settlement from becoming final), the terms regarding attorney's fees do not undermine preliminary approval. *See* Agmt. § VIII.

d. The Separate Confidential Agreement is Appropriate

Rule 23(e)(3) requires the Parties to "file a statement identifying any agreement made in connection with the [settlement] proposal." Fed. R. Civ. P. Rule 23(e)(3). The only such agreement is the Supplemental Agreement that allows Defendants to terminate the Settlement only if the Court certifies the class under Rule 23(b)(3) *and* if enough class members opt out. "This type of provision is known

as a 'blow-up'" and is "common and guard[s] against the possibility that a sufficient number of class members opt out of a class action settlement such that the Defendant's potential future liability is not reduced in a way that renders the settlement worthwhile." *Mandalevy v. Bofl Holding, Inc.*, No. 3:17-cv-667-GPC-MSB, 2022 WL 4474263, at *9 (S.D. Ca. Sept. 26, 2022); 2 McLaughlin on Class Actions § 6:22 (21st ed.) (explaining such agreements are common and usually filed under seal)."There are compelling reasons to keep this information confidential in order to prevent third parties from utilizing it for the improper purpose of obstructing the settlement." *Hefler v. Wells Fargo & Co.,* No. 16-cv-05479-JST, 2018 WL 4207245, at *7 (N.D. Ca. Sept. 4, 2018) (citing *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 948 (9th Cir. 2015)). Thus, this agreement is proper.

3. The Settlement Has No Obvious Deficiencies.

The next factor "considers whether there are any obvious deficiencies with the proposed settlement." *Ayala*, 2023 WL 7388870, at *7; *Manzo*, 2022 WL 183492, at *7 (same). This includes unduly preferential treatment of class representatives or of segments of the class, or excessive compensation of attorneys. *Grant v. Cap. Mgmt. Servs., L.P.*, No. 10-CV-2471-WQH BGS, 2013 WL 6499698, at *5 (S.D. Cal. Dec. 11, 2013); *Newberg on Class Actions* § 11:25 (4th ed. 2010). The Ninth Circuit has advised courts to be concerned (1) when counsel receive a disproportionate distribution of the settlement or a handsome fee and minimal monetary class recovery, (2) when the parties negotiate a "clear sailing" provision under which defendant agrees not to object to the attorneys' fees sought or payment of fees are made separate from class funds, and (3) when the parties agree that fees not awarded will revert to the defendant, not to the class fund. *Kim v. Allison*, 8 F.4th 1170, 1180 (9th Cir. 2021); *In re Bluetooth*, 654 F.3d at 947. Such signs do not necessarily mean that a settlement is improper, but only that it is supported by an

explanation of why the fee is justified and does not betray the class's interests. *Id.* at 949; *see Gamino,* 2022 WL 20581948, at *2 (granting preliminary approval).

The only one of these present in this Settlement is a "clear sailing provision" for attorney's fees, but this is not a reason to deny preliminary approval. *Ayala*, 2023 WL 7388870, at *7 (explaining "[c]lear sailing provisions are not prohibited nor are they 'fatal to final approval'" and granting preliminary approval); *Gamino,* 2022 WL 20581948, at *2 (granting preliminary approval of an ESOP class action with a clear sailing provision because the amounts awarded would be decided by the court at final approval). Of course, the "[t]wenty-five percent is the typical benchmark for attorney's fees in common fund cases." *Gamino*, 2022 WL 20581948, at *2 (citing *In re Pac. Enters. Sec. Litig.*, 47 F.3d 373, 379 (9th Cir. 1995)); *see Ayala*, 2023 WL 7388870, at *7 (granting preliminary approval where settlement contemplated a 30% fee award). Here, Plaintiff's counsel to date has incurred more than $500,000 in lodestar. Barton Decl. ¶ 14. As such, a 25% award based on $1.885 million (assuming that is the only value of the settlement considered) would result in an award of $471,000 in fees (less than lodestar). *Id*. The ultimate amount will be determined by the Court after Plaintiff's counsel files a motion for attorney's fees and any decision on fees will not affect the Settlement becoming final. Agmt. § VIII.5. The Settlement does not provide for a separate payment of attorney's fees or reversion of any amounts to Defendants. *See Id.* § VIII.1.

The Settlement Agreement does not unduly favor Plaintiff or segments of the Class, but treats all Class members equitably relative to each other. *See infra* III.A.2. Defendants have agreed not to object to a $5,000 Class Representative Service Award. Agmt. § VIII.2. But service awards are "fairly typical in class action cases," and are particularly appropriate in employment actions. *Ayala*, 2023 WL 7388870, at *9 (citing *Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 958 (9th Cir. 2009). "Five thousand dollars is considered a presumptively reasonable service award in the Ninth

Circuit." *Gamino,* 2022 WL 20581948, at *2 (citing *Carlin v. DairyAmerica, Inc.*, 380 F. Supp. 3d 998, 1024 (E.D. Cal. 2019)). A service award, for which the amount will be determined by the court, in itself "does not establish preferential treatment that would prevent preliminary approval." *Ayala*, 2023 WL 7388870, at *9 (granting preliminary approval where settlement contemplated a $5,000 service award). Here, Plaintiff will file a motion explaining why this amount is reasonable and justified in light of his participation in the case and the average recovery per class member. Agmt. § VIII.1. The amount will be decided by the Court, and if the Court declines to issue any award, that will not affect the Settlement. *Id*. § VIII.5.

Thus, there are no obvious deficiencies in the Settlement Agreement.

4. The Settlement Treats All Class Members Equitably

A settlement treats class members equitably relative to each other when it "takes appropriate account of differences among their claims." 2018 Advisory Committee Note to Rule 23. "[T]here is no rule that settlements benefit all class members equally" so long as any differences are "rationally based on legitimate considerations." *Holmes v. Cont'l Can Co.*, 706 F.2d 1144, 1148 (11th Cir. 1983) (citing *Kincade v. Gen. Tire & Rubber Co.*, 635 F.2d 501, 506 n.5 (5th Cir. 1981)); *Cohen v. Resolution Tr. Corp*., 61 F.3d 725, 728 (9th Cir. 1995) *vacated on other grounds*, 72 F.3d 686 (9th Cir. 1996) (approving settlement with different treatment of certain parties that was rationally based on legitimate considerations and there was no indication of any collusion against them, the settlement may be approved). As the Eleventh Circuit explained in rejecting an objector's argument, "the text of the [Rule 23(e)(2)(D)] requires equity, not equality, and treating class members equitably does not necessarily mean treating them all equally." *In re Blue Cross Blue Shield Antitrust Litig.,* 85 F.4th 1070, 1093 (11th Cir. 2023). Put simply, this provision is "to ensure that similarly situated class members are treated similarly and that dissimilarly situated class members are not arbitrarily treated as if they were

similarly situated." 4 Newberg and Rubenstein on Class Actions § 13:56 (6th ed.). This requirement is satisfied when the settlement "is specifically tailored to their claims in the litigation" and each class member's share is calculated based on losses alleged in the case. *Sparks v. Mills*, 626 F.Supp.3d 131, 138 (D. Me. 2022); *see Cunningham,* 2021 WL 1626482, at *7.

Here, the Settlement itself does not differentiate between Class Members in terms of the amount to be provided. Instead, the Settlement Agreement itself merely provides that the Net Settlement Fund will be allocated and distributed to Class Members through the Plan (to preserve the tax-favored benefits of the money) pursuant to the Court-approved Plan of Allocation. Agmt. §§ V.A.4-5, V.5.B.2, 3(a) & 3(b). The Settlement provides that the Plan of Allocation will be proposed by Class Counsel and subject to approval by the Court. *Id.* § VI.1. Modification of the Plan of Allocation by the Court will not prevent the Settlement from becoming final. *Id.* § VI.3. The only restriction imposed by the Settlement Agreement is that the Excluded Persons cannot receive distributions from the Settlement Fund. *Id.* § VI.5. The only difference under the Agreement relates to whether Class members are entitled to an immediate distribution under the terms of the Plan. *Id.* § V.A.5(a)-(c) & § V.B.3(a)-(b). But that is a feature of the Plan, which allows certain participants (mainly former employees) to take distributions after they cease employment. All participants will benefit from the debt reduction, but those participants who continue to hold stock (primarily current employees) will benefit from the debt reduction in the future. That is merely because those participants will continue to receive allocations of stock to their account under the terms of the Plan. As those are legitimate distinctions that may be considered as part of a settlement, this factor favors preliminary approval.

B. The Plan of Allocation Should be Preliminarily Approved.

"The Plan of Allocation, like the class settlement as a whole, must be fair, reasonable, and adequate." *Ramsey v. MRV Commc'ns Inc.*, No. CV 08-04561 (GAF) (RCx), 2010 WL 11596641, *7 (C.D. Cal. Nov. 16, 2010). As this Court has explained, a plan of allocation based on a pro rata basis is reasonable. *Manzo*, 2022 WL 183492, at *9 (granting preliminary approval of such a allocation); *Pierce v. Rosetta Stone, Ltd.*, No. 11-cv-01283-SBA, 2013 WL 1878918, at *6 (N.D. Cal. May 3, 2013) (same). Courts approve plans of allocations in ESOP cases where "each claimant will be allocated a pro rata share of the fund based on the" shares in his or her ESOP account as of a particular date "or if she terminated employment prior to that date, the number of vested shares in her account at the time of her termination." *Gamino,* 2022 WL 20581948, at *1; *New England Biolabs, Inc. v. Miller*, No. 1:20-cv-11234-RGS, 2022 WL 20583575, at *4 (D. Mass. Oct. 26, 2022) (approving allocation "tie[d] to the number of shares the class member owned and the price of the stock at time of sale"); *Kaplan v. Houlihan Smith & Co.*, No. 12 C 5134, 2014 WL 2808801, *3 (N.D. Ill. June 20, 2014) (approving allocation dividing settlement pro rata "based on the number of shares each class member held in his/her ESOP account on [a specified date]"); *Cunningham*, 2021 WL 1626482, at *6 (approving allocation in ESOP class action where it distributed settlement funds pro rata based on number of shares previously held by class members).

The proposed Plan of Allocation provides that each Class Member will receive a pro rata share of the Cash Settlement and Stock Settlement funds. Agmt. Ex. A at 3-4. The pro rata share will be determined by first dividing the number of shares of Employer Stock in a Payee Class Member's Employer Stock Account (the "Credited Balance") by the sum of the Credited Balances of all Class Members. *Id*. The product of this number and the total number of cash or shares will determine each Class

Member's distribution amount total. *Id*. This is an equitable and reasonable method of allocating Class Members' payments.

C. The Proposed Class Notice and Plan of Notice are Appropriate.

Rule 23(e) requires that the court to direct notice in a reasonable manner to all Class Members who would be bound by the settlement. A proper notice should contain: (1) the nature of the action; (2) the definition of the certified Class; (3) the Class claims, issues, and defenses; (4) that a Class Member may enter an appearance through an attorney; (5) that a Class Member may object to the Settlement; (6) the time and manner for making objections; and (7) the binding effect of a class judgment on members under Rule 23(c)(3). Fed. R. Civ. P. 23(c)(2)(B); *see Ayala*, 2023 WL 7388870, at *9 (approving notice containing this information); *Manzo*, 2022 WL 183492, at *9 (same). The Class Notice meets these standards.

Class members will receive notice by email if available or by U.S. Mail. Agmt. § III.4. Any Class Notices returned as undeliverable, will be re-sent by U.S. Mail. *Id*. § III.7. The Settlement Agreement provides for a toll-free phone number and website to be maintained. *Id*. § III.4, VII.2(f). This method of notice is the most practicable. Fed. R. Civ. P. 23(c)(2)(B); *Ayala*, 2023 WL 7388870, at *9 (approving similar notice plan); *Manzo*, 2022 WL 183492, at *10 (same).

Plaintiff's counsel sought bids for settlement administration from 11 potential service providers and received 9 bids. Barton Decl. ¶ 15. Plaintiff's counsel is comparing the bids and will submit a supplement as the recommended Settlement Administrator.

IV. CONCLUSION

For the forgoing reasons, Plaintiff's motion to preliminarily approve the proposed Settlement should be granted.

Dated: May 21, 2025

Respectfully submitted,

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