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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN (SANTA ANA) DIVISION

ANTONIO HURTADO, et al.,	Case No.: 8:17-cv-01605-JLS-DFM
Plaintiffs,	*Assigned to Hon. Josephine L. Staton*
v.	**PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT**
RAINBOW DISPOSAL CO., INC. EMPLOYEE STOCK OWNERSHIP PLAN COMMITTEE, et al.	
Defendants.	Date: December 11, 2020 Time: 10:30 a.m. Courtroom: 10A ORAL ARGUMENT WAIVED

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Plaintiffs Antonio Hurtado, Christopher Ortega, Jose Quintero, Maritza Quintero, Maria Valadez, and Jorge Urquiza respectfully submit this Memorandum in support of their Motion for Preliminary Approval of the proposed Class Action Settlement with Defendants pursuant to Rule 23(e) of the Federal Rules of Civil Procedure,[1] to approve the proposed notice to the Class, and to set various dates related to the approval of the Settlement.

Pursuant to the Settlement, Defendants have collectively agreed to pay $7.9 million into a Settlement Fund to be allocated to the Class, with $7.5 million to be paid by the Republic Defendants and $400,000 to be paid by GreatBanc Trust Company ("GreatBanc"). In exchange, the Class will dismiss with prejudice its claims asserted in the Second Amended Complaint against Defendants. The Class will also release Defendants from any claims relating to or arising out of the allegations of the Second Amended Complaint. Given the uncertainty of establishing both liability and damages the Settlement represents an excellent result for the Class and the Court should preliminarily approve it.

I. History and Status of the Case

A. Allegations of the Complaint

Before October 1, 2014, the Rainbow Disposal Co., Inc. Employee Stock Ownership Plan (the "ESOP" or "Plan") owned 100% of Rainbow Disposal Co., Inc. ("Rainbow"), and Rainbow stock constituted 97% of the Plan's assets. Second Amended Complaint, ECF No. 153 ("SAC") ¶¶ 5, 81. Rainbow's Articles of Incorporation restricted ownership to the ESOP or Rainbow employees. *Id.* ¶ 55. In 2014, the ESOP fiduciaries were (1) GreatBanc, the Trustee, (2) Rainbow CEO

[1] Class Counsel previously informed the Court that only some of the Plaintiffs supported the Settlement. ECF No. 197 at 2 n.2. Since that time, all Plaintiffs have now decided to again support the Settlement.

Gerald Moffat, the sole member of the Committee, and (3) the Rainbow Board, which consisted of Moffatt, Rainbow President Jeff Snow, and Greg Range. *Id.* ¶¶ 17-21, 28.

Rainbow was one of the largest Southern California waste-disposal and recycling companies. But beginning in 2010, Rainbow's management (who were also ESOP fiduciaries but did not include Range, who joined the Rainbow Board in 2013) caused Rainbow to engage in business ventures outside California in which they had a personal interest. *Id.* ¶¶ 62-65. These self-dealing activities caused Rainbow to default on its loan covenants and to incur significant losses. *Id.* ¶ 76. These losses also resulted in the decline in the value of Rainbow stock and the ESOP assets. *Id.* ¶ 77. While the value of Rainbow began to recover by 2014, no ESOP fiduciary took any action to remedy these breaches even though the ESOP was the only shareholder. Had Rainbow not incurred or had recovered these losses, its stock price would have been higher. *Id.* ¶ 80.

In 2014, Rainbow's Board and the Rainbow Disposal Co., Inc. Employee Stock Ownership Plan Committee (the "Committee") sought to sell Rainbow. During the sales process, Moffat and Snow secretly negotiated $5 million in non-compete bonuses for themselves as part of the sale—and rejected more competitive offers for the Company that did not include such side-payments. *Id.* ¶¶ 144, 153. At the time he served on the Rainbow Board, Range was employed by the investment banking firm Stout Risius Ross, LLC ("Stout"). With Range as a member of the Rainbow Board, the Board voted to engage Stout to perform investment banking services for Rainbow. Range abstained from that vote. *Id.* ¶¶ 283. By July 2014, the Rainbow Board selected a proposed buyer—Republic. On August 25, 2014, Moffat executed an amendment to the Plan to allow GreatBanc, the ESOP trustee (previously with limited authority), to sell the Rainbow stock

held by the ESOP. *Id.* ¶ 101. One day after the Amendment, Rainbow, the Rainbow ESOP and Republic entered into a Stock Purchase Agreement. *Id.* ¶¶ 132-34.

An October 2014 letter from GreatBanc informed ESOP participants that Rainbow ESOP stock had been sold to Republic. *Id.* ¶ 144. Participants were not permitted to vote on the transaction. *Id.* ¶ 143. The summary plan description for the ESOP promised that participants could vote on "important corporate matters." *Id.* ¶ 245. Rainbow had stated for years in filings with the DOL that ESOP participants were "entitled to exercise voting rights" for the stock in their ESOP accounts. *Id.* ¶ 247.

After the sale, the members of the Committee (and the Board) were high-level Republic employees. *Id.* ¶¶ 22-27. These new ESOP fiduciaries provided incomplete, contradictory and misleading information about the sale and its terms, and the value of their ESOP shares. In October 2014, participants were told that the ESOP stock was sold for $17.66 per share (or at least $64.8 million). *Id.* ¶ 147. But participants ultimately received approximately $15.10 per share. *Id.* ¶ 221. In 2017, Rainbow's DOL filings and ERISA-mandated disclosures revealed that $15 million of the sale proceeds, which had not been distributed and remained in the ESOP, had been left in undiversified investments for nearly three years, with a return of virtually zero (and expenses exceeding returns). *Id*. ¶¶ 7, 321.

B. The Claims and Relief Requested

The Second Amended Complaint alleges fourteen counts:

- **Count I** alleges that the Prior ESOP Committee Defendants and GreatBanc breached their fiduciary duties to the Plan by permitting the sale of Rainbow stock held by the ESOP in the October 1, 2014 Transaction. *Id*. ¶¶ 206-223.

- **Count II** alleges that the Prior ESOP Committee Defendants and GreatBanc breached their fiduciary duties to the Plan by failing to require a participant vote to authorize the October 1, 2014 Transaction. *Id*. ¶¶ 224-240.
- **Count III** alleges that the plan administrator of the ESOP failed to provide a summary plan description advising Plan participants that they would not be able to vote on the October 1, 2014 Transaction in violation of ERISA's SPD requirements. *Id*. ¶¶ 241-249.
- **Count IV** alleges that the Prior ESOP Committee Defendants, the New ESOP Committee Defendants, and GreatBanc breached their fiduciary duties to the Plan by failing to disclose important information to Plan participants regarding the October 1, 2014 Transaction and its proceeds. *Id*. ¶¶ 250-258.
- **Count V** alleges that Defendants Moffatt and Snow engaged in transactions prohibited by ERISA and dealt with the assets of the Plan for their own account by negotiating valuable non-compete bonuses for themselves in connection with the October 1, 2014 Transaction. *Id*. ¶¶ 259-267.
- **Count VI** alleges that Defendants GreatBanc, Moffatt, and Snow caused the Plan to engage in a prohibited transaction regarding those same non-compete agreements. *Id*. ¶¶ 268-278.
- **Count VII** alleges that Defendant Range engaged in transactions prohibited by ERISA by receiving consideration for his services as financial advisor to Rainbow in connection with the October 1, 2014 Transaction. *Id*. ¶¶ 279-285.

- **Count VIII** alleges that the Prior ESOP Committee Defendants and GreatBanc breached their fiduciary duties to the Plan by failing to manage a chose in action against corporate fiduciaries of Rainbow who used company assets to invest in ventures in which they had a personal interest. *Id*. ¶¶ 286-301.
- **Count IX**, brought only by Plaintiffs Ortega and Maritza Quintero rather than on behalf of the Class, alleges that the New ESOP Committee Defendants failed to provide certain documents upon request as required by ERISA. *Id*. ¶¶ 302-316.
- **Count X** alleges that the New ESOP Committee Defendants and GreatBanc breached their fiduciary duties to the Plan by failing to prudently invest the proceeds of the October 1, 2014 Transaction. *Id*. ¶¶ 317-333.
- **Count XI** alleges that the members of the ESOP Committee and Rainbow Board of Directors breached their fiduciary duties to the Plan by failing to monitor the conduct of other fiduciaries. *Id*. ¶¶ 334-345.
- **Count XII** alleges that Defendants are liable as cofiduciaries for the breaches of other fiduciaries. *Id*. ¶¶ 346-356.
- **Count XIII** alleges that Republic knowingly participated in the prohibited transactions of Defendants Moffatt and Snow. *Id*. ¶¶ 357-367.
- **Count XIV** alleges that certain indemnity arrangements that would require the Plan participants to be responsible for the liability or breaches of Defendants are void as against public policy under ERISA. *Id*. ¶¶ 368-376.

The Second Amended Complaint seeks equitable relief to recover losses to the plan and redress these alleged wrongs. The relief requested includes requiring breaching fiduciaries to restore all losses to the Plan resulting from their alleged breaches, the disgorgement of profits, the rescission of the October 1, 2014 Transaction subject to a participant vote, an accounting, the imposition of constructive trusts over the proceeds of prohibited transactions, the removal of breaching fiduciaries from their positions as fiduciaries, the appointment of an independent fiduciary, statutory penalties, and attorney's fees. *See id*. at Prayer for Relief ¶¶ A-P.

C. Procedural History

Plaintiffs filed their initial Complaint on September 15, 2017, alleging fourteen claims for relief, arising under ERISA against the following Defendants the Plan Committee, Moffatt, Snow, Range, Jon Black, Catharine Ellingsen, Bill Eggleston, GreatBanc, and Republic. ECF No. 1. The ESOP was named only as a nominal defendants *Id.* Plaintiffs amended their Complaint on February 28, 2018, adding as defendants persons who had served as directors of Rainbow following the October 1, 2014 Transaction: Mark R. Clatt, Brian M. DelGhiaccio, Steven J. Eddleblute, and Brian A. Goebel (the "New Director Defendants"). ECF No. 57. All Defendants moved to dismiss on March 21, 2018. Plaintiffs and the New Director Defendants entered into a Tolling Agreement to which claims against the New Director Defendants were voluntarily dismissed without prejudice on May 18, 2018. *See* ECF No. 91.

The Court denied the remaining Defendants motions to dismiss on July 7, 2018. ECF No. 110. Plaintiffs moved for certification of this case as a class action on December 14, 2018, and this court granted class certification, appointed Plaintiffs as Class Representatives, and appointed R. Joseph Barton of Block &

Leviton LLP and Joseph A. Creitz of Creitz & Serebin LLP as Class Counsel on April 22, 2019. ECF No. 177 at 20. Plaintiffs further amended the Complaint on February 6, 2019, adding Defendants Myndi Kort and Michael Huycke. ECF No. 153.

The pace of discovery intensified following this Court's grant of class certification. Over the course of this litigation, Plaintiffs served more than 72 individual requests for production of documents and directed more than 20 interrogatories to each Defendant. Downes Decl. ¶¶ 2-10. Plaintiffs also served more than 20 document subpoenas on non-parties to this case. *Id*. ¶ 12. Defendants collectively produced more than 150,000 pages of documents, and nonparties produced more than 100,000 pages. *Id.* ¶¶ 11-12. By stipulation and in light of the complexity of this case, the parties agreed to increase the number of depositions each side was permitted to take beyond the presumptive limit of 10. *See* ECF No. 180. Class Counsel took 13 depositions, including the depositions of Defendants Jon Black, Catharine Ellingsen, Bill Eggleston, Myndi Kort, and Michael Huycke. Downes Decl. ¶ 13.

Near the close of fact discovery, the parties agreed to conduct an in-person mediation facilitated by Robert Meyer of JAMS on December 12, 2019, in Irvine, California. Decl. of Robert A. Meyer ¶ 3 (ECF No. 193-1). While an agreement regarding settlement was not reached at this mediation, the parties made substantial progress, and stipulated to an extension of certain deadlines in this case to prevent the erosion of insurance monies available for a potential settlement while the parties negotiated. ECF 193 at 8-9. The parties met for a second in-person mediation on January 15, 2020. Decl. of Robert A. Meyer ¶ 4 (ECF No. 198). The second mediation concluded with the mediator issuing a mediator's proposal, that all Class Representatives accepted on January 15, 2020, and that all of the

Defendants accepted by January 18, 2020, subject to allocation and funding. *Id*. Following confirmation of an agreement as to funding and allocation by the Defendants, the parties executed a term sheet to memorialize the settlement on March 6, 2020. Downes Decl. ¶ 20. The parties subsequently entered into the formal Settlement Agreement on July 23, 2020.

II. Terms of the Settlement and Plan of Allocation

The terms of the proposed Settlement are set forth in the Settlement Agreement. Downes Decl. Ex. 1 ("Agmt"). In short, the Settlement Agreement provides for a payment of $7.9 million (with $7.5 million to be paid by the Republic Defendants and $400,000 to be paid by GreatBanc), inclusive of payments to the Class, Class Counsel's attorneys' fees and litigation expenses, and incentive awards to the Class Representatives. *Id*. §§ III.1, VII.1. Defendants will pay $7.9 million into the Settlement Fund within 30 days of preliminary approval. *Id*. § III.1. In addition to the settlement payment, Republic will pay any costs associated with distributions from the Republic 401(k) Plan once funds are deposited into the Republic 401(k) Plan, as well as the cost of an independent fiduciary. *Id*. §§ IV.6-7, IX. Republic will not pay any costs related to the administration of the Republic 401(k) Plan (aside from distributions). *Id*. § IV.7.

In exchange, the Class will dismiss the claims asserted in the Second Amended Complaint with prejudice and release Defendants from any and all claims that the Class asserted or could have asserted that relate to or arise out of the facts alleged or the claims set forth in the Second Amended Complaint, including: (a) Defendant Rainbow Disposal Co., Inc.'s investments before October 1, 2014, including but not limited to the Southeast Renewables, LLC, Rainbow West Florida, LLC, and/or the West Florida Recycling, LLC ventures, (b) the 2009 Summary Plan Description for the ESOP, (c) the 2014 ESOP Transaction, (d) the

negotiation and resolution by GreatBanc on behalf of the ESOP regarding disputes with Republic related to the Holdback Escrow Funds, (e) the investment of the ESOP funds post-transaction through January 15, 2020, (f) disclosures or alleged failure to disclose by Defendants relating to the 2014 ESOP Transaction or the investment of the ESOP funds post-transaction through January15, 2020, and (g) any alleged action or alleged inaction taken by the ESOP's trustee based on facts or events alleged in Plaintiffs' Second Amended Complaint. Agmt. § XIII.1.

III. The Proposed Settlement Merits Preliminary Approval

As a matter of public policy, settlement is a strongly favored method for resolving disputes. *Util. Reform Project v. Bonneville Power Admin.*, 869 F.2d 437, 443 (9th Cir. 1989). This is especially true in class actions. *Officers for Justice v. Civil Serv. Comm'n of City & Cnty. of S.F.*, 688 F.2d 615, 625 (9th Cir. 1982); *In re Toys R Us-Del., Inc.--Fair & Accurate Credit Transactions Act (FACTA) Litig.*, 295 F.R.D. 438, 448 (C.D. Cal. 2014) (explaining "a strong judicial policy [] favors settlements, particularly where complex class action litigation is concerned") (internal citations and quotations omitted). To protect the interests of the class, Federal Rule of Civil Procedure 23(e) provides that a class action cannot be settled without court approval. Fed. R. Civ. P. 23(e). "Approval under Rule 23(e) involves a two-step process in which (1) the court determines whether a proposed class action settlement deserves preliminary approval and, if so, directs notices to the class for comment and (2) after notice is given to class members, the court determines whether final approval is warranted." *Anderson-Butler v. Charming Charlie Inc.*, No. CIV 2:14-01921 WBS AC, 2015 WL 6703805, at *1 (E.D. Cal. Nov. 3, 2015) (citing *Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 525 (C.D. Cal. 2004)).

The request for 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). As approval is only preliminary, courts generally undertake a limited review of the proposed settlement. *Id.* "Preliminary approval and notice of the settlement terms to the proposed class are 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 ....'" *Urakhchin v. Allianz Asset Mgmt. of Am., L.P.*, No. SACV151614, 2018 WL 3000490, at *4 (C.D. Cal. Feb. 6, 2018) (Staton, J.) (quoting and citing cases). The proposed Settlement readily satisfies the requirements for preliminary approval.

A. The Settlement is the Result of Serious, Informed, and Non-Collusive Negotiations

The first factor is met where the settlement "appears to be … the product of informed, vigorous, arms-length bargaining." *Ontiveros v. Zamora,* Civ. No. 2:08-567 WBS DAD, 2014 WL 3057506, at *14 (E.D. Cal. July 7, 2014)*; see Colesberry v. Ruiz Food Prods. Inc.*, No. CV F04-5516, 2006 WL 1875444, at *6 (E.D. Cal. June 30, 2006) (granting preliminarily approval of settlement where everything "indicates th[e] settlement is the product of arm's length negotiations and there is no indication Plaintiffs or their attorneys have been improperly influenced by Defendants"); *Ebarle v. Lifelock, Inc*., No. 15-CV-00258-HSG, 2016 WL 234364, at *6 (N.D. Cal. Jan. 20, 2016) ("An initial presumption of fairness is

usually involved if the settlement is recommended by class counsel after arms' length bargaining.") (quotation marks and citation omitted). The fact that experienced counsel has been actively engaged in the litigation and has diligently pursued the necessary discovery evidences the non-collusive nature of the settlement. *Urakhchin,* 2018 WL 3000490, at *5 (finding extensive discovery weighed in favor of approval); *West v. Circle K Stores, Inc.,* No. CIV S-04-0438, 2006 WL 1652598, at *11 (E.D. Cal. June 13, 2006); *Does I v. The Gap, Inc.*, No. CV-01-0031, 2002 WL 1000073, at *13 (D.N. Mar. I. May 10, 2002). The assistance of a neutral mediator in the settlement negotiations further evidences the non-collusive nature of the negotiations. *Vanwagoner v. Siemens Indus., Inc.*, No. 2:13-CV-01303, 2014 WL 7273642, at *9 (E.D. Cal. Dec. 17, 2014); *see Hawthorne v. Umpqua Bank,* No. 11-CV-06700-JST, 2014 WL 4602572, at *5 (N.D. Cal. Sept. 15, 2014) (finding no collusion where "[t]he settlement was reached at arms-length with the use of a professional mediator and over the course of months of effort by both parties").

In this case, a settlement was not reached until Plaintiffs' counsel had conducted substantial discovery. Plaintiffs' counsel sought and obtained dozens of interrogatory responses and more than 250,000 pages of documents from Defendants and more than twenty non-parties. Downes Decl. ¶¶ 4-12. Plaintiffs' counsel also met and conferred with Defendants' and nonparties on discovery matters throughout the case in an effort to resolve disputes without the involvement of the Court. *Id.* ¶¶ 13-14. Ultimately, Plaintiffs sought to compel the production of further documents by Defendant Moffatt, the need for which was obviated by the settlement of this case. *See* Minutes of Informal Discovery Conference before Hon. Douglas McCormick ECF No. 196; Downes Decl. ¶ 15. Plaintiffs' counsel also took a total of 13 depositions at locations across the

country, including the depositions of Defendants' transaction advisors and five of the named defendants. Downes Decl. ¶ 16. Plaintiffs' counsel's review of the extensive discovery elicited in this case was supplemented with the assistance of three outside experts, including experts on valuation, investment, and fiduciary standards in the ESOP industry. Downes Decl. ¶ 17.

The terms of the Settlement resulted from hard-fought negotiations. The Parties negotiated the principal terms of the agreement over the course of two in-person mediations facilitated by Robert Meyer of JAMS on December 12, 2019, and January 15, 2020, in Irvine, California. Decl. of Robert A. Meyer ¶ 4 (ECF No. 198). The second mediation concluded with the mediator issuing a mediator's proposal, which all Class Representatives accepted on January 15, 2020, and which all of the Defendants accepted by January 18, 2020, subject to allocation and funding. *Id*.; Downes Decl. ¶ 19 Following confirmation of an agreement as to funding and allocation by the Defendants, the parties entered into a term sheet on March 6, 2020. *Id*. ¶ 20. Following further negotiation of the terms of the Settlement, the parties entered into the Settlement Agreement on July 23, 2020. *Id*. ¶ 21.

The opinion of "experienced plaintiffs' advocates and class action lawyers" is to be considered on preliminary approval. *See The Gap*, 2002 WL 1000073, at *13; *Dalton v. Lee Publ'ns, Inc.*, No. 08-CV-1072 GPC NLS, 2014 WL 5325698, at *3 (S.D. Cal. Oct. 17, 2014); *Knutson v. Schwan's Home Serv., Inc.*, No. 3:12-CV-00964-GPC-DHB, 2014 WL 3519064, at *3 (S.D. Cal. July 14, 2014); *Hester v. Vision Airlines, Inc.*, No. 2:09-CV-00117-RLH-NJK, 2014 WL 1366550, at *5 (D. Nev. Apr. 7, 2014). As this Court previously recognized, each of Class Counsel has "extensive experience litigating complex ERISA class actions." *Hurtado v. Rainbow Disposal Co.*, No. 817CV01605, 2019 WL 1771797, at *9 (C.D. Cal.

Apr. 22, 2019). And Class Counsel has conducted "ample work undertaken and resources devoted by [Class Counsel] to investigate and prosecute Plaintiffs' claims in this action." *Id.*

In short, the settlement is the product of extensive arms-length mediated negotiations facilitated by an experienced neutral and conducted by informed and experienced counsel after more than two years of hard-fought litigation, extensive discovery, zealous advocacy and vigorous arms-length bargaining.

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

While the Court's ultimate assessment of whether the proposed settlement is fair, reasonable, and adequate depends upon many factors, at preliminary approval, the Court must only be satisfied that the settlement "falls within the range of *possible* approval" and has no "obvious deficiencies." *Angell v. City of Oakland,* No. 13-CV-00190 NC, 2015 WL 65501, at *7 (N.D. Cal. Jan. 5, 2015) (emphasis added). Determining whether a settlement "falls within the range of possible approval" requires focus on "substantive fairness and adequacy" and balances plaintiffs' expected recovery against the value of the settlement offer. *Bellinghausen v. Tractor Supply Co.*, 303 F.R.D. 611, 623 (N.D. Cal. 2014); *see Schuchardt v. Law Office of Rory W. Clark*, No. 15-CV-01329-JSC, 2016 WL 232435, at *10 (N.D. Cal. Jan. 20, 2016) (same). In order "[t]o determine whether preliminary approval is appropriate, the settlement need only be potentially fair, as the Court will make a final determination of its adequacy at the hearing on the Final Approval, after such time as any party has had a chance to object and/or opt out." *Urakhchin*, 2018 WL 3000490, at *4 (quoting *Acosta v. Trans Union, LLC*, 243 F.R.D. 377, 386 (C.D. Cal. 2007)).

Here, the Settlement Agreement provides that Defendants will pay $7.9

million into a Settlement Fund. Agmt. § III.1. This represents approximately 34% of the maximum amount that Class Counsel and the expert estimated that Class members could recover if the case were successfully litigated through trial on all counts and the trier of fact agreed with Plaintiffs on the proper measure of recovery, and the resulting judgment could be collected. Downes Decl. ¶ 17. The settlement amount also represents more than a 16% premium over and above the $48,815,131.29 originally allocated to the ESOP from the proceeds of the October 1, 2014 Transaction. *See* ECF No. 163-1. Class Counsel recognizes and acknowledges the expense, risk, and length of continued proceedings necessary to prosecute the litigation against Defendants through trial and appeals, including the risks that any or all of Plaintiffs' claims might fail on a motion for summary judgment, following a trial on the merits, or on appeal. "In most situations, unless the settlement is clearly inadequate, its acceptance and approval are preferable to lengthy and expensive litigation with uncertain results." *Urakhchin*, 2018 WL 3000490, at *4 (quoting *Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 526 (C.D. Cal. 2004)). Additionally, with respect to the Defendants whom Class Counsel considered most culpable and against whom Class Counsel believed that there were the strongest claims, there was a significant risk that Plaintiffs could obtain a favorable decision in favor of the Class, but there would be no assets to collect or collection would be very difficult. Accordingly, Class Counsel believes that the Settlement is well within the range of reasonableness.

The monetary relief provided by the Settlement is reasonable. This conclusion is supported by settlements reached in other cases involving ESOP transactions involving privately held stock. In a recent case, a court granted preliminary approval for a $6.3 million class settlement of a valuation dispute in connection with an $85 million ESOP transaction. *Casey v. Reliance Trust*

Company, No. 18-cv-424 (E.D. Tex. Apr. 22, 2020) (Downes Decl. Ex. 4); *see also In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 459 (9th Cir. 2000) (holding 16% recovery fair and adequate in ERISA class action); *Carter v. San Pasqual Fiduciary Tr. Co.*, No. SACV151507JVSJCGX, 2018 WL 6174767, at *4 (C.D. Cal. Feb. 28, 2018) (finding amount offered strongly favored approval of settlement in ESOP valuation case where monetary relief amounted to 35% of defendants' exposure); *Vincent v. Reser*, No. C 11-03572 CRB, 2013 WL 621865, at *2 (N.D. Cal. Feb. 19, 2013) (approving settlement of $5.1 million in connection with $35 million ESOP transaction).

The scope of the releases in a proposed settlement is acceptable where the claims released are limited to those based upon the facts set forth in the complaint. *Nen Thio v. Genji, LLC*, 14 F. Supp. 3d 1324, 1332 (N.D. Cal. 2014); *Hesse v. Sprint Corp.*, 598 F.3d 581, 590 (9th Cir. 2010) ("A settlement agreement may preclude a party from bringing a related claim in the future even though the claim was not presented and might not have been presentable in the class action, but only where the released claim is based on the identical factual predicate as that underlying the claims in the settled class action"). Here, the Settlement only releases relating to or arising out of facts alleged or claims set forth in the Second Amended Complaint. Agmt. § XIII.1.

C. The Settlement has no Obvious Deficiencies

The final factor considered on preliminary approval is whether the agreement has any obvious deficiencies, such as "unduly preferential treatment of class representatives or of segments of the class, or excessive compensation of attorneys." *Grant*, 2013 WL 6499698, at *5; *see also Bellinghausen*, 2014 WL 6694011, at *9; Newberg on Class Actions § 11:25 (4th ed. 2010). The Ninth Circuit has advised courts to be concerned (a) "when counsel receive a

disproportionate distribution of the settlement, or when the class receives no monetary distribution but class counsel are amply rewarded"; (b) "when the parties negotiate a 'clear sailing' arrangement providing for the payment of attorneys' fees separate and apart from class funds, which carries 'the potential of enabling a defendant to pay class counsel excessive fees and costs in exchange for counsel accepting an unfair settlement on behalf of the class'"; and (c) "when the parties arrange for fees not awarded to revert to defendants rather than be added to the class fund." *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 947 (9th Cir. 2011). 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.

The Settlement and Class Counsels' proposed Plan of Allocation do not unduly favor the Class Representatives or segments of the Class. As the Ninth Circuit has recognized, "[a] class action settlement need not necessarily treat all class members equally." *Cohen v. Resolution Tr. Corp*., 61 F.3d 725, 728 (9th Cir. 1995) *vacated on other grounds*, 72 F.3d 686 (9th Cir. 1996). Differential treatment is appropriate when it is "rationally based on legitimate considerations." *Id.* In a case in which a subgroup of the class is treated differently, the court must ensure that the settlement is "fair, reasonable and adequate to *all* concerned." *Id.* (emphasis added). Where the disparate treatment is rationally based on legitimate considerations and there was no indication of any collusion against them, the settlement may be approved. *See id.* at 727, 728 (approving such a settlement); *see also Santos v. Camacho,* No. CIV. 04-00006, 2008 WL 8602098, at *10 (D. Guam Apr. 23, 2008), *aff'd sub nom. Simpao v. Gov't of Guam,* 369 F. App'x 837 (9th Cir. 2010).

The Settlement Agreement and Class Counsel's proposed Plan of Allocation treat all members of the Class the same in that they will receive a monetary distribution from the Settlement Fund on a *pro rata* basis based on the number of their shares held at the time of 2014 Transaction. Agmt § V; Downes Decl. Ex. 3. Each Class Member's share will be based on the number of shares held in their ESOP account as of October 1, 2014. *See id*. Any differences will be as a result of differences in the underlying losses suffered by Class members in connection with the October 1, 2014 Transaction. In *Kaplan v. Houlihan Smith & Co.*, No. 12 C 5134, 2014 WL 2808801, (N.D. Ill. June 20, 2014), the court approved the plan of allocation in an ESOP class action as reasonable where "[t]he way the settlement proceeds will be divided among the class members" is that "[t]he settlement amount (after fees and expenses) will be divided pro rata, based on the number of shares each class member held in his/her ESOP account on [a specified date]." *Id.* at *3. Under this Plan of Allocation, each Class Member's share of the Net Settlement Amount is calculated and determined on a pro rata basis by comparing the number of Rainbow shares held in his or her ESOP account to the total number of Rainbow shares held in the ESOP accounts of all Class Members as of October 1, 2014.

With respect to the proposed attorneys' fees, Class Counsel will seek a percentage of the Settlement Fund not to exceed 30%. Agmt. § VII.2. In conjunction with final approval, Class Counsel will file a motion for attorney's fees and litigation expenses explaining why the requested amounts are reasonable and justified in light of the circumstances of the case including the attorney lodestar. *See Urakhchin*, 2018 WL 3000490, at *6 (granting preliminary approval where parties had not identified proposed amount for attorney's fees but requiring class counsel to articulate attorney's fees and service payment requests in separate

application). While Defendants have agreed not to oppose Class Counsel's requests for attorney's fees so long as the fee motion does not exceed 30%, the Settlement does not provide for the payment of attorneys' fees separately from class funds or for the reversion of amounts not paid as fees to the Defendants. *Id.* at *6 (holding that "clear sailing" provision did not signal collusion where fees would be paid from capped settlement fund).

At this stage, the question is merely whether the agreement is preliminarily fair. The specific amounts of attorney's fees and any class representative incentive award can be reserved on this preliminary approval motion to the final approval hearing and the discretion of the Court. *Anderson-Butler v. Charming Charlie Inc.*, No. 14 CV 1921, 2015 WL 4599420, at *11 (E.D. Cal. July 29, 2015) (preliminarily approving settlement and declining to "evaluate the fee award at length" in "considering whether the settlement is adequate," because "[i]f the court, in ruling on the fees motion, finds that the amount of the settlement warrants a fee award at a rate lower than what plaintiff's counsel requested" the court has the power to reduce the award accordingly).

IV. The Notice and Plan of Notice Should be Approved

Once the parties obtain preliminary approval of the settlement, 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 "(i) the nature of the action; (ii) the definition of the class certified; (iii) the class claims, issues, or defenses; (iv) that a class member may enter an appearance through an attorney if the member so desires; (v) that the court will exclude from the class any member who requests exclusion; (vi) the time and manner for requesting exclusion; and (vii) the binding effect of a class judgment on members under Rule 23(c)(3)." Fed. R. Civ. P. 23(c)(2)(B); *see* Manual for Complex Litigation, supra, § 21.312;

Urakhchin, 2018 WL 3000490, at *7 (approving notice containing this information). Here, the proposed notice to the Class provides information on all of these subjects and informs Class Members about their rights under the Settlement as well as their right to be heard at the final fairness hearing. *See* Downes Decl. Ex. 2.

It is well-established that notice sent by first class mail is sufficient when the names and addresses of the class members are known. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173-77 (1974); *Peters v. Nat'l R.R. Passenger Corp.*, 966 F.2d 1483, 1486 (D.C. Cir. 1992) ("It is beyond dispute that notice by first class mail ordinarily satisfies rule 23(c)(2)'s requirement that class members receive 'the best notice practicable under the circumstances.'"); *see* Manual for Complex Litigation, supra, § 21.311 (explaining that individual notice via mail is preferred when names and addresses are known). Here, the members of the Class will receive notice by U.S. Mail. Agmt. § II.3. Publication notice is not necessary in this case, because data identifies the names and addresses of all Class Members. Publication notice be of minimal value in alerting potential Class Members, but would likely increase the costs of administration and thereby decrease the benefits available to pay Class Members. Downes Decl. ¶ 18. In such circumstances, this Court has authorized notice only by mail. *See Urakhchin*, 2018 WL 3000490, at *7; *Munday v. Navy Fed. Credit Union*, No. SACV151629JLSKESX, 2016 WL 7655807, at *10 (C.D. Cal. Sept. 15, 2016) (Staton, J.). Thus, these procedures satisfy due process, meet the requirements of Rule 23, and should be approved.

Class Counsel has solicited bids for class notice and administration services through a competitive process. Class Counsel solicited responses to a request for proposals from seven reputable service providers, of which six submitted bids. Downes Decl. ¶ 25. Following extensive discussion with the respondents to ensure

an apples to apples comparison of services, Class Counsel has submitted the two lowest priced bids for this Court's consideration. *See* Downes Decl. ¶ 26 and Exs. 5 and 6. Class Counsel recommends that the Court appoint CPT Group as the Settlement Administrator. Downes Decl. ¶ 29.

V. The Court Should Establish Dates for Effectuating Final Approval of the Settlement

In order to effect notice, fix a date for the final approval hearing, and provide a deadline for the submission of objections, Plaintiffs request that the Court establish the dates set forth in Plaintiffs' motion.

VI. Conclusion

For the forgoing reasons, the Court should grant Plaintiffs' motion to preliminarily approve the proposed Settlement, approve the proposed Class notice, authorize its distribution to the Class, and set dates outlined above.

DATED: July 27, 2020

Respectfully submitted,

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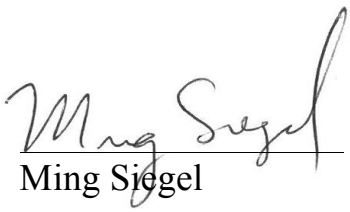
CERTIFICATE OF SERVICE

I, Ming Siegel, hereby certify that on July 27, 2020, a copy of the foregoing Plaintiffs' Motion and Notice of Motion for Preliminary Approval of Settlement was served on the following counsel of record via the CM/ECF system:

Dated this 27th day of July 2020.



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