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

ANTONIO HURTADO, et al., Plaintiffs, v. RAINBOW DISPOSAL CO., INC. EMPLOYEE STOCK OWNERSHIP PLAN COMMITTEE, et al. Defendants.	Case No.: 8:17-cv-01605-JLS-DFM *Assigned to Hon. Josephine L. Staton* **PLAINTIFFS' SUPPLEMENTAL MEMORANDUM OF LAW IN SUPPORT OF UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT (Per Dkt. 211)** Date: December 11, 2020 Time: 10:30 a.m. Courtroom: 10A ORAL ARGUMENT WAIVED

Pursuant to this Court's Order, ECF No. 211, Plaintiffs respectfully submit this Supplemental Memorandum in support of their Motion for Preliminary Approval, ECF No. 209.

I. Introduction

The Court's November 23, 2020 Order instructed Plaintiffs to specifically and comprehensively address the factors for evaluating the fairness, reasonability, and adequacy of a proposed settlement set forth in *Staton v. Boeing Co*, 327 F.3d 938, 959 (9th Cir. 2003):

> the strength of plaintiffs' case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed, and the stage of the proceedings; the experience and views of counsel; the presence of a governmental participant; and the reaction of the class members to the proposed settlement.

Id. The Court also requested "a reasonable breakdown of Defendants maximum potential liability…." ECF No. 211 at 2. These factors weigh in favor of preliminary approval here.

II. The Strength of Plaintiffs' Case and The Risk, Expense, Complexity, and Likely Duration of Further Litigation

In assessing this factor, the Court evaluates the time and cost required to continue the litigation. In determining the probability of Plaintiffs' success on the merits, there is no "particular formula by which that outcome must be tested." *See Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 965 (9th Cir. 2009). "In most situations, unless the settlement is clearly inadequate, its acceptance and approval are preferable to lengthy and expensive litigation with uncertain results." *Urakhchin v. Allianz Asset Mgmt. of Am., L.P.*, No. SACV151614, 2018 WL 3000490, at *4 (C.D. Cal. Feb. 6, 2018) (quoting *Nat'l Rural Telecomms. Coop. v.*

DIRECTV, Inc., 221 F.R.D. 523, 526 (C.D. Cal. 2004)) (Staton, J.). There is strong legal and factual support for Plaintiffs' claims, but continued litigation would be complex, costly, risky, and protracted.

First, the parties had not yet conducted expert discovery. Plaintiffs intended to offer three expert witnesses at trial. ECF No. 209-2. Undoubtedly, the five groups of Defendants in this case would depose all three experts and would offer their own expert witnesses and reports, whom Plaintiffs, in turn would likely depose and rebut. Plaintiffs have already expended approximately 3,800 hours of attorney time and accrued $197,000 in costs litigating this case. Downes Decl. ¶ 2. Extensive and expensive expert discovery would have been a critical and costly component of preparation for trial. Barton Decl. ¶ 2.

Second, taking the case through trial would be an expensive undertaking. Class Counsel has previously tried class action ESOP cases, and is familiar with the risk, complexity, and expense involved. ECF No. 139-22 at ¶ 5; *see Chesemore v. All. Holdings, Inc.*, No. 09-CV-413-WMC, 2014 WL 4415919, at *6 (W.D. Wis. Sept. 5, 2014) (approving 16,000 hours of attorney time and over $1 million in costs as reasonable in settlement after trial), *aff'd sub nom. Chesemore v. Fenkell*, 829 F.3d 803 (7th Cir. 2016).

Third, Defendants would likely have sought summary judgment in whole or in part and even if those motions were entirely unsuccessful, as this Court has observed, "in any case, there is a substantial risk of losing at trial." *Munday v. Navy Fed. Credit Union*, No. SACV151629, 2016 WL 7655807, at *8 (C.D. Cal. Sept. 15, 2016) (Staton, J.). While Class Counsel in this case has had success at trial in other ERISA and ESOP cases, Class Counsel is aware that these are difficult and risky cases where courts have sided with Defendants. *E.g., Fish v. Greatbanc Tr. Co.*, 09 C 1668, 2016 WL 5923448, at *1 and *68 (N.D. Ill. Sept. 1,

2016) (finding for defendants on all claims in ESOP fiduciary breach case after 34 trial days); *see also Sacerdote v. New York Univ.*, 328 F.Supp.3d 273, 280 (S.D.N.Y. 2018) (finding for defendants on all claims in ERISA fiduciary breach case following trial).

Fourth, "ERISA actions are notoriously complex cases, and ESOP cases are often cited as the most complex of ERISA cases." *Pfeifer v. Wawa, Inc.*, No. CV 16-497, 2018 WL 4203880, at *7 (E.D. Pa. Aug. 31, 2018). In this case, there are fourteen counts brought against twelve Defendants, involving multiple factually and legally independent claims that would need to be separately proved. Several of the claims depended upon an underlying fiduciary breach of a Defendant to be proved to establish another Defendant's knowing participation in or failure to remedy that breach or their failure to monitor the breaching fiduciary. *See* ECF No. 153 ¶¶ 334-67. The derivative character introduces difficult issues regarding the knowledge of individual fiduciaries that would present challenges at trial.

Fifth, even if Plaintiffs prevailed on all claims, the potential range of recovery could vary widely depending on this Court's determination of the appropriate measure of loss. Downes Decl. ¶ 3. For example, the potential recovery on Count X, which relates to the failure to properly invest the proceeds of the October 2014 ESOP Transaction, *see* ECF No. 153 at ¶¶ 317-333 could vary from as much as a de minimis amount to $2.5 million depending on the Court's determination of the appropriate alternative investment vehicle for those proceeds. Downes Decl. ¶ 5. Likewise, assuming Plaintiffs established liability on Count I, Plaintiffs recovery could vary substantially depending on whether the Court ultimately agreed with Plaintiffs' contention that certain business opportunities available to Rainbow Disposal Co., Inc. were not properly valued by the breaching fiduciaries or whether the Court adopted other indicators of purchase interest in

Rainbow as the appropriate measure of loss to the ESOP. Downes Decl. ¶ 4. This substantial variance in potential recovery introduces significant risk in continued litigation even assuming success at trial, which is far from guaranteed.

Sixth, given the number and complexity of the issues involved at trial (projected to last three to four weeks, ECF No. 122 at 3), and the substantial liability at issue, Defendants would likely appeal any judgment in favor of Plaintiffs. Even plaintiffs in class actions who survive summary judgment and succeed at trial have had such verdicts reversed on appeal.

Finally, success on the merits of this case and affirmance on appeal would not exhaust the risk to Plaintiffs and the Class. Class Counsel viewed the claims against Defendants Moffatt and Snow as having the highest likelihood of success, and viewed those Defendants as most culpable in connection with the transaction at the heart of this lawsuit. Downes Decl. ¶ 7. However, collecting a judgment from the individual defendants would be challenging. There is a significant risk that there would be no non-bankruptcy-exempt assets to collect or that collection would be very difficult. *Id*. While every defendant had some insurance, the policies are so-called "wasting" policies – meaning that defense costs count against the indemnity limits. ECF No. 198 at ¶ 7. Thus, while there are insurance funds available now, the costs of defending the case through trial would likely leave Moffatt, Snow, and GreatBanc without any available insurance to actually satisfy any judgment against them.

III. The Risk of Maintaining Class Action Status

This Court has previously held that, absent indicia of a specific enumerable risk to maintaining the class action status of this case throughout the litigation, "the Court need not consider this factor for settlement purposes." *In re Biolase, Inc. Sec. Litig.*, No. SACV131300JLSFFMX, 2015 WL 12697736, at *7 (C.D. Cal.

June 5, 2015) (Staton, J.). But this Court has also held that even so "there remains a risk that a class may be decertified," that is "not so minimal as to preclude a Court granting preliminary approval to a settlement agreement." *Urakhchin*, 2018 WL 3000490, at *4 (citing *Rodriguez*, 536 F.3d at 966) (internal quotation marks removed). Here, Defendants vigorously opposed certification of the Class, and would be able to raise these same arguments on appeal. *See* ECF No. 150. This factor thus favors preliminary approval.

IV. The Amount Offered in Settlement as Compared to Defendants' Maximum Potential Liability

In order to assess the $7.9 million settlement amount, the Court requested "a reasonable breakdown of Defendants' maximum potential liability…." ECF No. 211. The chart below, based on the analysis by Plaintiffs' experts sets forth a count-by-count the maximum potential recovery or other significant remedies available to the Class if judgment were to enter for the Plaintiffs.[1]

Count	Defendant(s)	Maximum Recovery/Remedy
Count I: Breach of Fiduciary Duty Under ERISA § 404(a)(1)(A), (B) & (D), 29 U.S.C. § 1104(a)(1), for Authorizing the October 2014 Transaction for Less than Adequate Consideration	Prior ESOP Committee Defendants	$9,300,000 (most likely maximum) to $19,852,000 (potential maximum)
	GreatBanc	
Count II: Breach of Fiduciary Duty Pursuant to ERISA § 404(a)(1)(A), (B) & (D), 29 U.S.C. § 1104(a)(1)(A), (B) & (D), For Failing to Require a Participant Vote	Prior ESOP Committee Defendants	Rescission of the October 2014 Transaction
	GreatBanc	
Count III: Violation of ERISA § 102(a), 29 U.S.C. § 1022(a) For Failure to Disclose Participants Lacked a Right to Vote on a Sale	Rainbow	Reformation of the Plan and/or Rescission of the Transaction

[1] Downes Decl. ¶ 4. Count IX is not a Class claim and is excluded from this breakdown. *See* ECF No.177 at 6.

Count IV: Breach of Fiduciary Duty Pursuant to ERISA § 404(a)(A)(1)(A) & (B), 29 U.S.C. § 1104(a)(A)&(B) For Failure to Disclose Information About the Sale & the Proceeds	Prior ESOP Committee Defendants	Accounting of Plan Assets
	New ESOP Committee Defendants	
	GreatBanc	
Count V: Prohibited Transactions in Violation of ERISA § 406(b)(1) & (3), 29 U.S.C. § 1106(b)(1) & (3)	Gerald Moffatt	$3,489,958.38
	Jeff Snow	$2,975,000.00
Count VI: Prohibited Transactions In Violation of ERISA § 406(a)(1)(D), 29 U.S.C. § 1106(a)(1)(D)	Gerald Moffatt	$6,464,958.00
	Jeff Snow	
	GreatBanc	
Count VII: Prohibited Transactions in Violation of ERISA § 406(b)(1) & (3), 29 U.S.C. § 1106(b)(1) & (3) Against Defendant Range	Gregory Range	$893,159.43
Count VIII: Breach of Fiduciary Duty Pursuant to ERISA § 404(a)(1)(A) & (B), 29 U.S.C. § 1104(a)(1)(A)&(B) For Failure to Manage a Chose in Action	Prior ESOP Committee Defendants	$11,177,523.00
	GreatBanc	
Count X: Breach of Fiduciary Duty Under ERISA § 404(a)(1)(A), (B), (C) & (D), 29 U.S.C. § 1104(a)(1) For Failing to Properly Invest Plan Assets After October 1, 2014	GreatBanc	$2,498,163
	New ESOP Committee Defendants	
Count XI: Breach of Duty to Monitor Pursuant to ERISA § 404(a)(1)(A) & (B), 29 U.S.C. § 1104(a)(1)(A) & (B)	Gerald Moffatt	Per Underlying Claims
	Gregory Range	
	Jeff Snow	
	New ESOP Committee Defendants	
Count XII: Co-Fiduciary Liability Pursuant to ERISA § 405, 29 U.S.C. § 1105	Gerald Moffatt	Per Underlying Claims
	Gregory Range	
	Jeff Snow	
	GreatBanc	
	Prior ESOP Committee Defendants	
	New ESOP Committee Defendants	
Count XIII: Knowing Participation in Breaches of Fiduciary Duties & Prohibited Transactions Pursuant to ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3)	Republic	Restoration of the Rainbow stock in whole or in part Rescission of the October 2014 Sale
Count XIV: Violation of ERISA § 410 &	Gerald Moffatt	Declaration that

Breach of Fiduciary Under ERISA §§ 404(a)(1)(A) and (B), 29 U.S.C. § 1110 & §§ 1104(a)(1)(A) and (B)	Gregory Range GreatBanc New ESOP Committee Defendants	indemnities purporting to relieve Defendants of liability are void.
Estimated Total Maximum Recovery[2]		$23.3 million[3]

Based on the analysis of Plaintiffs' experts, Class Counsel viewed the likely maximum recovery on the class claims to be $23.3 million. Downes Decl. ¶ 6. The $7.9 million recovery in this case represents approximately 34% of the maximum amount that the Class members could recover if the liability were successfully litigated through trial on all counts, the trier of fact agreed with Plaintiffs on the proper measure of recovery, and the resulting judgment could be collected. ECF No. 209-2 ¶ 17. Even if Plaintiffs' alternative theory on Count I prevailed, the maximum recovery on the class claims would be $33.8 million and the $7.9 million recovery would represent 23.4% of that amount. Downes Decl. ¶ 4.

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[2] The claim-by-claim recoveries described are not necessarily cumulative. For example, recovery from Defendants Snow and Moffatt under Count V, which alleges transactions prohibited under ERISA § 406(b)(1) & (3), may be considered duplicative of those amounts under Count VI's breach of fiduciary duty theory.

[3] The monetary recovery available on Count I is the difference between the actual amounts paid to the ESOP in the Republic Services, Inc. ("Republic") acquisition of Rainbow Disposal Co., Inc. ("Rainbow") and the fair market value of Rainbow stock. *Brundle v. Wilmington Tr., N.A.*, 919 F.3d 763, 781 (4th Cir. 2019). In consultation with experts, Class Counsel concluded that the most defensible basis for measuring loss on Count I was an offer to acquire Rainbow made by a strategic competitor contemporaneously to Republic acquisition, which was calculated to be worth $9,300,000 more than the 2014 sale price. An alternative measure of loss would be based on the failure to appropriately value certain business opportunities available to Rainbow in connection with the Republic acquisition, which would have measured the loss at $19,852,000; however, Class Counsel viewed the first measure as far more likely and heavily discounted the latter in evaluating the claims of the Class and negotiating the Settlement. Downes Decl. ¶ 4.

This result for the class compares favorably with results reached in settlement of similar ERISA class action cases. *See Casey v. Reliance Tr. Co.*, No. 18-cv-424 (E.D. Tex. Apr. 22, 2020) (Downes Decl. Ex. 4); *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. SACV151507, 2018 WL 6174767, at *4 (C.D. Cal. Feb. 28, 2018) (finding offer of 35% of potential exposure strongly favored approval of settlement in ESOP valuation case); *Reyes v. Bakery & Confectionery Union & Indus. Int'l Pension Fund*, No. 14–CV–05596, 2017 WL 6623031, at *6 (N.D. Cal. Dec. 28, 2017) (approving ERISA settlement recovery of 25%); *Vincent v. Reser*, No. C 11-03572, 2013 WL 621865, at *2 (N.D. Cal. Feb. 19, 2013) (approving settlement of $5.1 million in connection with $35 million ESOP transaction). This factor favors preliminary approval.

V. The Extent of Discovery Completed

This factor considers whether "the parties have sufficient information to make an informed decision about settlement." *Linney v. Cellular Alaska P'ship*, 151 F.3d 1234, 1239 (9th Cir. 1998). This factor favors preliminary approval where extensive discovery has been conducted by Class Counsel, *Urakhchin*, 2018 WL 3000490, at *5. This is so even where discovery has not yet concluded, *Munday*, 2016 WL 7655807, at *9.

Here, the parties reached a settlement in principle after the close of fact discovery. *See* ECF No. 209-2 at ¶ 19; ECF No. 185 at 2. Plaintiffs conducted extensive discovery, including dozens of requests for production of documents, interrogatories, requests for admission, depositions, and non-party subpoenas. ECF No. 209-2 at ¶¶ 4-12. Counsel reviewed more than 250,000 pages of documents produced by the Defendants and twenty nonparties, *id*. at ¶¶ 11-12, deposed

thirteen witnesses, *id*. at ¶ 16, and consulted with three outside experts on ESOP valuation, investment, and fiduciary standards. *Id*. at ¶ 17. This factor favors preliminary approval.

VI. The Experience and Views of Counsel

"The recommendations of plaintiffs' counsel should be given a presumption of reasonableness." *Urakhchin*, 2018 WL 3000490, at *5 (quoting *In re Omnivision Techs., Inc.*, 559 F.Supp.2d 1036, 1043 (N.D. Cal. 2008)). The Court has previously recognized that the recommendation of counsel with extensive class action experience weighs in favor of preliminary approval. *In re Biolase, Inc. Sec. Litig.*, No. SACV131300, 2015 WL 12697736, at *8 (C.D. Cal. June 5, 2015). "This presumption is justified because '[p]arties represented by competent counsel are better positioned than courts to produce a settlement that fairly reflects each party's expected outcome in litigation.'" *Munday*, 2016 WL 7655807, at *9. The Court appointed Joseph Barton and Joseph Creitz as Class Counsel in light of their "extensive experience litigating complex ERISA class actions" and the "ample work undertaken and resources devoted by [Class Counsel] to investigate and prosecute Plaintiffs' claims in this action." *Hurtado v. Rainbow Disposal Co.*, No. 817CV01605, 2019 WL 1771797, at *9 (C.D. Cal. Apr. 22, 2019); *see* ECF No. 139-22 at ¶¶ 4-11 (detailing Mr. Barton's experience); ECF No. 139-24 at ¶¶ 1-7 (detailing Mr. Creitz's experience). Mr. Barton has tried four ERISA class or fiduciary breach cases, of which two were ESOP cases. ECF No. 139-22 at ¶¶ 5-6. As such, he has specific experience to understand and evaluate the risks and benefits of a settlement in such cases. Based on their appreciation of those risks, and benefits, Class Counsel endorse the Settlement Agreement as fair, reasonable, and adequate. Thus, this factor thus favors preliminary approval.

VII. The Presence of a Government Participant

This factor is neutral where, as here, there is no government entity participating in the case. *Salazar v. Midwest Servicing Grp., Inc.*, No. CV 17-0137 PSG (KSX), 2018 WL 4802139, at *5 (C.D. Cal. Oct. 2, 2018); *Tom v. Com Dev USA, LLC*, No. 16CV1363PSGGJSX, 2017 WL 10378629, at *5 (C.D. Cal. Dec. 4, 2017); *see also* ECF No. 154 at ¶¶ 10-19 (no governmental participant).

VIII. The Reaction of Class Members to the Proposed Settlement

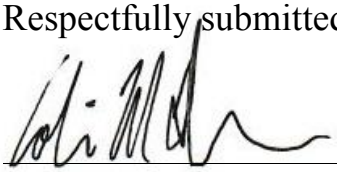
This Court has recognized that "evaluation of this factor is more proper at the final approval stage." *Biolase*, 2015 WL 12697736, at *8. Lack of evidence of reactions to the proposed settlement is "not uncommon at the preliminary approval stage" before notice of the proposed settlement is provided to a class. *Munday*, 2016 WL 7655807, at *9. Indeed, one of the purposes of preliminary approval is to "invite the class's reaction." William B. Rubenstein, et al., *Newberg on Class Actions* § 13:10 (5th ed. 2013).; *Urakhchin*, 2018 WL 3000490, at *6 (ordering Class Counsel to submit such declarations for final approval). The named Plaintiffs/class representatives all support the settlement.

IX. Conclusion

For the forgoing additional reasons, the Court should grant Plaintiffs' Motion for Preliminary Approval of Settlement.

DATED: December 7, 2020

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Colin M. Downes, hereby certify that on December 7, 2020, a copy of the foregoing Supplemental Memorandum of Law in Support of Motion for Preliminary Approval of Settlement was served on the following counsel of record via the CM/ECF system:

Dated this 7th day of December 2020.

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