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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

IN RE NORTHROP GRUMMAN CORPORATION ERISA LITIGATION. THIS DOCUMENT RELATES TO: All Actions	Master File No. 06-CV-6213 AB (JCx) **PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT** Hon. André Birotte Jr. Final approval hearing: October 23, 2017, at 10:00 a.m. Courtroom 7B

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INTRODUCTION

Plaintiffs respectfully request that the Court grant final approval of the settlement, which resolves litigation that has been pending for over eleven years. Before September 2006, when Plaintiffs brought this action, no 401(k) excessive fee case had been filed in the 30-year history of ERISA, by either the Department of Labor or any private firm. The claims involved were novel and complex, and dependent in large part on regulations with little (if any) caselaw interpreting them. Undaunted by these challenges, Plaintiffs zealously litigated this case for over a decade at great risk and expense. The Court dismissed Plaintiffs' initial complaint, but Plaintiffs successfully re-pled their claims. The Court then denied Plaintiffs' motion for class certification, and Plaintiffs successfully appealed that denial to the Ninth Circuit. Following remand, Plaintiffs engaged in extensive discovery, reviewing 2.5 million pages of documents that Defendants produced and taking over a dozen depositions. Plaintiffs used that discovery to file the operative complaint and partially defeated Defendants' motion for summary judgment (following a four-year hiatus while the case was stayed pending the successful appeal to the Supreme Court in *Tibble v. Edison International*). Plaintiffs then engaged in the massive undertaking of preparing for trial. And after putting on the first week of their case in chief, Plaintiffs finally reached the proposed settlement, more than a decade after this lawsuit was filed.

The $16.75 million settlement is a very significant monetary recovery for the Class. It is 160% of the $10.5 million Defendants claimed was their maximum exposure, and 70% of the $24 million Plaintiffs contended was improperly taken from the Plans during the relevant time. It appropriately balances Plaintiffs' potential recovery against the chance Defendants might succeed at trial or on appeal. Moreover, the settlement ensures that the Class will obtain a meaningful recovery now, as opposed to a potentially smaller recovery months or years later. The settlement was achieved only after the parties had fully completed discovery,

summary judgment, three separate mediation attempts, and a week of trial. The parties thus had a full understanding of all strengths and weaknesses of the case in deciding to settle, and the settlement did not result from collusion. Moreover, of the over 215 thousand class members who were mailed notices of the settlement, only four—a mere 0.00186%—objected, demonstrating the class' overwhelming support of the settlement. The settlement is fair, reasonable, and adequate, and the Court should grant final approval.

BACKGROUND

A. The unusually complex and protracted pre-trial procedural history.

Plaintiffs' filed their initial complaint on September 28, 2006 against the Northrop Grumman Savings Plan Administrative Committee and the Northrop Grumman Savings Plan Investment Committee (the "Committees") and Committee members J. Michael Hately, Dennis Wootan, Ian Ziskin, Ryan Hamlin, and Rose Mary Abelson (the "Individual "Defendants"), as well as Northrop Grumman Corporation, the Northrop Grumman Corporation Compensation and Management Development Committee of the Board of Directors, and various individual directors. Doc. 1. On February 28, 2007, Judge Real dismissed the initial complaint. Doc. 28. Plaintiffs filed a first amended complaint on March 14, 2007. Doc. 43. On May 7, 2007, the Committees and Individual Defendants answered that complaint. Doc. 59. Northrop Grumman and the other named defendants moved to dismiss the claims against them. Doc. 61. Judge Real granted that motion. Doc. 64.

After Judge Real initially denied Plaintiffs' motion for class certification (Doc. 102), Plaintiffs sought and obtained interlocutory review of that order from the Ninth Circuit, which reversed the Court's initial denial and remanded the case back to this Court. *Grabek v. Northrop Grumman Corp.*, 346 Fed.Appx. 151, 153 (9th Cir. Sept. 28, 2009)(Unpub. Disp.). Upon remand from the Ninth Circuit, Plaintiffs then filed a renewed motion for class certification. Doc. 172. The Court granted the motion on March 29, 2011, appointed Gary Grabek, Julie Spicer, Mark Geuder, and

1 Dwite Russell as Class representatives, and appointed Schlichter, Bogard &
2 Denton, LLP ("SBD") as class counsel. Doc. 421.
3 In the course of this litigation, Defendants produced, and Plaintiffs reviewed,
4 nearly 2.5 million pages of documents. Doc. 783-6 ¶9. This included documents
5 post-dating the action's commencement (September 28, 2006) in light of the
6 lengthy stay during Plaintiffs' appeal of the Court's class certification denial. *See*
7 Doc. 280-1 at 2–3, 4–5; *see also* Doc. 261. Plaintiffs also took 17 depositions of
8 Defendants and non-parties, including experts. Doc. 783-6 ¶9.
9 Plaintiffs also used the information they obtained from Defendants' document
10 production to file the operative complaint on September 15, 2010. Doc. 189; Doc.
11 332; Doc. 338. That complaint alleged that Defendants breached their fiduciary
12 duties under ERISA by causing participants in the Northrop Grumman Savings
13 Plan ("NGSP") and Northrop Grumman Financial Security & Savings Program
14 ("FSSP," collectively "the Plans") to pay excessive and unnecessary investment
15 management and administrative fees (Doc. 338 ¶¶43–74), and by imprudently and
16 disloyally selecting investment managers for the Plans' investments that charged
17 the Plans higher fees for worse performance than other capable managers would
18 have (*id.* ¶¶ 75–85).
19 Following discovery, Defendants moved for summary judgment (Doc. 418),
20 which Plaintiffs opposed (Doc. 500). Defendants' motion was supported by a 214-
21 paragraph statement of uncontroverted facts, 8 declarations, and 236 exhibits. *See*
22 Docs. 419, 440, and 459. Plaintiffs vigorously opposed this motion, not only
23 responding to each of Defendants' facts, but submitting an additional 372
24 paragraphs of disputed facts supported by 4 declarations and 122 exhibits. Docs.
25 423, 424, 479. While that motion was outstanding, the Court stayed the case in
26 February 2014 pending the outcome of *Tibble v. Edison International*, another
27 ERISA 401(k) fiduciary breach action in this District, and handled by undersigned
28 counsel. Doc. 534. The *Tibble* case was the subject of an appeal to the Ninth

Circuit. Thereafter, the plaintiffs filed a petition for writ of certiorari in the Supreme Court, which was granted. Following the Supreme Court's unanimous decision favorable to the plaintiffs in *Tibble v. Edison Int'l*, 135 S.Ct. 1823 (2015), this Court granted summary judgment on Plaintiffs' investment management fee claims related to two investment options and their claims concerning the distribution of Plan assets to Logicon, a Northrop subsidiary. Doc. 606 at 34–35, 45–48. In doing so, the Court dismissed all claims against the Investment Committees, Hamlin, and Abelson. *Id.* at 65. The Court denied Defendants' motion as to claims against the Administrative Committee, Hateley, Ziskin, and Wootan. *Id*. at 48–49, 52–61, 65. Plaintiffs' remaining claims were that Defendants breached their duties of prudence and loyalty under 29 U.S.C. §1104(a) and committed prohibited transactions under 29 U.S.C. §§1106(a) and (b) by causing the Plans to reimburse Northrop for unreasonable and unnecessary administrative services Northrop purportedly provided. Doc. 688 at 3–12.

B. Mediations

The parties attempted mediation on three separate occasions. The parties first met for an all-day mediation with mediator Ronald Dean on March 8, 2011, before Defendants moved for summary judgment, but could not reach a settlement. Doc. 402. The parties met for a second all-day mediation session on January 15, 2016 in accordance with the Court's order (Doc. 606 at 66), but likewise could not reach a settlement. Doc. 618. The parties once again attempted to mediate their claims on January 5, 2017 with mediator Margaret A. Levy, as ordered by the Court (Doc. 655), but still were unable settle the case.

C. Trial.

Plaintiffs designated 228 exhibits for potential use at trial, and eleven witnesses they intended to call, including two experts. Defendants designated an additional 603 trial exhibits and eleven witnesses, including three experts. Doc. 748. The parties also prepared and submitted a Joint Stipulation of Facts (Doc. 715-1),

1 Proposed Findings of Fact and Conclusions of Law (Doc. 721-1 (Plaintiffs'—fifty
2 pages), Doc. 722-1 (Defendants'—thirty-six pages)), and memoranda of
3 Contentions of Fact and Law (Doc. 688 (Plaintiffs'—seventeen pages), Doc. 689
4 (Defendants'—twenty-five pages)). At trial, Plaintiffs asserted three claims for
5 fiduciary breach and prohibited transactions under 29 U.S.C. §§1104(a)(1),
6 1106(a)(1)(C)–(D), and 1106(b)(1)–(2). Doc. 688 at 3 (Mem. 1). All three claims
7 were based on the same facts—Northrop executives taking Plan assets to offset
8 corporate expenses. *Id.* at 5–12 (Mem. 3–10). Plaintiffs contended that the Plans'
9 losses from the breaches were approximately $24 million. *Id.* at 7 (Mem. 5).
10 Defendants denied any liability. Doc. 689 at 12–24 (Mem. 4–16). Defendants
11 contended their maximum exposure if Plaintiffs succeeded in proving liability was
12 $10.5 million. Doc. 731 at 8–9 (Def. Tr. Br. 3:25–4:1).
13 In a brief filed a week before trial was scheduled to begin, Defendants raised for
14 the first time a challenge to SBD's adequacy to serve as class counsel. *See* Doc. 731
15 at 26–28 (Mem. 21–23). After the Court's summary judgment order, Plaintiffs
16 moved to re-open discovery to obtain information about fees Northrop charged the
17 Plans in the more than four-year period the case had been stayed pending a decision
18 in the *Tibble* case. Doc. 644. The Court denied that request (Doc. 652), and several
19 class members, represented by undersigned counsel, filed a second case, *Marshall*
20 *v. Northrop Grumman Corp.*, No. 16-6794 (C.D.Cal), covering the subsequent time
21 period. Defendants argued that SBD's representation of the class in *Marshall*
22 "created a conflict of interest that precludes this action from proceeding on a class-
23 wide basis unless [SBD] withdraw" from *Marshall*. *Id.* at 27 (Mem. 22). The Court
24 thereafter ordered Plaintiffs to brief this issue (Doc. 734), which Plaintiffs did (Doc.
25 735). The Court ultimately rejected Defendants' disqualification argument and
26 allowed the trial to go forward. Tr. 4:23–5:9 (Mar. 14, 2017 a.m., Doc. 776).
27 Trial commenced on March 14, 2017. The next day Defendants presented the
28 Court with bench briefs contending that claims related to expenses Northrop

charged for information technology and investment management expenses were barred by the Court's summary judgment order and that the Court should exclude any evidence regarding these payments. Doc. 740, Doc. 741. Because the Court found these contentions to be of prima facie merit, the Court allowed Plaintiffs to file an opposing brief, which they did on March 17. Tr. 372:25–373:9 (Mar. 16, 2017 a.m., Doc. 778); Doc. 744.

Following opening statements, the parties examined class representatives Grabek, Spicer, and Geuder, as well as Hateley. Plaintiffs' examination of Wootan was still in progress when the Court recessed for the week on Thursday, March 16.

During the course of trial, the parties continued to work with Ms. Levy on a potential pre-judgment resolution. On Sunday, March 19, the parties finally reached a settlement in principle. Doc. 746. The final amount of the settlement was $16.75 million.

D. Preliminary settlement approval and motion for fees and costs.

The Court granted preliminary approval of the settlement on June 23, 2017. Doc. 772. The Settlement Administrator mailed notices out to 215,184 class members, which were delivered on or before August 15, 2017. Ex.[1] 1 ¶6.[2] The Notice specified that Plaintiffs would seek $5,583,333 in attorneys' fees, up to $1,240,000 for reimbursement of expenses, and $25,000 incentive awards for the 4 class representatives. *Id.* at 9, 15. On August 24, 2017, Plaintiffs filed a motion for attorneys' fees, reimbursement of expenses, and incentive awards for named Plaintiffs. Doc. 783.

[1] All "Ex." references herein are to exhibits to the October 13, 2017 Declaration of Stephen M. Hoeplinger.

[2] After the parties discovered an error in the data provided by the Plans' current recordkeeper that caused some former participants to be mischaracterized as current participants, the Settlement Administrator re-mailed proper notice forms to the affected class members. Ex. 1 ¶8. The Court thereafter extended the deadline for former participants to submit claim forms from October 13, 2017 to October 20, 2017. Doc. 786.

1 **E. Class member reaction.**

2 The Court's preliminary approval order allowed class members to object to the
3 settlement or Plaintiffs' motion for attorneys' fees by September 23, 2017 (30 days
4 before the fairness hearing). Doc. 772 at 11. Only four class members objected to
5 the settlement by September 23, and no class members sent in objections after that
6 date. None of the objections have any merit. *See* Plaintiffs' response to objectors,
7 filed concurrently herewith.

8 **F. Support for the settlement and class counsel's efforts.**

9 In accordance with the settlement terms, Gallagher Fiduciary Advisors, LLC
10 was retained to serve as the Independent Fiduciary to the Plans and "determine
11 independently whether to approve and authorize the settlement of Released
12 Claims." Doc. 788-1 ¶¶2.28, 3.1. As part of its approval process, the Independent
13 Fiduciary conducted an extensive review of this case's pleadings and other
14 documents, as well as interviews with class counsel, counsel for Defendants, and
15 two of the mediators who worked with the parties. Ex. 2 at 2. The Independent
16 Fiduciary has approved the settlement, and SBD's requested attorneys' fees and
17 reimbursement of expenses, as "reasonable in light of the [Plaintiffs'] likelihood of
18 full recovery, the risks and costs of litigation, and the value of the claims foregone."
19 *Id.* at 3. The Pension Rights center also has filed a declaration resoundingly
20 supporting the settlement and SBD's efforts. Doc. 783-3.

21 **LEGAL STANDARD**

22 The Court must approve any class action settlement. Fed.R.Civ.P. 23(e). The
23 Court may approve the settlement "after a hearing and on finding that it is fair,
24 reasonable, and adequate." Fed.R.Civ.P. 23(e)(2). "[T]here is a strong judicial
25 policy that favors settlements, particularly where complex class action litigation is
26 concerned." *In re Syncor ERISA Litig.*, 516 F.3d 1095, 1101 (9th Cir. 2008)(citing
27 *Class Plaintiffs v. Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992)). This policy
28 recognizes that "[p]arties represented by competent counsel are better positioned

than courts to produce a settlement that fairly reflects each party's expected outcome in the litigation." *In re Pacific Enters. Sec. Litig.*, 47 F.3d 373, 378 (9th Cir. 1995). "[T]he court's intrusion upon what is otherwise a private consensual agreement negotiated between the parties to a lawsuit must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned." *Officers for Justice v. Civil Service Comm'n*, 688 F.2d 615, 625 (9th Cir. 1982). "The proposed settlement is not to be judged against a hypothetical or speculative measure of what *might* have been achieved by the negotiators." *Id.* (emphasis in original, citations omitted).

The Court should consider eight factors courts in evaluating the fairness of a settlement:

> (1) the strength of the plaintiff's case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the risk of maintaining class action status throughout the trial; (4) the amount offered in settlement; (5) the extent of discovery completed and the stage of the proceedings; (6) the experience and view of counsel; (7) the presence of a governmental participant; and (8) the reaction of the class members of the proposed settlement.

In re Online DVD-Rental Antitrust Litig., 779 F.3d 934, 944 (9th Cir. 2015) (quotations and citation omitted).

ARGUMENT

A. The settlement did not result from fraud or collusion.

The settlement was not the product of fraud or collusion. Rather, it resulted from lengthy, contentious, and complex arm's-length negotiations and three separate attempts at mediation. The parties aggressively litigated this case for well over a decade. *Officers for Justice*, 688 F.2d at 627 (no collusion where parties litigated for 6 years before settlement); *In re Heritage Bond Litig.*, No. 02-ML-1475-DT,

2005 U.S.Dist.LEXIS 13555, *22 (C.D.Cal. June 10, 2005)(“The length of time necessary to achieve the settlement[] and the active litigation of this case evidences that the settlements were reached in good faith.”). Settlement was reached only with the assistance of a neutral mediator, and only after trial had begun. *See Hightower v. JPMorgan Chase Bank, N.A.*, No. 11-1802-PSG-PLAx, 2015 U.S.Dist.LEXIS 174314, *26 (C.D.Cal. Aug. 4, 2015)(no evidence of collusion where settlement was reached under guidance from experienced mediator); *In re HP Laser Printer Litig.*, No. 07-667-AB-RNBx, 2011 U.S.Dist.LEXIS 98759, *12–13 (C.D.Cal. Aug. 31, 2011)(same). Thus, “[b]y the time the settlement was reached, the litigation had proceeded to a point in which both plaintiffs and defendants had a clear view of the strengths and weaknesses of their cases.” *Vasquez v. Coast Valley Roofing, Inc.*, 266 F.R.D. 482, 489 (C.D.Cal. 2010)(Wagner, J., internal quotations and alterations and citation omitted).

Moreover, the settlement has none of the signs of collusion the Ninth Circuit identified in *In re Bluetooth Headset Products Liability Litigation*, 654 F.3d 935, 947 (9th Cir. 2011). There is no “clear sailing” arrangement. *Id*. The settlement is not one where “the class receives no monetary distribution,” nor will SBD receive “a disproportionate distribution of the settlement.” *Id.* As Plaintiffs’ explained in their fee request, the 1/3 fee SBD seeks is the market rate for similar cases, and the fee SBD has been awarded for its pioneering work in all but one other settlement. Doc. 783-1 at 17–18 (Mem. 9–10). The Independent Fiduciary also has evaluated the settlement and Plaintiffs’ requested attorneys’ fees and found each to be reasonable. Ex. 2 at 3. Finally, none of the $16.75 million will revert back to Defendants under any circumstances. *In re Bluetooth*, 654 F.3d at 947; Doc. 788-1 ¶6.13.

B. The settlement is fair, reasonable, and adequate.

Each of the Ninth Circuit’s factors demonstrates that the settlement is more than “fair, reasonable, and adequate.” Fed.R.Civ.P. 23(e)(2).

1. Plaintiffs' case, while strong, faced challenges.

"[T]rials of class actions are inherently risky and unpredictable propositions." *Cervantez v. Celestica Corp.*, No. 07-729-VAP-OPx, 2010 U.S.Dist.LEXIS 78342, *10 (C.D.Cal. July 6, 2010). The trial in this case concerned events that occurred up to seventeen years earlier, and was scheduled to last for four weeks. The parties designated over 800 trial exhibits and intended to call more than a dozen witnesses, including multiple experts for each side. Plaintiffs brought prohibited transactions claims under 29 U.S.C. §1106 for which there are few reported cases at all and no reported cases directly on point. These involved detailed and complex regulations (29 CFR §§2550.408b-2, 2550.408c-2) and DOL advisory opinions on which there were no reported cases. *See*, *e.g.*, Plaintiffs' Proposed Findings Of Fact And Contentions Of Law, Doc. 721-1 at 31–39 (¶¶30–72). Beyond the difficulties inherent in litigation of this complexity, Defendants had mounted a vigorous defense at all stages of the case, and obtained summary judgment on several of Plaintiffs' claims. Doc. 606. Thus, "while Plaintiffs are confident of the strength of their case, it is imprudent to presume ultimate success at trial and thereafter." *Heritage Bond*, 2005 U.S.Dist.LEXIS 13555, *24–25 (approving settlement where case was "exceptionally complex and risky to prosecute"). These challenges weigh in favor of approving the settlement. *See Millan v. Cascade Water Servs.*, No. 12-1821, 2016 U.S.Dist.LEXIS 72198, *20–21 (E.D.Cal. June 2, 2016)(approving settlement where plaintiff's "claims would almost certainly face issues of proof" at trial); *Noll v. eBay, Inc.*, 309 F.R.D. 593, 605–06 (N.D.Cal. 2015)(approving settlement where defendant had "maintained a vigorous defense throughout the litigation" and the court had previously dismissed several claims); *Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 526 (C.D.Cal. 2004)(Baird, J., approving settlement that "compare[d] favorably to the uncertainties associated with continued litigation regarding the contested issues").

Moreover, the amount of damages recoverable was uncertain. While Plaintiffs

claimed that the Plans suffered nearly $24 million in losses, Defendants argued their exposure was "at most $10.5 million." Doc. 731 at 8–9 (Def. Tr. Br. 3:25–4:1).[3] The Court saw at least some merit in this position. Moreover, that $10.5 million was the amount Northrop took from the Plans for all administrative services Defendants contended were still at issue in the case. The Court could have found that some of those services were reasonable and necessary, and that Defendants were not liable for the full $10.5 million. It thus was quite possible that Plaintiffs would have recovered less than the $16.75 million settlement amount. This too favors approval. *See Deaver v. Compass Bank*, No. 13-222, 2015 U.S.Dist.LEXIS 166484, *20 (N.D.Cal. Dec. 11, 2015)(approving settlement where there was "significant risk that litigation might result in a smaller or non-existent recovery for the class members").

2. Even after prevailing at trial, the class likely would have waited years for any recovery.

"[I]t is the very uncertainty of outcome in litigation and avoidance of wasteful and expensive litigation that induce consensual settlements." *Officers for Justice*, 688 F.2d at 625. Even if Plaintiffs succeeded at trial, "it is likely that an appeal would have followed." *DIRECTV*, 221 F.R.D. at 527. Waiting for judgment and then an appeal likely would have delayed the class' recovery for years. For example, in *Tussey v. ABB, Inc.*, the first and only full trial of a 401(k) excessive fee case (also handled by SBD), the trial was held in 2010, but the court did not issue its decision until 2012. No. 06-4305, 2012 U.S.Dist.LEXIS 45240 (W.D.Mo. Mar. 31, 2012). Since then, the court's decision has been appealed to the Eighth Circuit twice, there has been an unsuccessful writ of certiorari filed by defendants in the Supreme Court, the case currently is back in the trial court for the third time, and class members still have not received any compensation. "By participating in

[3] Defendants argued that the $24 million Plaintiffs claimed were the Plans' losses included services that were the subject of claims the Court had previously dismissed at summary judgment (Doc. 606). *See* Docs. 740, 741.

the settlement, class members have an opportunity for an immediate, guaranteed payout now in lieu of the possibility of an uncertain recovery that will take months, if not years, to achieve." *Rodriguez v. Kraft Foods Grp.*, No. 14-1137, 2016 U.S. Dist.LEXIS 138652, *21 (E.D.Cal. Oct. 5, 2016); *see also Deaver*, 2015 U.S.Dist. LEXIS 166484, *20 ("Although [p]laintiffs might have received more if they proceeded through litigation and prevailed on the merits of their case, they might also receive less and there is a value to the class in obtaining the money now."); *Boyd v. Bank of Am. Corp.*, No. 13-561-DOC-JPRx, 2014 U.S.Dist.LEXIS 162880, *13 (C.D.Cal. Nov. 18, 2014)("This settlement appears to be an expeditious way to resolve this litigation and provide class members a disbursement in a timely matter."). This "militates in favor of settlement rather than further protracted and uncertain litigation." *DIRECTV*, 221 F.R.D. at 527.

3. Defendants challenged the adequacy of SBD's representation up to the beginning of trial.

Although the Court certified the class and appointed SBD class counsel years earlier (Doc. 421), Defendants challenged SBD's adequacy to represent the class in a Trial Brief filed a week before trial. Doc. 731 at 26–28 (Mem. 21–23). Defendants argued that SBD's representation of the class in *Marshall* "created a conflict of interest that precludes this action from proceeding on a class-wide basis unless [SBD] withdraw" from that case. Doc. 731 at 27 (Mem. 22). Though the Court rejected this argument, there was still the risk that Defendants could raise it on appeal. This factor therefore weighs in favor of approving the settlement.[4]

4. The settlement provides significant monetary relief.

The $16.75 million settlement amount is <u>160%</u> of the $10.5 million Defendants contended at trial was the <u>most</u> Plaintiffs could recover. Doc. 731 at 8–9. It is 70% of the $24 million Plaintiffs claimed were the Plans' losses. Even deducting the

[4] At worst, the factor is "neutral" and does not weigh against approving the settlement. *Vasquez*, 266 F.R.D. at 489)(factor was considered neutral for purposes of final approval because there were no facts that would defeat class treatment).

requested attorneys' fees and costs, the net payable to the class (approximately $10 million) is over 40% of what Plaintiffs claimed were the Plans' losses and just under what Defendants claimed was their maximum exposure. This is in the range of settlements courts in this Circuit have determined to be fair and reasonable. *See, e.g.*, *Aguilar v. Wawona Frozen Foods*, No. 15-93, 2017 U.S.Dist.LEXIS 76751, *7 (E.D.Cal. May 18, 2017)(settlement representing 75% of total anticipated recovery, or 47% after subtracting attorneys' fees, "support[ed] final approval"); *Millan*, 2016 U.S.Dist.LEXIS 72198, *23 (settlement that would "disburse[] to the class members … approximately one-quarter of the predicted maximum recovery amount" was "well with the acceptable range"); *Deaver*, 2015 U.S.Dist.LEXIS 166484, *22–23 (settlement representing "10.7% of the total potential liability exposure, before any deductions for fees, costs, or incentive awards" was fair and reasonable); *Noll*, 309 F.R.D. at 607 (settlement amount "represent[ing] approximately nine percent of the total … fees at issue in the case" "favor[ed] settlement"); *Boyd*, 2014 U.S.Dist.LEXIS 162880, *14–15 (settlement that "amount[ed] to 36% of full possible relief" was "more than fair"); *Heritage Bond*, 2005 U.S.Dist.LEXIS 13555, *28–30 (settlement for "approximately 36% of the class' net loss" was fair and reasonable). Moreover, the Independent Fiduciary has, after an extensive review and interviews with counsel for both sides and two mediators, deemed the settlement amount to be reasonable. Ex. 2 at 3.

5. The settlement was reached only after a decade of litigation and was negotiated at arm's-length.

"A settlement following sufficient discovery and genuine arms-length negotiation is presumed fair." *DIRECTV*, 221 F.R.D. at 28. This settlement was reached only after more than a decade of hard-fought litigation. Defendants produced, and Plaintiffs reviewed, over 2.5 million pages of documents, after which Plaintiffs filed the operative complaint. The parties took dozens of depositions of parties, non-parties, and experts. They attempted mediation three times with three

1 different mediators. They vigorously prepared for trial, including submitting and
2 responding to extensive findings of fact and conclusions of law. Docs. 722-1, 723-
3 1, 729-1, 730-1. And they only reached settlement after a week of trial. The parties
4 unquestionably "'arrived at a compromise based on a full understanding of the legal
5 and factual issues surrounding the case.'" *DIRECTV*, 221 F.R.D. at 527–28
6 (quoting 5 *Moore's Federal Practice* §28.85[2][e] (Matthew Bender 3d ed.), and
7 approving settlement that was arrived at "only after the parties had exhaustively
8 examined the factual and legal bases of the disputed claims").

9 **6. The settlement is deemed fair by experienced class counsel.**

10 "'Great weight is accorded to the recommendation of counsel, who are most
11 closely acquainted with the facts of the underlying litigation.'" *Heritage Bond*,
12 2005 U.S.Dist.LEXIS 13555, *32 (quoting *DIRECTV*, 221 F.R.D. at 528). "A
13 presumption of correctness is said to 'attach to a class settlement reached in arm's-
14 length negotiations between experienced capable counsel after meaningful
15 discovery.'" *Id.* at *32–33 (quoting *Manual for Complex Litigation* (Third) §30.42).
16 SBD is the most experienced firm in the country in the field of 401(k) excessive fee
17 litigation. *See, e.g.*, *Nolte v. Cigna Corp.*, No. 07-2046, 2013 U.S.Dist.LEXIS
18 184622, *8 (C.D.Ill Oct. 15, 2013)(recognizing SBD as the "preeminent firm in
19 401(k) fee litigation"); *Tussey v. ABB, Inc.*, No. 06-4305, 2015 U.S.Dist.LEXIS
20 164818, *7–8 (W.D.Mo. Dec. 9, 2015)(cases brought by SBD have "educated plan
21 administrators, the Department of Labor, the courts and retirement plan participants
22 about the importance of monitoring recordkeeping fees and separating a fiduciary's
23 corporate interest from its fiduciary obligations"). The firm's managing partner,
24 Jerome J. Schlichter, has been practicing law for forty years and has represented
25 plaintiffs in dozens of class actions in civil rights cases and 401(k) excessive fee
26 cases. Doc. 783-2 at 2–3, ¶¶3–4. He negotiated the settlement with the mediator,
27 Ms. Levy, while the case was in actual trial. Mr. Schlichter has described the
28 $16.75 million settlement is "a positive result for the class." *Id.* at 8, ¶18. This

1 weighs in favor of approving the settlement. *See, e.g.*, *Noll*, 309 F.R.D. at 607–08
2 (opinion of counsel who had litigated twenty class actions that settlement was "in
3 the best interests of the class" favored approval of settlement); *Barbosa v. Cargill*
4 *Meat Solutions Corp.*, 297 F.R.D. 431, 447 (E.D.Cal. 2013)(settlement approved in
5 light of "the experience and view of [c]lass [c]ounsel," who "understood the
6 complex risks and benefits of any settlement" and who was "experienced in this
7 area of law").

8 **7. The lack of objections by state attorneys general demonstrates the**
9 **settlement's fairness.**

10 The Settlement Administrator mailed all required Class Action Fairness Act
11 notices under 28 U.S.C. §1715(b). Ex. 1 ¶3. No state attorney general has objected
12 to the settlement. *Id.* "[T]his factor favors the settlement." *Noll*, 309 F.R.D. at 608
13 (noting lack of objections from state attorneys general).[5]

14 **8. The extraordinarily small number of objections indicates strong**
15 **class support for the settlement.**

16 "[T]he absence of a large number of objections to a proposed class action
17 settlement raises a strong presumption that the terms of a proposed class settlement
18 [] are favorable to the class members." *DIRECTV*, 221 F.R.D. at 529; *see also Noll*,
19 309 F.R.D. at 608 ("A low number of opt-outs and objections in comparison to
20 class size is typically a factor that supports settlement approval."). Here, less than
21 two one-thousandths of a percent of the class have submitted objections. Of the
22 more than 215 thousand class members to whom the Settlement Administrator
23 mailed notices, only four class members objected to the settlement.[6] That is just
24

25 [5] At worst, this factor is neutral and does not diminish the settlement's fairness.
See Heritage Bond, 2005 U.S.Dist.LEXIS 13555, *37 ("this factor does not apply
26 to the Court's analysis"); *DIRECTV*, 221 F.R.D. at 528 (same).

[6] Moreover, none of the objectors offer any good reason why the settlement
27 should not be approved. One, for example, takes no issue with the settlement itself,
but rather believes that too many lawsuits are filed in today's society and that this
28 one should not have been filed at all. *See* Plaintiffs' response to objectors (filed
concurrently herewith).

0.00186% of the class, and is a microscopic fraction of the percentage of objectors in other cases that have been approved.[7] This "indicate[s] a favorable reaction by class members and their overall satisfaction with the [s]ettlement." *Id.* (approving settlement with objection rate of 0.00025%); *see also Rodriguez*, 2016 U.S.Dist. LEXIS 138652, *24 (fact that only 2.74% of class requested to be excluded from settlement weighed in favor of approval).

CONCLUSION

For the foregoing reasons, Plaintiffs request that the Court grant final approval of the settlement.

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Respectfully submitted,

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[7] Of the 215,184 notices that were mailed to class members, 22,597 were returned as undeliverable. The Settlement Administrator was able to locate new addresses for 16,439 of these class members. Ex. 1 ¶9. Even if the 6,158 for whom delivery was attempted unsuccessfully is subtracted from the overall 215,184, four objectors out of 209,026 class members notified is still just a 0.001896% objection rate.