UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

MARIA KARLA TERRAZA,

Plaintiff,

v.

SAFEWAY INC., et al.,

Defendants.

Case No. 16-cv-03994-JST

ORDER DENYING MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT

Re: ECF No. 259

Before the Court is Plaintiffs' unopposed motion for preliminary approval of settlement. ECF No. 259. The Court will deny the motion.

I. BACKGROUND

A. The Parties and Claims

Defendant Safeway is a California corporation that sponsors a 401(k) retirement savings plan ("Plan") for "eligible [Safeway] employees." ECF No. 258 ¶¶ 9, 32-33. Safeway appointed Defendant Benefit Plans Committee to administer the Plan on Safeway's behalf. *Id.* ¶ 33. Both Safeway and the Benefit Plans Committee (collectively, "Safeway Defendants") are Plan Administrators, Plan fiduciaries, and Employee Retirement Income Security Act ("ERISA") fiduciaries under 29 U.S.C. §§ 1002 and 1102. *Id.* ¶¶ 9-10, 33. Defendant Aon is a Plan fiduciary and an investment advisor. *Id.* ¶ 28.

Plaintiff Maria Karla Terraza is a Plan participant. *Id.* ¶ 1. She asserts claims against Safeway Defendants and Aon (collectively, "Defendants") on behalf of the Plan and all Plan participants. ECF No. 258 ¶¶ 1, 9-28. Specifically, Terraza asserts claims under ERISA §§ 409

and 502, 29 U.S.C. §§ 1109 and 1132,[1] and seeks the following relief: (1) a "declaratory judgment holding that the acts of Defendants described herein violate ERISA and applicable law;" (2) a "permanent injunction against Defendants prohibiting the practices described herein and affirmatively requiring them to act in the best interests of the Plan and its participants;" (3) "[e]quitable, legal or remedial relief for all losses and/or compensatory damages;" (4) "[a]ttorneys' fees, costs and other recoverable expenses of litigation;" and (5) "[s]uch other and additional legal or equitable relief that the Court deems appropriate and just under all of the circumstances." *Id*. ¶ 6.

B. Procedural Background

This action began on July 14, 2016, when Terraza filed a complaint against the Safeway Defendants, ECF No. 1, alleging breach of fiduciary duty under ERISA § 404, 29 U.S.C. § 1104, which governs 401(k) retirement savings plans. *Id*. On November 14, 2016, this Court related Terraza's action to another case asserting similar claims, *Dennis M. Lorenz v. Safeway, Inc., et al.*, Case No. 16-cv-04903. ECF No. 35.[2]

Terraza filed an amended complaint on November 18, 2016. ECF No. 37. The Court denied a motion to dismiss that complaint. ECF No. 65. On March 31, 2017, Terraza filed her second amended complaint, which added Aon as a defendant. ECF No. 72. Aon then filed a motion to dismiss, which the Court granted in part and denied in part. ECF No. 109.

Lorenz filed amended complaints in September 2016, November 2016, and March 2017. *Lorenz*, ECF Nos. 1, 31, 66. The Safeway Defendants moved to dismiss Lorenz's second amended complaint. *Lorenz*, Nos. 36. The Court granted in part and denied in part Defendants' motion. *Lorenz*, ECF No. 58.

On July 6, 2018, the Safeway Defendants filed motions for summary judgement in both the *Terraza* and *Lorenz* cases. ECF No. 136; *Lorenz*, ECF No. 95. On the same day, Terraza and

[1] Section 1132 permits Plan participants to bring actions under Section 1109, which makes plan fiduciaries liable "to make good to such plan any losses to the plan" resulting from a breach of fiduciary duty.

[2] Unless otherwise specified, all docket citations refer to the electronic case filing numbers in *Terraza v. Safeway Inc.*, Case No. 16-cv-03994.

Lorenz filed motions for partial summary judgement. ECF No. 142; *Lorenz*, ECF No. 101-3. The Court denied these motions. ECF No. 208; *Lorenz*, ECF No. 143. On April 12, 2019, the Court granted in part and denied in part the Safeway Defendants' motions for summary judgment. ECF No. 224; *Lorenz*, ECF No. 139.

The parties engaged in mediation sessions on August 2, 2018 and April 18, 2019. ECF No. 259 at 12. During the April 2019 session, the parties agreed upon a resolution for both the *Terraza* and *Lorenz* cases. *Id*. Terraza filed a third amended complaint ("TAC") on September 13, 2019, for the purpose of moving for a preliminary approval of settlement and naming Lorenz as a Class Representative (Terraza and Lorenz are hereafter referred to as "Plaintiffs"). ECF No. 259 at 11; ECF No. 258 ¶ 8. On September 13, 2019 Plaintiffs filed an unopposed motion for preliminary approval of settlement and class certification. ECF No. 259.

C. Settlement Terms

The proposed settlement agreement ("Settlement") resolves claims between Defendants and the Settlement Class, defined as:

> All current and former participants and beneficiaries of the Plan at any time on or after July 14, 2010 through and including July 28, 2016, including any beneficiary of a deceased person who was a participant in the Plan at any time during the Class Period, and any alternate payees, in the case of a person subject to a [qualified domestic relations order ("QDRO")] who was a participant in the Plan at any time during the Class Period.

ECF No. 259 at 12; ECF No. 258 ¶ 102.

Under the Settlement, Safeway will contribute eight million dollars ($8,000,000) and Aon will contribute $500,000 to the Settlement Fund, for a total Settlement Amount of eight million five hundred thousand dollars ($8,500,000). ECF No. 260-1 ¶¶ 1.46, 1.47, 3.1(a). The following amounts will be deducted from the Maximum Settlement Amount, subject to Court approval: (1) up to 33.33 percent of the Settlement Amount in attorney's fees and $500,000 in expenses, *id*. ¶ 7.2; (2) up to $10,000 for Terraza and $10,000 for Lorenz in Case Contribution Awards, *id*. ¶ 7.1; (3) all Administrative Costs and contingency reserve for Administrative Expenses, *id*. ¶ 1.30, and; (4) "all Independent Fiduciary Fees and Costs approved by the Court," *id.* Plaintiffs estimate that the Settlement Amount represents 18 percent of the maximum amount of damages

Class Members could recover. ECF No. 259 at 34.

The following individuals are eligible for a payment from the Net Settlement Amount: (1) Participants, meaning "any Class Member who maintained a positive balance in the Plan at any time between July 14, 2010 and July 28, 2016, and has an Active Account,"[3] ECF No. 260-1 ¶¶ 1.3, 1.32; (2) Authorized Former Participants, meaning Former Participants who properly submitted a Former Participant Claim Form, *id*. ¶ 1.7; (3) Beneficiaries, *id*. ¶ 1.8; and (4) Alternate Payees, meaning persons entitled to Plan benefits because of a valid QDRO, *id*. ¶ 1.4.

Each individual's payment will be based upon their Settlement Allocation Score, as determined by the Settlement Administrator. *Id*. ¶ 1.5.1. Settlement Scores will be determined by calculating the Class Member's year-end account balance during the Class Period and dividing that amount by the total sum of year-end asset amounts in the Plan during the Class Period. *Id*. This method is intended to ensure that each Class Member's distribution is proportional to the size of his or her account. ECF No. 259 at 30. If an Authorized Former Participant, Beneficiary, or Alternate Payee receives a Settlement Allocation Score of $10 or less, that individual will receive $10. ECF No. 260-1 ¶ 1.5.2.

In exchange, Class Members will release the following claims:

> [A]ny and all actual or potential claims (including any Unknown Claims), actions, causes of action, demands, obligations, or liabilities (including claims for attorney's fees, expenses, or costs), for monetary, injunctive, and any other relief against the Defendant Released Parties through the date the Court enters the Final Approval Order and Judgment arising out of or in any way related to: (a) the conduct alleged in the Actions, including conduct that was alleged in, or could have been alleged in, the Actions' operative Complaints by any Class Member, whether or not the conduct was actually included as counts in those Complaints; (b) the selection, retention, and monitoring of the Plan's actual or potential investment options and service providers; (c) the performance, fees, and other characteristics of the Plan's investment options; (d) the Plan's fees and expenses, including without limitation, its recordkeeping and other service provider fees; (e) the nomination, appointment, retention, monitoring, and removal of the Plan's fiduciaries; and (f) the approval by the Independent Fiduciary of the Settlement.

[3] Active Accounts are Plan accounts with a positive balance. ECF No. 260-1 ¶ 1.2.

Id. ¶ 1.41.[4] The released claims do not include claims to enforce the covenants or obligations in the agreement. *Id*.

To inform Class Members of the Settlement, the Settlement Administrator will send a Notice, *id*. at 45-52, to Class Members by email or first-class mail within 45 calendar days of the entry of a preliminary approval order. *Id*. ¶ 2.6(a). The Settlement Administrator will use the Class Member's last known email or mailing address. *Id*. If necessary, the Settlement Administrator will update the Class Member's mailing addresses before mailing the Notice. *Id*. If a Notice is returned as un-deliverable, the Settlement Administrator will use "commercially reasonable efforts to locate" the Class Member and re-mail the Notice one time if the Settlement Administrator identifies an updated location. *Id*. Additionally, the Settlement Administrator will issue the Summary Notice, *id*. at 53-56, as a national press release via PRNewswire within 45 days of entry of a preliminary approval order. *Id*. ¶ 2.6(a). Before sending the Notice, the Settlement Administrator will create a website containing documents relevant to the Settlement and establish a toll-free phone number that Class Members can call with questions. *Id*. ¶¶ 2.6 (c), (d).

Class Members will not be able to exclude themselves from the Class. *Id*. ¶ 2.4, 50, 56. Class Members may object to the Settlement by sending to the Court their objection, along with their name, address, phone number, their counsel's name and contact information, if represented by counsel, and a list of any other objections to any class action settlements made in the past five years. *Id*. at 51.

To receive a payment, only Authorized Former Participants, Beneficiaries, and Alternate Payees without Active Accounts must submit a claim form ("Former Participant Claim Form"). *Id*. at 61. Former Participant Claim Forms must be returned to the Settlement Administrator within 90 days of the entry of the preliminary approval order. *Id*. ¶ 2.6(b). The Settlement Administrator will send Class Members a reminder postcard if they have not returned their form within 50 days, unless the Settlement Administrator is unable to identify an email or mailing address for the Class Member. *Id*. Class Members who receive a check must cash the check

[4] The Agreement provides that California Civil Code Section 1542 does not apply because the release is not a general release. ECF No. 260-1 ¶ 1.41.

within 180 calendar days of issuance. *Id*. ¶ 3.2(c).

The parties will retain an Independent Fiduciary to approve the Settlement. *Id*. ¶ 2.7.

II. JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1332.

III. CLASS CERTIFICATION

A. Legal Standard

Class certification under Federal Rule of Civil Procedure 23 is a two-step process. First, a plaintiff must demonstrate that the four requirements of Rule 23(a) are met: numerosity, commonality, typicality, and adequacy. "Class certification is proper only if the trial court has concluded, after a 'rigorous analysis,' that Rule 23(a) has been satisfied." *Wang v. Chinese Daily News, Inc.*, 737 F.3d 538, 542-43 (9th Cir. 2013) (quoting *Wal–Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 351 (2011)).

Second, a plaintiff must establish that the action meets one of the bases for certification in Rule 23(b). Plaintiffs rely on Rule 23(b)(1), under which "[m]ost ERISA class action cases are certified." ECF No. 259 at 17, 21-22; *Reyes v. Bakery & Confectionery Union & Indus. Int'l Pension Fund*, No. 14-CV-05596-JST, 2015 WL 5569462, at *4 (N.D. Cal. Sept. 22, 2015) (citation omitted). Rule 23(b)(1) permits certification if:

> [P]rosecuting separate actions by or against individual class members would create a risk of: (A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or (B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests.

Id.

When determining whether to certify a class for settlement purposes, a court must pay "heightened" attention to the requirements of Rule 23. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997). "Such attention is of vital importance, for a court asked to certify a settlement class will lack the opportunity, present when a case is litigated, to adjust the class, informed by the proceedings as they unfold." *Id.* at 620.

B. Analysis

1. Rule 23(a)(1): Numerosity

Rule 23(a)(1) requires that the class be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). "Plaintiffs need not state an exact number to meet the threshold requirements of Rule 23. Rather, the rule 'requires examination of the specific facts of each case and imposes no absolute limitations.'" *West v. Cal. Servs. Bureau, Inc.*, 323 F.R.D. 295, 303 (N.D. Cal. 2017) (quoting *Gen. Tel. Co. of the Nw. Inc. v. Equal Employment Opportunity Comm'n*, 446 U.S. 318, 330 (1980)). A class or subclass with more than 40 members "raises a presumption of impracticability based on numbers alone." *Hernandez v. Cty. of Monterey*, 305 F.R.D. 132, 153 (N.D. Cal. 2015) (citation omitted).

Here, the Settlement Class includes more than 35,000 current and former Plan participants. ECF No. 259-1 ¶ 6. The Court concludes that Plaintiffs have satisfied their burden to show that the number of putative class members is sufficiently numerous that their joinder would be impracticable. *See Hernandez*, 305 F.R.D. at 153.

2. Rule 23(a)(2): Commonality

Rule 23(a)(2) requires that there be "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). A common question is one "capable of classwide resolution – which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores, Inc.*, 564 U.S. at 350. For the purposes of Rule 23(a)(2), "even a single common question" is sufficient. *Id.* at 359 (quotation marks and internal alterations omitted).

Here, all proposed Class Members suffered from the same alleged ERISA violations as a result of Defendants' common practice. *See* ECF No. 259 at 19-20. Proving these violations would involve common questions of law and fact, such as: (1) whether Defendants breached their fiduciary duties by failing to monitor the Plan's investments, (2) whether Defendants breached their fiduciary duties by failing to defray reasonable Plan administration expenses, and (3) whether relief should be afforded to Plaintiffs and the Class. ECF No. 259 at 20. Accordingly, the proposed class satisfies the commonality requirement.

3. Rule 23(a)(3): Typicality

In certifying a class, courts must find that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed R. Civ. P. 23(a)(3). "The purpose of the typicality requirement is to assure that the interest of the named representative aligns with the interests of the class." *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992). "The test of typicality 'is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct.'" *Id.* (quoting *Schwartz v. Harp*, 108 F.R.D. 279, 282 (C.D. Cal. 1985)).

Plaintiffs' claims arise from their participation in the same Plan as the other Class Members. ECF No. 259 at 20. Like other Class Members, Terraza and Lorenz allege that they sustained damages as a result of Defendants' insufficient Plan oversight. *Id*. at 20. These allegations involve the "same course of conduct," which is "not unique to the named plaintiffs." *See Hanon*, 976 F.2d at 508. Therefore, the typicality requirement is satisfied. *See In re Northrop Grumman Corp. ERISA Litig.*, No. CV 06-06213 MMM (JCx), 2011 WL 3505264, at *10 (C.D. Cal. March 29, 2011) ("Courts within the Ninth Circuit have repeatedly concluded that the typicality requirement is satisfied in defined contribution cases.").

4. Rule 23(a)(4): Adequacy

"[T]he adequacy of representation requirement . . . requires that two questions be addressed: (a) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (b) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 462 (9th Cir. 2000).

No party has suggested, and the Court has not found, any evidence in the record suggesting that Terraza and Lorenz have any conflicts of interest with the other Class Members. They share common claims and seek the same relief as the other Class Members. *See* ECF No. 259 at 20-21. Moreover, Class Counsel are experienced in class action litigation and have vigorously prosecuted this action on behalf of the Class Members. ECF No. 259 at 21; ECF No. 259-1 ¶¶ 10-11. Counsel have "investigated the action, reviewed significant discovery," "conducted many

depositions, worked with multiple experts," and "engaged in extensive motion practice including responding to Defendants' motions to dismiss and motion for summary judgment." *Id.* ¶ 11. The Court concludes that Terraza, Lorenz, and Class Counsel provide adequate representation for the proposed class.

5. Rule 23(b)(1)

Rule 23(b)(1) permits certification if prosecuting separate actions would create a risk of: "(A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class" or "(B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests." Fed. R. Civ. P. 23(b)(1).

The Court concludes that Plaintiffs satisfy Rule 23(b)(1)(A). "Certification under Rule 23(b)(1) is particularly appropriate in cases," such as this, which involve "ERISA fiduciaries who must apply uniform standards to a large number of beneficiaries." *Foster v. Adams & Assocs., Inc.*, No. 18-CV-02723-JSC, 2019 WL 4305538, at *7 (N.D. Cal. Sept. 11, 2019) (citation omitted); *Reyes*, 2015 WL 5569462, at *4 ("Most ERISA class action cases are certified under Rule 23(b)(1)." (citation omitted)). Moreover, the proposed class includes more than 35,000 Class Members, each of whom could individually file suit for damages arising from the same conduct. "This would create a risk of 'inconsistent and varying adjudications,' resulting in 'incompatible standards of conduct' for Defendants." *Kanawi v. Bechtel Corp.*, 254 F.R.D. 102, 111 (N.D. Cal. 2008). In light of this risk, the Court finds that Plaintiffs satisfy Rule 23(b)(1)(A). *Id.* Because certification is appropriate on this basis, the Court does not address whether Plaintiffs satisfy Rule 23(b)(1)(B). *See Reyes*, 2015 WL 5569462, at *4.

For the foregoing reasons, the Court concludes that provisional certification of the proposed class is appropriate for the purposes of settlement.

IV. APPOINTMENT OF CLASS COUNSEL

When a court certifies a class, it must consider the following when appointing class counsel: (1) "the work counsel has done in identifying or investigating potential claims in the

action;" (2) "counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;" (3) "counsel's knowledge of the applicable law;" and (4) "the resources that counsel will commit to representing the class." Fed. R. Civ. P. 23(g)(1)(A). The court may also "consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class." Fed. R. Civ. P. 23(g)(1)(B).

Shepherd, Finkelman, Miller & Shah, LLP ("Shepherd") "obtained a good understanding of the issues and vigorously prosecuted this action" by engaging in extensive motion practice, conducting many depositions, working with experts, and negotiating the Settlement with both Aon and the Safeway Defendants. *See* ECF No. 259-1 ¶ 11; *see Cabiness v. Educ. Fin. Solutions, LLC*, No. 16-cv-01109, 2018 WL 3108991, at *4 (N.D. Cal. June 25, 2018). Additionally, Shepherd has "significant prior experience in litigating" ERISA class actions. ECF No. 259-1 ¶ 10; *Cabiness*, 2018 WL 3108991, at *4. The Court will appoint Shepherd as class counsel pursuant to Federal Rule of Civil Procedure 23(g).

V. MOTION FOR PRELIMINARY APPROVAL

A. Legal Standard

The Ninth Circuit maintains a "strong judicial policy" that favors the settlement of class actions. *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992). Rule 23 requires courts to employ a two-step process in evaluating a class action settlement. First, the parties must show "that the court will likely be able to . . . approve the proposal under Rule 23(e)(2)." Fed. R. Civ. P. 23(e)(1)(B). Second, courts must hold a hearing pursuant to Rule 23(e)(2) to make a final determination of whether the settlement is "fair, reasonable, and adequate."

The court's task at the preliminary approval stage is to determine whether the settlement falls "within the range of possible approval." *In re Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078, 1080 (N.D. Cal. 2007) (citation omitted); *see also* Manual for Complex Litigation, Fourth ("MCL, 4th") § 21.632 (FJC 2004) (explaining that courts "must make a preliminary determination on the fairness, reasonableness, and adequacy of the settlement terms and must direct the preparation of notice of the certification, proposed settlement, and date of the final fairness hearing"). "The initial decision to approve or reject a settlement proposal is committed to

the sound discretion of the trial judge." *City of Seattle*, 955 F.2d at 1276 (citation omitted). Courts "must be particularly vigilant not only for explicit collusion, but also for more subtle signs that class counsel have allowed pursuit of their own self-interests and that of certain class members to infect the negotiations." *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 947 (9th Cir. 2011).

Within this framework, preliminary approval of a settlement is appropriate if "the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class, and falls within the range of possible approval." *In re Tableware*, 484 F. Supp. 2d at 1079 (citation omitted). The proposed settlement need not be ideal, but it must be fair and free of collusion, consistent with counsel's fiduciary obligations to the class. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1027 (9th Cir. 1998) ("Settlement is the offspring of compromise; the question we address is not whether the final product could be prettier, smarter or snazzier, but whether it is fair, adequate and free from collusion."). To assess a settlement proposal, courts must balance a number of factors:

> [T]he strength of the 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. at 1026 (citations omitted).[5] The proposed settlement must be "taken as a whole, rather than the individual component parts," in the examination for overall fairness. *Id.* Courts do not have the ability to "delete, modify, or substitute certain provisions"; the settlement "must stand or fall in its entirety." *Id.* (citation omitted).

[5] These factors are substantially similar to those articulated in the 2018 amendments to Rule 23(e), which were not intended "to displace any factor [developed under existing Circuit precedent], but rather to focus the court and the lawyers on the core concerns of procedure and substance that should guide the decision whether to approve the proposal." *See Hefler v. Wells Fargo & Co.*, No. 16-CV-05479-JST, 2018 WL 6619983, at *4 (N.D. Cal. Dec. 18, 2018) (quoting Fed. R. Civ. P. 23(e)(2) advisory committee's note to 2018 amendment).

B. Discussion

As set forth below, the Court finds that the Settlement falls within the range of possible approval but that minor deficiencies in the proposed notice plan prevent preliminary approval.

1. Strength of Plaintiffs' Case; Risk, Expense, Complexity, and Likely Duration of Further Litigation

The risk, expense, complexity, and likely duration of further litigation weigh in favor of preliminary approval. Although Plaintiffs belief their claims are meritorious, they also "recognize the uncertainty that comes with going to trial," especially in light of the Court's unfavorable summary judgment rulings which removed some of Plaintiffs' claims from the case. ECF No. 259 at 33. Plaintiffs settled on the eve of trial, aiming to avoid "lengthy and expensive litigation with uncertain results." ECF No. 259 at 33; *Nat'l Rural Telecomm. Corp. v. Directv, Inc.*, 221 F.R.D. 523, 527 (C.D. Cal. 2004); *see Officers for Justice v. Civ. Serv. Comm'n of City and Cnty. of San Francisco*, 688 F.2d 615, 625 (9th Cir. 1982) ("[I]t is the very uncertainty of outcome in litigation and avoidance of wastefulness and expense of litigation that induce consensual settlements."). Considering the likelihood of appeal, moreover, Plaintiffs acknowledge that "it could be years before [they] see a dollar." ECF No. 259 at 33 (citing *In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1042 (N.D. Cal. 2008)).

2. Extent of Discovery Completed and the State of the Proceedings

The Settlement is a product of over three years of litigation, extensive motion practice, and thorough discovery including over 20 depositions. ECF No. 259 at 29, 35-36; ECF No. 259-1 ¶ 11. The discovery process has permitted the parties to collect "sufficient information to make an informed decision about the Settlement." *In re Mego*, 213 F.3d at 459.

3. Non-Collusive Negotiations

When the parties present a proposed settlement before a class has been certified, courts "must be particularly vigilant not only for explicit collusion, but also for more subtle signs that class counsel have allowed pursuit of their own self-interests and that of certain class members to infect the negotiations." *In re Bluetooth*, 654 F.3d at 947. Signs of collusion include: (1) a disproportionate distribution of the settlement fund to counsel; (2) negotiation of a "clear sailing

provision"; and (3) a reversionary clause, i.e., an arrangement for funds not awarded to revert to defendant. *Id.* at 947. If "multiple indicia of possible implicit collusion" are present, a district court has a "special 'obligat[ion] to assure itself that the fees awarded in the agreement were not unreasonably high.'" *Id.* (quoting *Staton v. Boeing Co.*, 327 F.3d 938, 965 (9th Cir. 2003)).

In examining both the terms and means by which the parties arrived at settlement, the Court concludes that the negotiations and agreement were non-collusive. The settlement was reached after the parties engaged in motion practice and participated in multiple arms-length settlement negotiations overseen by a neutral third party. *See* ECF No. 259 at 27; ECF No. 259-1 ¶ 5. This process supports the conclusion that the settlement is non-collusive and likely to benefit the class members. *See* Advisory Committee Notes, Fed. R. Civ. P. 23, subdiv. (e)(2) (2018) ("[T]he involvement of a neutral or court-affiliated mediator or facilitator in [] negotiations may bear on whether they were conducted in a manner that would protect and further the class interests."); *Satchell v. Fed. Exp. Corp.*, No. C 03-2659 SI, 2007 WL 1114010, at *4 (N.D. Cal. Apr. 13, 2007) ("The assistance of an experienced mediator in the settlement confirms that the settlement is non-collusive.").

Additionally, the Settlement does not contain multiple indicia of possible implicit collusion. *See In re Bluetooth*, 654 F.3d at 946 (finding that, if "multiple indicia of possible implicit collusion" are present, the court has "a special 'obligat[ion] to assure itself that the fees awarded in the agreement were not unreasonably high'" (quoting *Staton*, 327 F.3d at 965). The Settlement contains neither a "clear sailing provision" nor a reversionary arrangement. Class Counsel do request up to 33.33 percent in attorney's fees, which departs from the Ninth Circuit's 25-percent benchmark. ECF No. 260-1 ¶ 7.2; *Williams v. MGM-Pathe Commc'ns Co.*, 129 F.3d 1026, 1027 (9th Cir. 1997) (The "benchmark for an attorneys' fee award in a successful class action is twenty-five percent of the entire common fund."). However, as discussed below, this fee falls within the range of possible approval.

4. Attorney's Fees and Expenses

Even if parties have independently agreed to an amount, courts have an independent obligation to ensure that an award of attorney's fees is reasonable. *In re Bluetooth*, 654 F.3d at

941. In the Ninth Circuit, the "benchmark for an attorneys' fee award in a successful class action is twenty-five percent of the entire common fund." *Williams*, 129 F.3d at 1027. Although the benchmark is 25 percent, courts may adjust this amount depending on:

> the extent to which class counsel achieved exceptional results for the class, whether the case was risky for class counsel, whether counsel's performance generated benefits beyond the cash . . . fund, the market rate for the particular field of law (in some circumstances), the burdens class counsel experienced while litigating the case (e.g., cost, duration, foregoing other work), and whether the case was handled on a contingency basis.

Rodman v. Safeway Inc., No. 11-cv-03003-JST, 2018 WL 4030558, at *3 (N.D. Cal. Aug. 23, 2018) (citations and quotation marks omitted). Courts use Class Counsel's lodestar to cross-check the amount of fees requested. *Id.*

Here, Class Counsel request up to 33.33 percent in attorney's fees. ECF No. 260-1 ¶ 7.2. In requesting this amount, Counsel provide a lodestar of $3.1 million and report over 4,300 hours worked on the case. ECF No. 259-1 ¶ 12. Plaintiffs also note that, after removing attorney's fees and costs, the Settlement amounts to more than 18 percent of the maximum possible recovery. ECF No. 259 at 34. Plaintiffs assert that an award above the 25 percent benchmark is appropriate "in light of the facts and circumstances of the case, including, among other things, the results achieved, the skill and quality of work, the contingent nature of the fee," and "the time and expenses devoted to this engagement to achieve the result obtained and awards made in similar cases." ECF No. 259 at 31.

The Court need not determine an appropriate attorney's fee now. At the preliminary approval stage, however, the Court finds that Class Counsel's request falls "within the range of possible approval." *See Smith v. Am. Greetings Corp.*, No. 14-CV-02577-JST, 2016 WL 2909429, at *8-9 (N.D. Cal. May 19, 2016) (finding a 28 percent attorney's fee award reasonable because counsel's efforts compensated Class Members and remedied many of the policies giving rise to the lawsuit); *Cordy v. USS-POSCO Indus.*, No. 12-CV-00553-JST, 2014 WL 1724311, at *2 (N.D. Cal. Apr. 28, 2014) (finding a 30 percent attorney's fee award appropriate due to the "vigorousness of the litigation, the result achieved, the risk of non-recovery, the injunctive relief achieved, the special burdens borne by Class Counsel, and the fact that no member of the Class

has objected to the requested award."); *In re Omnivision*, 559 F. Supp. 2d at 1046 (finding that a settlement amount "more than triple the average recovery in securities class action settlements" weighed in favor of granting 28 percent in attorney's fees).

While this fee is within the range of possible approval, Ninth Circuit precedent dictates "that only special circumstances justify departure" from the 25 percent benchmark. *Reyes v. Bakery & Confectionery Union & Indus. Int'l Pension Fund*, No. 14-CV-05596-JST, 2017 WL 7243239, at *8 (N.D. Cal. Jan. 23, 2017) (internal quotation marks omitted). As such, Class Counsel should be prepared in future briefing to justify any departure from this benchmark. *See Hawthorne v. Umpqua Bank*, No. 11-CV-06700-JST, 2015 WL 1927342, at *5 (N.D. Cal. Apr. 28, 2015) (adjusting class counsel's 33 percent attorney's fee request downward to 25 percent because class counsel did not "cite any cases or proffer evidence to suggest this settlement represents such a significant degree of success as to justify adjustment.").

5. Incentive Awards

"[N]amed plaintiffs, as opposed to designated class members who are not named plaintiffs, are eligible for reasonable incentive payments." *Staton*, 327 F.3d at 977. Incentive awards are "discretionary . . . and are intended to compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, and, sometimes, to recognize their willingness to act as a private attorney general." *Rodriguez*, 563 F.3d 948, 958-59 (9th Cir. 2009) (internal citation omitted). Courts evaluate incentive awards individually, "using relevant factors including the actions the plaintiff has taken to protect the interests of the class, the degree to which the class has benefitted from those actions, the amount of time and effort the plaintiff expended in pursuing the litigation and reasonable fears of workplace retaliation." *Staton*, 327 F.3d at 977 (citation, internal quotations, and alterations omitted). Indeed, "courts must be vigilant in scrutinizing all incentive awards to determine whether they destroy the adequacy of the class representatives." *Radcliffe v. Experian Info. Sols., Inc.*, 715 F.3d 1157, 1164 (9th Cir. 2013).

"In this district, $5,000 for each class representative is presumptively reasonable." *Noll v. eBay, Inc.*, 309 F.R.D. 593, 611 (N.D. Cal. 2015); *see, e.g.*, *Smith*, 2016 WL 362395, at *11

(awarding $5,000 each to named plaintiffs who spent 20-25 hours on the case); *Fleury v. Richemont N. Am., Inc.*, No. C-05-4525 EMC, 2008 WL 3287154, at *6 (N.D. Cal. Aug 6, 2008) (awarding $5,000 where class representative was involved in litigation for three years, sat for a deposition, responded to written discovery, and attended a mediation session). This court has awarded more than $5,000 to compensate representatives for investing significant time and energy into litigation, as well as taking risks on behalf of other class members. *See, e.g.*, *Willner v. Manpower, Inc.*, No. 11-cv-02846-JST, 2015 WL 3863625, at *9 (N.D. Cal. June 22, 2015) (granting $7,500 incentive award to compensate the representative for "the risks she took on behalf of her fellow class members" and "the significant time and energy [she] has invested in this litigation over a period of four years, including sitting for a deposition"); *Boring v. Bed Bath & Beyond of California Ltd. Liab. Co.*, No. 12-CV-05259-JST, 2014 WL 2967474, at *3 (N.D. Cal. June 30, 2014) (granting $7,500 "to reflect the time and energy [plaintiff] expended in bringing this action and the risks taken on behalf of his fellow employees and class members"); *Dyer v. Wells Fargo Bank, N.A.*, 303 F.R.D. 326, 335-36 (N.D. Cal. 2014) (granting $10,000 incentive awards from a $14.7 million settlement fund, rather than the requested $15,000, where class representatives "invested significant time and energy and suffered some risk to their professional reputations by participating in this action as class representatives").

When evaluating incentive awards, courts also "consider the proportionality between the payment and the range of class members' settlement awards." *Willner*, 2015 WL 3863625, at *9 (rejecting requested $11,000 award where the average payment to class members was $605.02 and the maximum payment was $4,105.33); *Burden v. SelectQuote Ins. Servs.*, No. C 10-5966 LB, 2013 WL 3988771, at *6 (N.D. Cal. Aug. 2, 2013) (rejecting requested $10,000 award where it was "nearly three times the largest amount paid to any class member").

Here, Plaintiffs request $10,000 each for Terraza and Lorenz as Case Contribution Awards. ECF No. 260-1 ¶ 7.1. In doing so, Plaintiffs provide no individualized estimates of recovery. Plaintiffs argue, nevertheless, that $10,000 is an appropriate award because the parties reached Settlement "on the eve of trial," when Terraza and Lorenz were preparing to testify. ECF No. 259 at 31 n.6. Additionally, Class Counsel claim that "Terraza and Lorenz have actively participated

in the litigation," by assisting Class Counsel in drafting complaints and other documents, consulting with Class Counsel as needed, answering discovery requests for information, participating in settlement discussions, and being deposed by Defendants. ECF No. 259-1 ¶ 9. "The Court need not resolve the specific amount of the incentive award at this time as the matter will be conclusively determined at the Final Fairness and Approval Hearing." *Edenborough v. ADT, LLC*, No. 16-CV-02233-JST, 2017 WL 4641988, at *8 (N.D. Cal. Oct. 16, 2017). "However, Plaintiffs should be mindful of addressing these issues and providing appropriate detail and documentation in connection with their motion for final approval and motion for a service enhancement award."[6] *Id.* At this stage, the Court finds the Case Contribution Award falls within the range of possible approval.

6. Obvious Deficiencies

The Settlement contains no obvious deficiencies. It addresses Plaintiffs' central claims by providing Class Members with individualized payments proportional to the size of Class Members' retirement savings accounts. ECF No. 260-1 ¶ 1.5. Such relief falls within the range of possible approval. The Court therefore preliminarily approves the Settlement. Nonetheless, issues with the notice plan, as set forth below, preclude the Court from giving notice of the settlement to the proposed class. *See* Fed. R. Civ. Proc. 23(e)(1).

7. Notice Plan

For non-opt out cases, such as ERISA actions, "all that is required is such unspecified appropriate notice as the court may direct." *Reyes*, 2017 WL 7243239, at *7 (citations, quotation marks, and alterations omitted). Courts typically require less notice in Rule 23(b)(1) actions, as their outcomes do not truly bind class members. "For any class certified under Rule 23(b)(1) . . ., the court *may* direct appropriate notice to the class." Fed. R. Civ. P. 23(c)(2) (emphasis added). *See Wal–Mart Stores, Inc.*, 564 U.S. at 362 ("The Rule provides no opportunity for (b)(1) . . . class members to opt out, and does not even oblige the District Court to afford them notice of the

[6] Plaintiffs note that they are cognizant of the "need to fully support requests for service awards to Plaintiffs." ECF No. 259 at 14 n.4.

action.").

Here, Plaintiffs provide a class notice plan. ECF No. 260-1 ¶ 2.6. However, the Notice contains several minor deficiencies. The Court directs Plaintiffs to file an amended Notice which makes the following corrections.

First, the Notice does not provide a timeline for Class Members to object to the Settlement. *Id.* ¶ 2.5. Plaintiffs suggest that the preliminary approval order will set forth requirements for filing objections, *id*, but the parties must provide a deadline. Northern District Guidance § 9. The Court notes that courts in this district often recommend providing at least 60 days to object after the notice is mailed. *See Tijero v. Aaron Brothers, Inc.*, No. C-10-01089 SBA, 2013 WL 60464, at *10 ("[S]hould Plaintiffs attempt to renew their motion for preliminary approval, they should ensure that class members are afforded at least sixty (60) days to opt-out or object to the settlement."); *Myles v. AlliedBarton Security Services, LLC*, No. 12-cv-05761-JD, 2014 WL 6065602, at *5 (N.D. Cal. Nov. 12, 2014) ("If the parties seek preliminary approval of a new settlement, they should allocate a minimum of seventy-five days to opt out or object.").

Second, Plaintiffs do not specify by how many days the objection period will be extended for Class Members who receive their Notice late because the Settlement Administrator has to re-send it. *See Myles*, WL 6065602, at *5 (stating that the objection window "should be increased if a notice has to be re-sent.").

Third, Plaintiffs do not specify whether Class Members will have the opportunity to object to attorney's fees. Plaintiffs provide that the motion for attorney's fees and expenses will be posted on the Settlement website, but it is not clear whether the motion will be posted before or after the Court considers objections. *See* ECF No. 260-1 ¶ 2.6(c). Rule 23(h) and Ninth Circuit precedent require that class members have adequate "opportunity to object to the fee 'motion' itself, not merely to the preliminary notice that such a motion will be filed." *In re Mercury Interactive Corp. Sec. Litig.*, 618 F.3d 988, 993-94 (9th Cir. 2010) (quoting Fed. R. Civ. P. 23(h)(2)). Although "Rule 23(h) does not require that Class Counsel's fee motion be filed before the deadline for class members to object to . . . the substantive *settlement*," there must be a separate opportunity for class members to object to the fee motion after it is filed. *In re*

Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prod. Liab. Litig., 895 F.3d 597, 615 (9th Cir. 2018) (emphasis in original). The parties should propose either (1) a single objection/ exclusion deadline for both the substantive settlement and the fee motion, after the fee motion has been filed or (2) a second objection deadline for the fee motion.

Fourth, Plaintiffs provide the wrong address for the Court. ECF No. 260-1 at 50-51, 56. The correct address is Ronald V. Dellums Federal Building and United States Courthouse, Courtroom 6, 2nd Floor, 1301 Clay Street, Oakland, California 94612.

Fifth, Plaintiffs do not provide the website or toll-free phone number to be included in the Notice. Although Plaintiffs confirm that the website will be included in the Notice, they do not do the same for the phone number. ECF No. 260-1 ¶ 2.6(c). This Court has required Settlement Administrators to establish toll-free phone numbers. *See Reyes*, 2017 WL 7243239, at *7 (finding that the Settlement Administrator must create a toll-free number for class members to call with questions about the Settlement). Plaintiffs should therefore confirm that the phone number will be included in the Notice.

CONCLUSION

For the foregoing reasons, the Court preliminarily denies Plaintiffs' motion for preliminary approval. Plaintiffs may submit a revised motion for preliminary approval within 30 days.

IT IS SO ORDERED.

Dated: March 30, 2020

JON S. TIGAR
United States District Judge