UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

**CIVIL MINUTES – GENERAL**

Case No. 8:23-cv-00854-FWS-ADS Date: September 6, 2024
Title: Mary Nguyen v. Westlake Services Holding Company, *et al.*

Present: **HONORABLE FRED W. SLAUGHTER, UNITED STATES DISTRICT JUDGE**

| Melissa H. Kunig | N/A |
|---|---|
| Deputy Clerk | Court Reporter |
| Attorneys Present for Plaintiff: | Attorneys Present for Defendant: |
| Not Present | Not Present |

**PROCEEDINGS: (IN CHAMBERS) ORDER GRANTING UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT AND APPROVAL OF CLASS NOTICE [45]**

In this putative class action, Plaintiff Mary Nguyen ("Plaintiff") brings claims against Defendant Westlake Services Holding Company ("Westlake"), Defendant Westlake Services Holding Company Employee Stock Ownership Plan (the "Plan"), Defendant Westlake Services Holding Company Employee Stock Ownership Plan Committee, Defendant Don Hankey, Defendant Bret Hankey, Defendant Ian Anderson, Defendant Paul Kerwin, Defendant Eugene Leydiker, and Defendant Gracia Ang (collectively, "Defendants") under the Employee Retirement Income Security Act ("ERISA") relating to Defendants' alleged "failure to pay benefits under the terms of the Plan, failure to follow the terms of the Plan, and/or abuse of their discretion in the management of the Plan and the interpretation of the Plan." (Dkt. 38 (First Amended Complaint, "FAC") ¶ 3.) The parties have reached a proposed settlement agreement (the "Settlement"). (Dkt. 45-1, Ex. A ["SA"].) Before the court is Plaintiff's Unopposed Motion for Preliminary Approval of Settlement and Approval of Class Notice ("Motion" or "Mot."). (Dkt. 45.) The Motion is supported by the Declaration of Ronald S. Kravitz ("Kravitz Declaration" or "Kravitz Decl."). (Dkt. 45-1.) No opposition to the Motion has been filed. (*See generally* Dkt.) The court held a hearing on the Motion on August 22, 2024. (Dkt. 50.) Based on the state of the record, as applied to the applicable law, the Motion is **GRANTED**.

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## I. Background

### A. Factual and Procedural Background

Plaintiff filed this case on May 15, 2023. (Dkt. 1 ("Complaint").) The court detailed the facts alleged in the Complaint in its Order Granting in Part and Denying in Part Defendants' Motion to Dismiss. (Dkt. 37 ("MTD Order").) In summary, Plaintiff alleged in the Complaint that Defendants failed to follow and pay benefits according to the Plan's terms, breached their fiduciary duties, and abused their discretion in Plan management and Plan interpretation. (*See generally* Compl.) In the MTD order, the court denied Defendants' motion to dismiss as to Plaintiff's second breach of fiduciary duty claim and prohibited transaction claim (Counts IV, V), and granted Defendants' motion to dismiss as to Plaintiff's other claims for unlawful denial of benefits, violation of ERISA's anti-cutback provision, equitable relief under Section 502(a)(3), improper indemnification, and failure to monitor (Counts I, II, VI, VII, and VIII), as well as Plaintiff's first breach of fiduciary duty claim (Count III), dismissing these claims with leave to amend. (MTD Order at 21; *see* SA ¶ 1.3.)

On March 4, 2024, Plaintiff filed the FAC. (Dkt. 38; *see* SA ¶ 1.4.) In the FAC, Plaintiff again alleges that Defendants failed to follow and pay benefits according to the Plan's terms, breached their fiduciary duties, and abused their discretion. (*See generally* FAC.) Plaintiff seeks to recover benefits owed, losses the Plan sustained due to Defendants' breaches of fiduciary duty, and restoration to the Plan of any profits that may have been made by the breaching fiduciaries and parties in interest through the use of Plan assets. (*Id.* at 35-37.)

"Following initial discovery, which included the production of essential documents and participant data related to the Plan, the Parties requested a stay of certain deadlines in the Action pending a mediation." (Mot. at 11 (citing Dkt. 41); SA ¶ 1.5.) "The Court granted in part and denied in part the requested stay and allowed Plaintiff and Defendants to engage in mediation." (Mot. at 11 (citing Dkt. 42); SA ¶ 1.5.) "The Parties mediated the case with a well-respected neutral mediator, Robert A. Meyer (JAMS), on March 5, 2024, and April 29, 2024." (Mot. at

11; *see id.* at 26; *see* SA ¶ 1.6.) "The Parties were able to reach a settlement agreement on June 28, 2024." (Mot. at 11; *see generally* SA.)

**B. The Proposed Settlement**

Under the Settlement, Defendants agree to pay a Gross Settlement Amount of $1,250,000 to resolve Plaintiff's claims, including all claims for attorneys' fees and costs, as well as payment of class representative compensation and the costs of administering the Settlement. (SA ¶ 2.26; SA Ex. 1 ("Proposed Notice") ¶ 7.) The Net Settlement Amount—the Gross Settlement Amount minus court-approved attorney fees and costs, administrative expenses, and class representative incentive awards—will be distributed to eligible class members according to the Plan of Allocation, which allocates settlement proceeds among class members based on the total number of vested Westlake Shares the class member held as of March 31, 2020, the date of the special valuation. (*See* SA ¶ 6.4.) Participants will have the option of receiving the distribution as a tax-qualified rollover into a qualified account or directly by check. (Proposed Notice ¶ 8.)

In exchange for the Settlement's benefits, participating class members agree to release claims that "were asserted in the Action, or that arise out of, relate to, or are based on, or have any connection with any of the allegations, acts, omissions, purported conflicts, representations, misrepresentations, facts, events, matters, transactions, or occurrences that are alleged or asserted in the Action or could have been alleged or asserted based on the same factual predicate, whether or not pleaded in the Complaint or Amended Complaint," "[t]hat would be barred by res judicata based on entry by the Court of the Final Approval Order," "[t]hat relate to the direction to calculate, the calculation of, and/or the method or manner of allocation of the Qualified Settlement Fund pursuant to the Plan of Allocation or to any action taken or not taken by the Settlement Administrator in the course of administering the Settlement," or "[t]hat relate to the approval by the Independent Fiduciary of the Settlement Agreement, unless brought against the Independent Fiduciary alone." (SA ¶ 2.36.) The claims released "specifically exclude any claims wholly unrelated to this Settlement or this Action that the Class

Representative or Class Members have to the value of their respective vested account balances under the terms of the Plan and according to the Plan's records as of the date of the Effective Approval Order." (*Id.* ¶ 2.37.)

## II. Discussion

In deciding whether to grant preliminary approval of the Settlement, the court reviews (1) the requirements for provisional class certification, (2) the fairness of the Settlement, including attorney fees, (3) the adequacy of the proposed notice, and (4) the appointment of a settlement administrator.

### A. Rules 23(a) and (b): Provisional Class Certification

Plaintiff seeks to certify the following class:

> All Plan participants whose employment with Westlake or any of its affiliates terminated between January 1, 2019, and March 31, 2020, with account balances greater than $5,000 in the Plan, and the beneficiaries of such participants (as applicable).

(Mot. at 9; SA ¶¶ 2.42.) When a plaintiff seeks provisional class certification for settlement purposes, a court must ensure Federal Rule of Civil Procedure 23(a)'s four requirement and at least one of Rule 23(b)'s requirements are met. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997); *Staton v. Boeing Co*., 327 F.3d 938, 952–53 (9th Cir. 2003); Fed. R. Civ. P. 23(e)(1)(B)(i) (stating that notice to the class must be given "if giving notice is justified by the parties' showing that the court will likely be able to . . . certify the class for purposes of judgment on the proposal").

#### 1. Rule 23(a) Requirements

Under Rule 23(a), the plaintiff must show that the class is sufficiently numerous, that there are questions of law or fact common to the class, that the claims or defenses of the representative parties are typical of those of the class, and that the class representatives will fairly and adequately protect the class's interests. Fed. R. Civ. P. 23(a)(1)-(4).

**a. Numerosity**

Rule 23(a)(1) requires that "the class is so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). "No exact numerical cut-off is required; rather, the specific facts of each case must be considered." *In re Cooper Cos. Inc. Sec. Litig.*, 254 F.R.D. 628, 634 (C.D. Cal. 2009) (citing *Gen. Tel. Co. of Nw., Inc. v. EEOC*, 446 U.S. 318, 330 (1980)). "As a general matter, courts have found that numerosity is satisfied when class size exceeds 40 members." *Moore v. Ulta Salon, Cosmetics & Fragrance, Inc.*, 311 F.R.D. 590, 602-03 (C.D. Cal. 2015); *see Tait v. BSH Home Appliances Corp.,* 289 F.R.D. 466, 473–74 (C.D. Cal. 2012); *Rannis v. Recchia*, 380 F. App'x 646, 651 (9th Cir. 2010) (""In general, courts find the numerosity requirement satisfied when a class includes at least 40 members," while "[o]n the low end, the Supreme Court has indicated that a class of 15 'would be too small to meet the numerosity requirement.'").

Plaintiff's counsel estimates that the proposed class includes approximately 185 members. (Kravitz Decl. ¶ 6; Mot. at 13.) The court finds that such a large class size would make joinder impracticable, and proceeding as a class would promote the efficiency and economy of this action. *See Moore*, 311 F.R.D. at 602-03; *Rannis*, 380 F. App'x at 651; *see, e.g.*, *Conti v. L'Oreal USA S/D, Inc.*, 2023 WL 4600532, at *6 (E.D. Cal. July 18, 2023) (finding numerosity satisfied in ERISA case with 408 class members). The court therefore concludes that Plaintiff has made a sufficient showing to satisfy Rule 23(a)'s numerosity requirement at this stage of the proceedings.

**b. Commonality**

Rule 23(a)(2) requires that "there are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). The plaintiff must "demonstrate that the class members 'have suffered the same injury,'" which "does not mean merely that they have all suffered a violation of the same provision of law." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011) (quoting *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 157 (1982)). Rather, the plaintiff's claim must depend on a "common contention" that is capable of class-wide resolution. *Id.* This 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." *Id.* "[A] common question is one where the same evidence will suffice for each member to make a prima facie showing or the issue is susceptible to generalized, class-wide proof." *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 453 (2016) (cleaned up).

Plaintiff asserts the commonality requirement is satisfied because "several common questions of fact and law exist that pertain to the central issue" of "whether the Defendants breached their ERISA fiduciary duties in connection with the special valuation and segregation of company stock and the alleged failure to follow the terms of the Plan," including "(a) whether Defendants failed to discharge their duties with respect to the Plan solely in the interest of the Plan's participants for the exclusive purpose of providing benefits to participants and their beneficiaries; (b) whether Defendants breached their fiduciary duties under ERISA by implementing the special valuation of company stock as of March 31, 2020 and by failing to comply with the terms of the Plan; (c) whether Plaintiff and the Class received less than fair market value for their Westlake shares; (d) [w]hether Defendants engaged in a prohibited transaction in connection with the segregation of Westlake stock; and (e) whether and what form of relief should be afforded to Plaintiff and the Class." (Mot. at 14-15; *see also* FAC ¶ 80 (identifying common questions).) The court agrees. Indeed, courts regularly find similar common questions to be sufficient at the preliminary approval stage in ERISA cases. *See, e.g.*, *Harris v. Amgen, Inc.*, 2016 WL 7626161, at *3 (C.D. Cal. Nov. 29, 2016) (finding common questions including "(1) whether the individual Defendants were fiduciaries, (2) whether the individual Defendants breached fiduciary duties, (3) whether the Plans and their participants were injured, and (4) the proper measure of damages"); *Colesberry v. Ruiz Food Prod., Inc.*,

2006 WL 1875444, at *3 (E.D. Cal. June 30, 2006) ("The basis of all class members' claims is that Defendants violated ERISA and their fiduciary duties because the Plan was not paid enough for [the Plan's sale of RFP stock to RG3]."); *Munro v. Univ. of S. California*, 2019 WL 7842551, at *4 (C.D. Cal. Dec. 20, 2019) ("[T]he questions upon which all putative class members' claims depend include, *inter alia*: whether Defendants are fiduciaries; whether Defendants breached their fiduciary duties in each respect alleged; whether the Plans suffered losses because of those breaches; the method of calculating the Plans' losses; what equitable relief should be imposed to remedy the breaches and prevent future violations."). Accordingly, the court finds the commonality requirement is met.

**c. Typicality**

Rule 23(a)(3) requires that the "claims or defenses of the representative parties are typical of the claims or defenses of the class." Representative claims are "typical" if they are "reasonably co-extensive with those of absent class members; they need not be substantially identical." *Castillo v. Bank of America, NA*, 980 F.3d 723, 725 (9th Cir. 2020) (quoting *Hanlon v. Chrysler Corp*., 150 F.3d 1011, 1020 (9th Cir. 1998)). "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." *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 984 (9th Cir. 2011) (cleaned up). "In determining whether typicality is met, the focus should be 'on the defendants' conduct and plaintiff's legal theory,' not the injury caused to the plaintiff." *Lozano v. AT & T Wireless Servs., Inc.*, 504 F.3d 718, 734 (9th Cir. 2007) (quoting *Simpson v. Fireman's Fund Ins. Co.*, 231 F.R.D. 391, 396 (N.D. Cal. 2005)) (quoting *Rosario v. Livaditis*, 963 F.2d 1013, 1018 (7th Cir. 1992)).

In this case, Plaintiff alleges that, like every other class member, Plaintiff was a Plan participant that suffered financial harm because of Defendants' ERISA violations. (FAC ¶ 85; *see* Mot. at 15.) The court finds that Plaintiff's claims are "reasonably coextensive" with those of the class. *Hanlon*, 150 F.3d at 1020; *Munro*, 2019 WL 7842551, at *5 ("The named

plaintiffs are alleging injury to the Plans, and their claims are therefore identical to those of all putative class members and implicate identical injuries and course of conduct. Said differently, there was only one course of conduct that occurred: Defendants' management of the Plans."); *Harris*, 2016 WL 7626161, at *3 (finding typicality met in ERISA case where the plaintiffs were "participants or beneficiaries of the Plans in the relevant class period" who sought "to recover damages on identical theories that allege wrongful conduct in breach of fiduciary duty and violations of ERISA"). Accordingly, the court concludes the typicality requirement is met.

**d. Adequacy of Representation**

Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). "To determine whether named plaintiffs will adequately represent a class, courts must resolve two questions: '(1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?'" *Ellis*, 657 F.3d at 985 (quoting *Hanlon*, 150 F.3d at 1020).

The court observes that there is no evidence of a conflict of interest between Plaintiff and the class. (*See* Mot. at 16.) Rather, Plaintiff's claims are identical to those of the other class members, and she has every incentive to vigorously pursue those claims. (*See* Kravitz Decl. ¶ 5 ("Plaintiff . . . has no interests antagonistic to the Plan or members of the Settlement Class."). The court further finds that there is no evidence that Plaintiff's counsel will not adequately represent or protect the interests of the class. Plaintiff is represented by experienced ERISA class action counsel, and counsel has competently prosecuted Plaintiff's case to date, including by surviving a motion to dismiss. (*See* Mot. at 16; Kravitz Decl. ¶ 9 (listing some of counsel's accomplishments).) The court therefore concludes that adequacy is also satisfied here.

**2. Rule 23(b) Requirements**

In addition to the requirements of Rule 23(a), Plaintiff must satisfy the requirements of Rule 23(b). Here, Plaintiff seeks certification under Rule 23(b)(1). (Mot. at 16-17.) Rule 23(b)(1)(A) allows certification "if prosecuting separate actions by or against individual class members would create a risk of inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class." *Id.* 23(b)(1)(A). Rule 23(b)(1)(B) allows certification "if prosecuting separate actions by or against individual class members would create a risk of 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.* 23(b)(1)(B). In other words, "Rule 23(b)(1)(A) considers possible prejudice to a defendant, while 23(b)(1)(B) looks to prejudice to the putative class members." *Urakhchin v. Allianz Asset Mgmt. of Am., L.P. ("Allianz I")*, 2017 WL 2655678, at *7 (C.D. Cal. June 15, 2017) (internal quotation omitted).

ERISA imposes fiduciary duties that are "duties with respect to a plan" intended to collectively protect the "interest of the participants and beneficiaries." 29 U.S.C. § 1104(a). Accordingly, "ERISA fiduciary litigation presents a paradigmatic example of a (b)(1) class." *Allianz I*, 2017 WL 2655678, at *7 (cleaned up); *see Munro*, 2019 WL 7842551, at *8 ("Most ERISA class action cases are certified under Rule 23(b)(1)."); *see also* Fed. R. Civ. P. 23, Advisory Committee Note (1966) (recognizing that class certification is appropriate under Rule 23(b)(1)(B) in "an action which charges a breach of trust by an indenture trustee or other fiduciary similarly affecting the members of a large class of security holders or other beneficiaries, and which requires an accounting or like measures to restore the subject of the trust"). The court concludes that this case is no exception and that certification is appropriate under Rule 23(b)(1).

### 3. Class Counsel

"[A] court that certifies a class must appoint class counsel." *See* Fed. R. Civ. P. 23(g)(1). In doing so, the court must consider: "(i) the work counsel has done in identifying or

investigating potential claims in the action; (ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action; (iii) counsel's knowledge of the applicable law; and (iv) the resources that counsel will commit to representing the class." *Id.* The court finds that Plaintiff's counsel, Ronald S. Kravitz from Miller Shah LLP, meets the requirements of Rule 23(g) and therefore appoints Mr. Kravitz to represent the provisionally certified class as Class Counsel.

In summary, the court concludes Plaintiff adequately demonstrates that Rule 23(a) and Rule 23(b)(1)'s requirements are met. The court therefore grants provisional class certification for settlement purposes and appoints Ronald S. Kravitz of Miller Shah LLP as Class Counsel.

**B. Rule 23(e): Preliminary Approval of Proposed Settlement Agreement**

Although there is a "strong judicial policy that favors settlements, particularly where complex class action litigation is concerned," *Linney v. Cellular Alaska P'ship*, 151 F.3d 1234, 1238 (9th Cir. 1998), a settlement of class claims requires court approval. Fed. R. Civ. P. 23(e). This is because "[i]ncentives inhere in class-action settlement negotiations that can, unless checked through careful district court review of the resulting settlement, result in a decree in which the rights of class members, including the named plaintiffs, may not be given due regard by the negotiating parties." *Staton*, 327 F.3d at 959 (cleaned up).

Rule 23(e) governs class action settlement approval. Courts may approve class action settlements only when they are "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). In making this determination, courts must consider whether (A) the class representatives and class counsel have adequately represented the class, (B) the proposal was negotiated at arm's length, (C) the relief provided for the class is adequate, and (D) the proposal treats class members equitably relative to each other. *Id.* 23(e)(2)(A–D).

**1. Adequacy of Class Representatives and Class Counsel**

As stated in the court's analysis of the Rule 23(a) factors, the court finds Plaintiff and Class Counsel have ably represented the class to date and have efficiently secured a significant settlement. "The Court is unaware of any conflict of interest between Plaintiff[] and the proposed class." *Dean v. China Agritech*, 2012 WL 1835708, at *5 (C.D. Cal. May 3, 2012). "Plaintiff's claims are identical to those of the class and she has every incentive to vigorously pursue those claims." *Becerra-S. v. Howroyd-Wright Emp. Agency, Inc.*, 2020 WL 8571838, at *3 (C.D. Cal. Oct. 5, 2020). "Nor is there any evidence that [Class Counsel] will not adequately represent or protect the interests of the class." *Id.* Class Counsel has extensive experience litigating ERISA class actions, (Kravitz Decl. ¶ 9), has been appointed as counsel in ERISA class action settlements, *see, e.g.*, *Shin v. Plantronics, Inc.*, 2019 WL 8638832, at *3 (N.D. Cal. Aug. 13, 2019), and appears "qualified and competent." *Hanlon*, 150 F.3d at 1020. Accordingly, the court finds this factor weighs in favor of granting preliminary approval.

**2. Arm's Length Negotiation**

Rule 23(e)(2)(B) requires that "the proposal was negotiated at arm's length." Fed. R. Civ. P. 23(e)(2)(B). Plaintiff represents that "the Settlement Agreement represents the culmination of intensive arm's-length negotiations with the assistance of Mediator Robert Meyer of JAMS, who the Parties met with on two occasions." (Mot. at 22.)

The court finds that the Settlement appears at this stage of the proceedings to be the result of arms-length negotiations between the parties. The settlement negotiations occurred before a neutral private mediator who has "experience with ERISA mediations." *Gruber v. Grifols Shared Servs. N. Am., Inc.*, 2023 WL 8610504, at *1 (C.D. Cal. Nov. 2, 2023) (describing Mr. Meyer); *Mandi Peterson v. Vivendi Ticketing US LLC*, 2024 WL 3915154, at *5 (C.D. Cal. June 20, 2024) ("The negotiation was under the direction of mutually agreed-upon mediator, Robert Meyers of JAMS, who has extensive experience mediating and managing multiparty and multifaceted cases, which tends to support that the agreement was non-collusive."); *see Bluetooth*, 654 F.3d at 948 (explaining that although the "mere presence of a neutral

mediator . . . is not on its own dispositive," it is "a factor weighing in favor of a finding of non-collusiveness"); *Hashemi v. Bosley, Inc.*, 2022 WL 2155117, at *6 (C.D. Cal. Feb. 22, 2022) ("The parties extensively negotiated the Settlement over several months prior to mediation and ultimately reached a final agreement only after arms-length negotiations before [the] mediator."). The settlement negotiations also occurred between experienced counsel. *See Nguyen v. Radient Pharms. Corp.*, 2014 WL 1802293, at *3 (C.D. Cal. May 6, 2014) ("The fact that experienced counsel involved in the case approved the settlement after hard-fought negotiations is entitled to considerable weight.") (cleaned up). Moreover, as further explained in Section II.B.3.c., *infra*, although the Settlement contains a clear sailing arrangement, it does not appear to have any other "subtle signs" of collusion that courts must police, and the clear sailing arrangement does not at this stage of the proceedings appear indicative of collusion. *See Roes, 1-2 v. SFBSC Mgmt.*, LLC, 944 F.3d 1035, 1048 (9th Cir. 2019). The court therefore finds at this stage of the proceedings that this factor weighs in favor of granting preliminary approval.

### 3. Adequacy of Class Relief

In determining whether class relief is "adequate," courts must analyze "(i) the costs, risks, and delay of trial and appeal; (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims; (iii) the terms of any proposed award of attorney's fees, including timing of payment; and (iv) any agreement required to be identified under Rule 23(e)(3)." *Id.* 23(e)(2)(C).[1]

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[1] Before Congress codified these factors in 2018, the Ninth Circuit instructed district courts to apply the following factors in determining whether a settlement agreement was fair, reasonable, and accurate: "[1] the strength of plaintiffs' 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 views of counsel; [7] the presence of a governmental participant; and [8] the reaction of the class members to the proposed settlement." *Roes, 1-2*,

### a. The Costs, Risks, and Delay of Trial and Appeal

The court finds that $1.25 million Settlement reflects a substantial outcome for class members. (*See* Mot. at 25 ("[T]he amount of the settlement . . . is a strong achievement, especially given the nature of the claims and defenses and the uncertainty of trial . . . , and will provide significant recompense to former Plan participants.").) By the court's math, even if the court awards all of the requested fees, costs, class representative compensation, and administrative expenses, dividing the Net Settlement Amount by 185 class members will result in each class member receiving an award of multiple thousands of dollars.

The court further finds the benefits class members will receive under the Settlement present a fair compromise given the costs, risks, and delay of trial and appeal. Although litigation had not progressed far in this case, the parties had the benefit of the previously described research, experience, discovery, and motion practice. (*See* Mot. at 25 ("[T]he Parties settled the action after exchanging substantial documents and information during the administrative review of Plaintiff's claims and the initial discovery conducted after Plaintiff filed the complaint."). With that information, the parties were able to realistically value the scope of Defendants' potential liability and assess the costs, risks, and delay of moving forward with class certification, motion practice, and trial. *See In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 459 (9th Cir. 2000) (explaining that approving the settlement is favored when the "parties have sufficient information to make an informed decision about settlement" (cleaned up)).

944 F.3d at 1048; *Staton*, 327 F.3d at 959. The court still considers these factors to the extent that they shed light on the Rule 23(e) inquiry. *See Wong v. Arlo Techs., Inc.*, 2021 WL 1531171, at *8 (N.D. Cal. Apr. 19, 2021).

The court observes that those costs and risks are not insignificant. Because this case is in the beginning stages, substantial litigation costs would be required to take this case to trial. "Numerous depositions and document and other written discovery would be required if the case continued." *Farrar v. Workhorse Grp., Inc.*, 2023 WL 5505981, at *7 (C.D. Cal. July 24, 2023). "Extensive and expensive expert discovery would also be necessary." *Id.* And there would be significant costs and risks associated with class certification, summary judgment, and trial. *See In re Portal Software, Inc. Sec. Litig.*, 2007 WL 4171201, at *3 (N.D. Cal. Nov. 26, 2007) ("Additional consideration of increased expenses of fact and expert discovery and the inherent risks of proceeding to summary judgment, trial and appeal also support the settlement."); *In re Netflix Privacy Litig.*, 2013 WL 1120801, at *6 (N.D. Cal. Mar. 18, 2013) ("The notion that a district court could decertify a class at any time is one that weighs in favor of settlement." (citation omitted)). Even if Plaintiff were able to certify a class, there would also be a risk that the court could later decertify the class. *See In re Netflix Privacy Litig.*, 2013 WL 1120801, at *6 (N.D. Cal. Mar. 18, 2013) ("The notion that a district court could decertify a class at any time is one that weighs in favor of settlement."). Moreover, "[w]hile Plaintiff believes that she would ultimately prevail, she recognizes the risks associated with complex litigation," and that "[t]his litigation involves complex factual and legal issues under ERISA," including "novel issues relating to the valuation of shares of an employee stock ownership plan during the pandemic." (Mot. at 23, 25.) In addition, even if Plaintiff could secure a better result than the Settlement represents at trial, any result obtained after additional litigation or trial would take significantly longer and there is a risk that Plaintiff could have received much less, or nothing at all. *See In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1041–42 (N.D. Cal. 2008) (discussing how a class action settlement offered an "immediate and certain award" in light of significant obstacles posed through continued litigation); (Mot. at 23 ("A certain result for Class Members now, rather than a possibly larger, but contingent one at some indefinite time years in the future, weighs in favor of approval of the Settlement."). Moreover, Plaintiff represents that "there is a substantial likelihood of appeal from any final judgment." (Mot. at 23.)

The court finds that elimination of all of these costs, risks, and delays weighs heavily in favor of approving the Settlement. *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 966 (9th Cir. 2009); *Curtis-Bauer v. Morgan Stanley & Co., Inc.*, 2008 WL 4667090, at *4 (N.D. Cal. Oct. 22, 2008) ("Settlement avoids the complexity, delay, risk and expense of continuing with the litigation and will produce a prompt, certain, and substantial recovery for the Plaintiff class.").

**b. The Effectiveness of the Proposed Method of Distribution of Class Relief**

Next, the court must consider "the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims." Fed. R. Civ. P. 23(e)(2)(C). "Often it will be important for the court to scrutinize the method of claims processing to ensure that it facilitates filing legitimate claims." Fed. R. Civ. P. 23 advisory committee's note to 2018 amendment. "A claims processing method should deter or defeat unjustified claims, but the court should be alert to whether the claims process is unduly demanding." *Id.*

In this case, the relief distribution is straightforward. "For each Class Member, the Class Member will have the opportunity to elect a tax-qualified rollover of his or her settlement payment to an individual retirement account or other eligible employer plan, provided that the Class Member supplies adequate information to the Settlement Administrator to effect the rollover. Otherwise, the Class Member will receive his or her settlement payment directly by check." (SA ¶ 6.5.) The court finds this procedure is not unduly demanding and therefore concludes that this factor weighs in favor of granting preliminary approval.

**c. Attorney Fees Award**

Next, the court must consider "the terms of any proposed award of attorneys' fees, including timing of payment," in determining whether the class's relief is adequate. Fed. R. Civ. P. 23(e)(2)(c). When reviewing attorney fee requests in class action settlements, courts

have discretion to apply the percentage-of-the-fund method or the lodestar method to determine reasonable attorney fees. *See Powers v. Eichen*, 229 F.3d 1249, 1256 (9th Cir. 2000); *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 944–45 (9th Cir. 2011). In considering the proposed attorney fee award, the court must also scrutinize the Settlement for three factors that tend to show collusion: (1) when counsel receives a disproportionate distribution of the settlement, (2) when the parties negotiate a "clear sailing arrangement," under which the defendant agrees not to challenge a request for agreed-upon attorney fees, and (3) when the agreement contains a "kicker" or "reverter" clause that returns unawarded fees to the defendant, rather than the class. *Briseno v. ConAgra Foods, Inc.*, 998 F.3d 1014, 1022 (9th Cir. 2021).

Here, Class Counsel states that it "will seek approval from the Court of their attorneys' fees not to exceed one third of the Gross Settlement Fund, as well as litigation costs and expenses advanced and carried by Class Counsel during this litigation." (Mot. at 24.) The court observes that the Settlement does not contain a reverter provision under which unawarded fees would revert to Defendants rather than the class. (*See generally* SA.) However, the court also observes that the Settlement contains a clear sailing term under which "Defendants will take no position with the Court regarding the requested Attorneys' Fees and Costs, Administrative Expenses, or Class Representative Compensation, so long as the requested Attorneys' Fees do not exceed one third of the Gross Settlement Fund and the requested Class Representative Compensation does not exceed $17,500 for the Class Representative." (SA ¶ 7.2.) "This causes some concern for the Court because it represents some form of agreement, by Defendant, not to oppose a motion for attorneys' fees. Additionally, the agreement was made over a percentage of the total settlement value, 33%, that exceeds the 25% benchmark that courts in the Ninth Circuit typically find reasonable." *Gruber*, 2023 WL 8610504, at *9.

The court notes that the clear sailing arrangement is not a "death knell" for approval, but rather means that the court must scrutinize the Settlement for signs that the fees counsel requests are unreasonably high. *McKinney-Drobnis v. Oreshack*, 16 F.4th 594, 610 (9th Cir. 2021). Specifically, the court must "peer into the provision and scrutinize closely the relationship between attorneys' fees and benefit to the class" even when the settlement has been

negotiated "with a neutral mediator before turning to fees." *Kim v. Allison*, 8 F.4th 1170, 1180 (9th Cir. 2021). Given the substantial benefits the Settlement provides to the class, the court finds at this stage of the proceedings that the clear sailing arrangement does not raise sufficient collusion concerns to deny preliminary approval of the amount of fees Class Counsel intends to seek, but Class Counsel shall thoroughly address the issues of the clear sailing arrangement and the appropriateness of a higher-than-benchmark-percentage award at the final approval stage. *See Gruber*, 2023 WL 8610504, at *9 ("[T]he Court warns the parties that it will further scrutinize the amount of fees requested, and the limited agreement not to oppose, at the final approval stage.").

In addition to the amount of Class Counsel's fees and costs, the court must scrutinize the timing of payment. Fed. R. Civ. P. 23(e)(2)(c). The Settlement provides that attorney fees and costs, administrative expenses, and class representative compensation award will be distributed no later than eight calendar days after the Settlement Effective Date, but the Net Settlement Amount for class members will be distributed no earlier than fourteen business days after the Settlement Effective Date. (SA ¶ 5.8.) This could cast a slight shadow on the proposed fee and cost arrangements. "This could cast a slight shadow on the proposed fee and cost arrangements." *Farrar*, 2023 WL 5505981, at *10 (citing *Salas Razo v. AT&T Mobility Servs., LLC*, 2022 WL 4586229, at *13 (E.D. Cal. Sept. 29, 2022) ("[C]ounsel will receive payment at the same time as Class Members, and the timing of payment does not weigh against preliminary approval of the Class Settlement.")). Class Counsel shall address this issue in their final approval briefing as well.

#### d. Agreements Required to Be Identified Under Rule 23(e)(3)

The court must also consider whether there is "any agreement required to be identified under Rule 23(e)(3)," Fed. R. Civ. P. 23(e)(2)(C)(iv)—that is, "any agreement made in connection with the proposal," *id.* 23(e)(3). The parties have identified no agreement other than the proposed Settlement.

### 4. Equitable Class Member Treatment

The final Rule 23(e) factor turns on whether the proposed settlement "treats class members equitably relative to each other." Fed. R. Civ. P. 23(e)(2). "Matters of concern could include whether the apportionment of relief among class members takes appropriate account of differences among their claims, and whether the scope of the release may affect class members in different ways that bear on the apportionment of relief." Fed. R. Civ. P. 23 advisory committee's note to 2018 amendment.

Under the Settlement, class members may receive differing payouts "based on the number [of] shares of company stock that they had in the Plan as of March 31, 2020, the date of the special valuation," such that payments will be distributed "in a manner proportionate to the size of the losses resulting from the reduction in the share price of the Company's shares as a result of the special valuation." (Mot. at 24.) The court finds this difference in treatment is appropriate and reasonable. *Grady v. RCM Techs., Inc.*, 671 F. Supp. 3d 1065, 1082 (C.D. Cal. 2023) ("“It is reasonable to allocate the settlement funds to class members based on the extent of their injuries or the strength of their claims on the merits."). Accordingly, the court concludes the Settlement treats class members equitably.

### 5. Named Plaintiff Class Representative Compensation Award

Next, the court notes that the Settlement indicates that Plaintiff may seek a class representative compensation award of no more than $17,500. (SA ¶ 7.2.) Service awards or incentive awards are payments to class representatives for their service to the class in bringing the lawsuit. *Radcliffe v. Experian Info. Sols. Inc.*, 715 F.3d 1157, 1163 (9th Cir. 2013). Courts routinely approve this type of award to compensate representative plaintiffs for the services they provide and the risks they incur during class action litigation. *Rodriguez*, 563 F.3d at 958-59; *Vasquez v. Coast Valley Roofing, Inc.*, 266 F.R.D. 482, 499 (E.D. Cal. 2010). A $5,000 payment is "presumptively reasonable." *Bellinghausen v. Tractor Supply Co.*, 306 F.R.D. 245, 266 (N.D. Cal. 2015).

However, the court observes that Plaintiff does not provide any argument in the Motion regarding the appropriateness of a $17,500 class representative compensation award. And the court has questions about whether such a large award would be appropriate. *See, e.g.*, *Baird v. BlackRock Institutional Tr. Co., N.A.*, 2021 WL 5113030, at *9 (N.D. Cal. Nov. 3, 2021) (finding $10,000 service awards for each ERISA plaintiff reasonable to compensate them for their 61 and 51.25 hours of efforts over four years of litigation, the reputational risk they undertook to participate in a lawsuit against their prior employer and colleagues, and their "understandabl[e] concern[] that their ability to return to work in the financial industry is now impaired"); *Harris*, 2016 WL 7626161, at *9 (ERISA case in which parties anticipated a request for "case contribution awards" of $5,000 per named plaintiff). When evaluating the reasonableness of an incentive award, courts consider "the actions the plaintiff has taken to protect the interests of the class, the degree to which the class has benefitted from those actions," and the time the plaintiff spent pursing the litigation. *Staton*, 327 F.3d at 977. The court will not deny preliminary approval of the Settlement based on the court's concerns regarding the amount of the possible class representative compensation award, but the court warns that Counsel shall fully brief the issue of the reasonableness of such an award at the final approval stage. "Specifically, the Court expects Class Counsel to support its motion for final approval with [a] detailed declaration[] from the named Plaintiff[] outlining the efforts expended and the risks taken on behalf of the class." *Harris*, 2016 WL 7626161, at *9.

### 6. Summary

In sum, after analyzing the Rule 23(e)(2) factors, and taking into consideration the eight factors the Ninth Circuit has provided to guide the court's Rule 23(e)(2) analysis, the court preliminarily concludes that the Settlement is fair, reasonable, and adequate. *See* Fed. R. Civ. P. 23(e)(2); *Kim*, 8 F.4th at 1178; *Roes, 1-2*, 944 F.3d at 1048; *Staton*, 327 F.3d at 959.

### C. Notice of the Proposed Settlement

"The Parties also seek this Court's approval of the Notice procedures set out in the Settlement and in full detail in the Kravitz Declaration." (Mot. at 27.) "For any class certified under Rule 23(b)(1) or (b)(2), the court may direct appropriate notice to the class." Fed. R. Civ. P. 23(c)(2)(A).

The court has reviewed the Proposed Notice and finds that the Proposed Notice "is satisfactory" because "it generally describes the terms of the settlement in sufficient detail to alert those with adverse viewpoints to investigate and to come forward and be heard." *Harris*, 2016 WL 7626161, at *9 (quoting *Churchill Vill., LLC v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir. 2004)) (cleaned up). "The proposed mail and website Notice is written in plain English and describes: (1) the nature of the claims in the case; (2) a description of the Settlement Class; (3) a description of the Settlement and the relief to be provided; and (4) how to get more information from this Court about the Settlement, the parties involved and the procedures to follow to object." (Mot. at 28.) The court further finds that the parties' proposed notice plan, under which "Strategic Claims Services will send direct Notice by email or by first class mail to members of the Settlement Class and post the notice on a website established for the case," is also adequate. (Mot. at 27); *see, e.g.*, *Becerra-S.*, 2020 WL 8571838, at *6 (finding adequate at preliminary approval stage "a notice protocol centering on direct mail").

### D. Settlement Administrator

Class Counsel has retained, and the Settlement names, Strategic Claims Services ("SCS") as Settlement Administrator. (Dkt. 45-1 ¶ 6; SA ¶ 2.40.) "SCS has extensive experience providing notice in securities class action settlements." *Hardy v. Embark Tech., Inc.*, 2023 WL 6276728, at *3 (N.D. Cal. Sept. 26, 2023); (*see* Dkt. 45-1 at 92-100 (Flyer Describing SCS and Curriculum Vitae of SCS' President and Founder). And federal courts routinely approve SCS as class action settlement administrator. *See, e.g.*, *Hardy*, 2023 WL 6276728, at *3; *M & M Hart Living Tr. v. Glob. Eagle Ent., Inc.*, 2018 WL 11471777, at *7 (C.D. Cal. Nov. 2, 2018);

*In re GTT Commc'ns, Inc. Sec. Litig.*, 2021 WL 6618727, at *3 (C.D. Cal. Dec. 6, 2021). The court appoints SCS as settlement administrator.

## III. Disposition

For the foregoing reasons, the court **GRANTS** the Motion. The court further **ORDERS** the following:

A. The court grants provisional class certification of the following class: "All Plan participants whose employment with Westlake or any of its affiliates terminated between January 1, 2019, and March 31, 2020, with account balances greater than $5,000 in the Plan, and the beneficiaries of such participants (as applicable)."
B. The court **APPOINTS** Plaintiff Mary Nguyen as Class Representative;
C. The court **APPOINTS** Miller Shah LLP as Class Counsel;
D. The court preliminarily approves the Settlement, subject to further consideration at the final approval stage;
E. The court **APPOINTS** Strategic Claims Services as Settlement Administrator;
F. The court approves the form of the proposed notice and directs the parties and the Settlement Administrator to carry out their obligations under this Order and the Settlement; and
G. The court sets a Final Approval Hearing for **Thursday, January 23, 2025, at 10:00 a.m.**[2] in **Courtroom 10D**. The court reserves the right to adjourn or continue the date of the Final Approval Hearing without further notice to the class.

Initials of Deputy Clerk: mku

[2] Should the parties believe another open date on the court's calendar is more amenable to holding the Final Approval Hearing, the parties may file a joint stipulation requesting to continue or advance the hearing date scheduled by the court.