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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

MICHAEL BOUVY,

Plaintiff,

v.

ANALOG DEVICES, INC., a Massachusetts company, as successor to LINEAR TECHNOLOGY CORPORATION; LINEAR TECHNOLOGY LLC, a Delaware company; LINEAR TECHNOLOGY ADMINISTRATIVE COMMITTEE; and DOE DEFENDANTS 1-20,

Defendants.

Case No. 19-cv-00881-DMS BLM

PLAINTIFF'S NOTICE OF MOTION AND UNOPPOSED MOTION FOR FINAL APPROVAL OF A CLASS ACTION SETTLEMENT

Judge: Hon. Dana M. Sabraw
Date: July 15, 2022
Time: 1:30 p.m.
Room: Courtroom 13A

TO THE COURT, ALL PARTIES, AND THEIR COUNSEL OF RECORD: PLEASE TAKE NOTICE that on July 15, 2022, at 1:30 p.m., or as soon thereafter as the matter may be heard before the Honorable Dana M. Sabraw, in Courtroom 13A of the above-entitled court, located at the James M. Carter and Judith N. Keep United States Courthouse, 333 West Broadway, San Diego, CA 92101, Plaintiff will move, and hereby does move, for an order granting final approval of a class action settlement.

Plaintiff's Motion is based on this Notice of Motion and Motion, the attached Memorandum of Points & Authorities, and upon such further evidence, pleadings, and argument of counsel as may be presented in connection with the Motion.

Respectfully submitted,

MICHAEL BOUVY, individually and on behalf of all others similarly situated,

Dated: June 24, 2022

By: /Rafey S. Balabanian
One of Plaintiff's Attorneys

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7

8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**

10 MICHAEL BOUVY,

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12 v.

13 ANALOG DEVICES, INC., a
14 Massachusetts company, as successor
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15 CORPORATION; LINEAR
TECHNOLOGY LLC, a Delaware
16 company; LINEAR TECHNOLOGY
ADMINISTRATIVE COMMITTEE;
17 and DOE DEFENDANTS 1 – 20;

18 Defendants.

Case No.: 19-cv-00881-DMS BLM

PLAINTIFF'S MEMORANDUM IN SUPPORT OF UNOPPOSED MOTION FOR FINAL APPROVAL OF A CLASS ACTION SETTLEMENT

Judge: Hon. Dana M. Sabraw
Date: July 15, 2022
Time: 1:30 p.m.
Courtroom: 13A

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INTRODUCTION

The Settlement[1] reached in this case creates a $1.5 million fund to compensate members of the Settlement Class for allegedly paying excessive recordkeeping fees for their 401(k) plan in violation of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001, *et seq*. ("ERISA"). The Settlement automatically allocates recovery to Settlement Class Members in proportion to how much they paid in excess recordkeeping fees over a five-year period directly into their retirement accounts. Most Class Members will receive several hundred dollars back and some Class Members will receive a few thousand as a result of the Settlement.

Since the Court preliminarily approved the Settlement in March, the Court-approved notice plan has been effectuated, delivering direct notice to over 98% of the Class and an independent fiduciary has blessed the Settlement after a thorough review. No objections to the Settlement have been received. This positive reaction merely reinforces what this Court has already preliminarily determined: that the Settlement is "fair, reasonable, and adequate." (Dkt. 87, at 1.) The Court should grant final approval to the Settlement.

BACKGROUND

The Court is no doubt familiar with the history of this case, so Plaintiff will not recite it in detail here. (*See* Dkt. 85-1, at 2-5; Dkt. 89-1, at 2-5 (discussing case history in detail).)

In brief, Plaintiff in this action was a participant in the Linear Technologies 401(k) Plan (the "Plan"). The Defendants managed that Plan, and its successor plan.[2] In managing the Plan, Defendants are charged under ERISA with acting as a

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[1] Capitalized terms in this brief take the meaning ascribed to them in the Settlement, which is available at Dkt. 85-3.

[2] Linear Technology Corporation sponsored the Plan until 2017, when the company merged with Analog Devices, Inc. After the merger, Linear Technology LLC sponsored the Plan. The Linear Technology Plan was merged into the Analog Devices-sponsored plan, The Investment Partnership Plan (the "TIP Plan"), in early 2019.

fiduciary. 29 U.S.C. § 1104(a). Bouvy contends that Defendants breached their fiduciary duties by failing to monitor recordkeeping fees incurred by the Plan, ultimately allowing Plan participants to incur excessive recordkeeping fees. *See Tibble v. Edison Int'l*, 843 F.3d 1187, 1197-98 (9th Cir. 2016) (en banc) (holding that ERISA imposes upon retirement plan managers a duty to manage plans in a "cost-conscious" manner).

Defendants moved to dismiss and the parties filed complex, lengthy briefs exhaustively discussing the case and the applicable law. (Dkts. 23, 24, 26.) The parties also filed supplemental submissions addressing the Supreme Court's then-recent decision in *Intel Corp. Investment Policy Committee v. Sulyma*, 140 S. Ct. 768 (2020). (Dkts. 28, 30, 31.) After the Court largely denied the motion to dismiss in a detailed order (Dkt. 32), Defendants moved to reconsider, which the Court denied after another round of briefing. (Dkts. 33, 37, 39.)

The parties then engaged in discovery. Defendants produced seven volumes of documents, around 48,000 pages of documents in total. (Dkt. 85-2, ¶ 5.) Defendants also produced an expert report to oppose class certification, which also disputed the merits of Plaintiff's claims. (*Id.*) At the time the case settled, Plaintiff was negotiating with Defendants about scheduling the depositions of five lay witnesses (all of whom participated in Plan management at some point), preparing third-party subpoenas to seek additional documents (such as from TransAmerica), and preparing to designate his merits experts. (*Id.* ¶ 6.)

The parties attempted to settle the case on two occasions. The first was at an Early Neutral Evaluation presided over by Magistrate Judge Barbara Lynn Major conducted shortly after the Court denied the motion to dismiss. (*Id.* ¶ 4.) But that attempt at settlement proved fruitless because at that pre-discovery moment, the parties came to the table with radically different case valuations, and Bouvy was unwilling to settle the case on an individual basis or for a pittance. (*Id.*)

The second attempt at settlement occurred after Bouvy moved for class certification (but before Defendants filed their opposition). (*Id.* ¶ 7.) This was again a Court-ordered settlement conference presided over by Magistrate Judge Major. Now with the benefit of discovery, the parties made good progress in negotiations before accepting a mediator's proposal put forward by Magistrate Judge Major. (*Id.* ¶ 9.)

Even after accepting the mediator's proposal, however, work remained to be done both to put the finishing touches on the Settlement, and to obtain the necessary participant data from third-party TransAmerica in order craft a workable and fair plan of allocation. (Dkt. 89-2, ¶ 6.) After months of back and forth, Plaintiff was able to present the instant Settlement to the Court in February of this year. (Dkt. 85.)

This Settlement ensures the return of much of the excess recordkeeping fees alleged in Bouvy's complaint. As Class Counsel explained in their motion for attorneys' fees, they estimated that the maximum possible damages under Bouvy's excessive-fees theory was between around $2.3 million and $3 million. (Dkt. 89-2, ¶ 7.) However, recent cases demonstrate that success on such a theory is far from a slam dunk. Plaintiffs in similar cases has struggled to show liability under an excessive-fees theory, or to set damages with sufficient specificity. Yet the Settlement here creates a $1.5 million fund—49% to 63% of the maximum possible recovery (*see id.*)—that will return hundreds and sometimes thousands of dollars back into the retirement accounts of Settlement Class Members.

The Court previously found in preliminarily approving the Settlement that the Settlement is "fair, reasonable, and adequate." (Dkt. 87, at 1.) The Court was exactly right. As explained in further detail below, this Settlement meets all the criteria for final approval.

KEY SETTLEMENT TERMS

For the Court's convenience, Plaintiff summarizes the terms of the Settlement here:

1 **A. Settlement Class Definition:** The Settlement provides, and the Court
2 certified for settlement purposes, a class of all persons who participated in the Plan at
3 any point from May 6, 2013 until January 18, 2019, the effective date in which the
4 Plan was merged into and with the TIP Plan, including any Beneficiary and/or
5 Alternative Payee. Excluded from the Settlement Class are (a) any Judge or
6 Magistrate presiding over this action and members of their families; (b) Defendants
7 and their beneficiaries; and (c) the legal representatives, successors, heirs or assignees
8 of any such excluded persons. (Settlement ¶ 1.37; Dkt. 87, ¶ 3.)
9 **B. Monetary Relief and Plan of Allocation:** The Settlement requires
10 Defendants to deposit $1.5 million into an escrow account, to be used to compensate
11 Settlement Class Members, pay attorneys' fees and an incentive award (subject to
12 Court approval), and pay the costs associated with administering the Settlement.
13 (Settlement ¶ 1.39.) Settlement Class Members shall be compensated as follows: The
14 Plan's recordkeeper shall furnish to the Settlement Administrator the quarterly
15 recordkeeping fees paid by each Settlement Class Member between the second
16 quarter of 2013 and the fourth quarter of 2018 (inclusive). The Settlement
17 Administrator will calculate the difference between what each Settlement Class
18 Member paid in recordkeeping fees each quarter and $12.50. Those figures will be
19 summed to determine each Settlement Class Member's Recordkeeping Balance.
20 Settlement Class Members will be entitled to a share of the Settlement Fund equal to
21 the share of their Recordkeeping Balance compared to the overall, classwide
22 Recordkeeping Balance. (*Id.* ¶ 3.2.)
23 **C. Incentive Award to Plaintiff:** The parties agreed that Plaintiff Bouvy
24 would, in accordance with his service to the Class, seek an incentive award of $7,500.
25 (*Id.* ¶ 9.2.) Bouvy has so moved. (Dkt. 89-1, at 11-14.)
26 **D. Payment of Attorneys' Fees and Expenses:** The Settlement provides
27 that Class Counsel will seek an award of fees from the Settlement Fund. (Settlement
28 ¶ 9.1.) Class Counsel has moved the Court for an award of fees equal to 25% of the

1 Settlement Fund. (Dkt. 89-1, at 5-11.) Class Counsel are not separately seeking
2 reimbursement of costs incurred while litigating this matter. (*Id.* at 10.)
3 **E. Notice:** Direct notice was provided to Settlement Class Members via
4 both email and U.S. mail, sent to the Settlement Class Member's last known address.
5 (Settlement ¶ 5.1(a)-(c).) Former Participants also received a follow-up reminder
6 notice by email to encourage submission of rollover forms. (*Id.* ¶ 5.1(d).) The success
7 of this notice program is discussed below.
8 **F. Release:** Settlement Class Members will release any claims they have
9 regarding the acts alleged here. This release does not extend to claims regarding the
10 TIP Plan, into which the Linear Technology 401(k) Plan merged. Nor does this
11 release extend to claims for individual denials of benefits, to claims arising out of acts
12 outside of the Class Period, or to claims unrelated to the Plan, such as employment or
13 wage claims. (*Id.* ¶ 1.33.)
14 **G. Independent Fiduciary Review:** As required under DOL regulations,
15 the Settlement was subject to review by an Independent Fiduciary acting on behalf of
16 the Plan as well as the Court. (*Id.* ¶ 2.) *See also* Prohibited Transaction Exemption
17 2003-39, 68 Fed. Reg. 75,632 (Dec. 31, 2003).The fiduciary approved of the
18 Settlement in a written report attached as Exhibit 1.
19
ARGUMENT

20
I. Notice satisfied Due Process

21 Before granting final approval of a class action settlement, the Court must
22 determine that Class Members received adequate notice. *See Hanlon v. Chrysler*
23 *Corp.*, 150 F.3d 1011, 1025 (9th Cir. 1998) ("Adequate notice is critical to court
24 approval of a class action settlement under Rule 23(e).").
25 Rule 23(c)(2)(B) requires "the best notice that is practicable under the
26 circumstances, including individual notice to all members who can be identified
27 through reasonable effort." "[T]he class must be notified of a proposed settlement in a
28 manner that does not systematically leave any group without notice[.]" *Officers for*

Justice v. Civil Serv. Comm'n of City & Cnty. of S.F., 688 F.2d 615, 624 (9th Cir. 1982). "The rule does not insist on actual notice to all class members in all cases." *Mullins v Direct Digital LLC*, 795 F.3d 654, 665 (7th Cir. 2015); *see also Juris v. Inamed Corp.*, 685 F.3d 1294, 1321 (11th Cir. 2012) (noting that "even in Rule 23(b)(3) class actions, due process does not require that class members actually receive notice" and collecting cases). Although what constitutes the "best notice practicable" is case-specific, a notice campaign that reaches 70% of a class is often reasonable. Federal Judicial Center, Judges' Class Action Notice & Claims Process Checklist & Plain Language Guide, at 3 (2010). The notice must also accurately describe the settlement. *See* Fed. R. Civ. P. 23(e)(1)(A); *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 946 (9th Cir. 2015).

Here, the Notice plan approved by the Court was successfully implemented and satisfied Due Process. The administrator reports that 98% of the Settlement Class received direct notice by U.S. mail of the Settlement. (Declaration of Analytics Consulting, LLC ¶ 13, attached as Exhibit 2.) Before mailing, all addresses were checked against the USPS National Change of Address database and notices that were returned by the Post Office as undeliverable were skip traced and resent to the identified new addresses. (*Id.* ¶¶ 7, 12.) The administrator also sent email notice to 4,349 email addresses (some class members have multiple email addresses); over 93% of these emails were successfully delivered. (*Id.* ¶ 10.) This level of direct notice easily satisfies Due Process. Moreover, the Settlement Administrator maintained a Settlement Website, which contained pertinent information about the Settlement and key case documents, including Class Counsel's fee petition. (*Id.* ¶ 14.) The website was accessed nearly 2,000 times during the notice period. (*Id.*) The administrator also fielded 136 calls from Settlement Class Members during the notice period, answering questions about the Settlement. (*Id.* ¶ 15.)

In sum, the successfully implemented Notice plan comported with Due Process, and the Court may proceed to consider whether the Settlement should receive final approval.

II. The Court should give final approval to the Settlement.

Judicial policy favors settlement in class actions and other complex litigation where substantial resources can be conserved by avoiding the time, cost, and rigors of formal litigation. *See Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992); *Officers for Justice*, 688 F.2d at 625 ("[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.").

To that end, the Ninth Circuit has identified several factors to consider when evaluating a settlement, including: (1) the strength of the 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 settlement amount; (5) the stage of the proceedings; (6) the experience and views of counsel; (7) whether there is a governmental participant; and (8) the reaction of the class members to the proposed settlement. *Staton v. Boeing Co.*, 327 F.3d 938, 959 (9th Cir. 2003).[3]

Likewise, Rule 23(e) requires a court to consider the following four factors, which largely overlap with the factors set forth in the *Staton* case: whether (1) the class representatives and class counsel have adequately represented the class, (2) the proposal was negotiated at arm's length, (3) the relief provided for the class is adequate, taking into consideration the risks associated with continued litigation, the effectiveness of distributing the proposed relief to the class, the terms of any proposed attorneys' fees, and the underlying settlement agreement; and (4) the

[3] There is no governmental participant in this case, so that factor is irrelevant.

1 proposal treats class members equitably relative to each other. The Ninth Circuit
2 requires a higher level of scrutiny "for evidence of collusion or other conflicts of
3 interest" when a class settlement is reached prior to adversarial class certification.
4 *Roes, 1-2 v. SFBSC Mgmt., LLC*, 944 F.3d 1035, 1043 (9th Cir. 2019) (quotation
5 omitted).
6 Because the Ninth Circuit's test covers much of the ground required by the
7 Rule, Plaintiff will analyze the *Staton* factors within the rubric of the Rule's required
8 analysis.[4]
9 **A. Plaintiff Bouvy and Class Counsel adequately represented the Class.**
10 As the Court found in certifying the class for settlement purposes, both the
11 named plaintiff and his lawyers have adequately represented the Settlement Class.
12 (Dkt. 87, ¶¶ 3, 5-6.) This finding applies as much to settlement approval as it does to
13 class certification. *See* Fed. R. Civ. P. 23(e)(2)(A).
14 For instance, Bouvy took some professional risk in attaching his name to the
15 Complaint. (Dkt. 89-3, ¶¶ 10-11.) He also actively monitored Class Counsel, assisted
16 in the preparation of the Complaint, and participated in discovery, enabling the
17 Settlement Class's claims to proceed. (*Id.* ¶¶ 3, 6-7.) His efforts were invaluable in
18 getting this action off the ground and in positioning it for settlement. (Dkt. 85-2,
19 ¶ 11.) And when resolution was discussed, Bouvy actively participated in those
20 negotiations. (Dkt. 89-3, ¶ 6.)
21 Similarly, Class Counsel has worked diligently to ensure the best possible
22 result for the Settlement Class. Class Counsel ably litigated a complicated motion to
23 dismiss, had filed a motion for class certification, and was readying to lay the
24 groundwork for a class trial. Class Counsel also tussled with the Defendants in
25 discovery to ensure that they were building the strongest case they could for the
26
27 [4] The Court previously certified the proposed Settlement Class for settlement
28 purposes. (Dkt. 87, ¶ 3.) No facts have come to light that would cast doubt on the Court's decision to certify the Settlement Class, nor, as explained below, have there been any objections to the Court's order or the Settlement.

Class. (Dkt. 85-2, ¶ 5; Dkt. 56-1, ¶¶ 3-7.) And even after the Settlement was reached, Class Counsel diligently worked to secure detailed Plan participant transactional data to construct the fairest plan of allocation. (Dkt. 81, ¶ 3.) While many excessive-fee settlements calibrate recovery to the amount of assets a class member has in a retirement plan, the instant Settlement calibrates recovery to the amount of recordkeeping fees actually paid. Class Counsel went the extra mile to ensure the fairest possible allocation of the Settlement Fund.

Thus, this factor weighs in favor of final approval.

B. The Settlement was negotiated at arm's length.

Second, the Settlement was negotiated at arm's length. *See* Fed. R. Civ. P. 23(e)(2)(B); *see also Roes, 1-2*, 944 F.3d at 1043 (noting that a district court must apply heightened scrutiny to a pre-certification settlement to ensure no collusion or conflicts of interest).

The clearest evidence of arm's-length negotiation is that the Settlement is a product of a mediation presided over by Magistrate Judge Major, and indeed is the product of a mediator's proposal. *Barbosa v. MediCredit, Inc.*, No. 14-cv-00063, 2015 WL 1966911, at *6 (C.D. Cal. May 1, 2015) ("Settlements reached with the help of a mediator are likely non-collusive."); *Pataky v. Brigantine, Inc.*, No. 17-cv-00352-GPC-AGS, 2018 WL 3020159, at *3 (S.D. Cal. June 18, 2018) ("The parties reached a settlement after extensive negotiations with the assistance of the Honorable Magistrate Judge Schopler's 'mediator's proposal.' In particular, the Court takes note that the parties entered into the agreement only after a second Early Neutral Evaluation. Consequently, this factor weighs strongly in favor of approval.") (internal citations omitted). And even after the parties' agreed to Magistrate Judge Major's proposal, they still wrangled for months over the final details, and Class Counsel invested significant time getting detailed participant data from the third-party Plan administrator, TransAmerica. This is clear evidence that the Settlement was negotiated at arm's length. Furthermore, the Settlement requires, and has received,

sign off from an independent fiduciary whose job it is to look out for the interests of the retirement fund in which Settlement Class Members participate. (Settlement ¶ 2; Exhibit 1.) The independent fiduciary concluded that the terms of the Settlement to be "fair and reasonable" in light of the strengths of the case on the merits and the amount recovered in similar settlements. (Exhibit 1, at 9-10.)

The Settlement also lacks any of the "red flags" the Ninth Circuit has warned district courts to be on guard for. *See In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 947 (9th Cir. 2011). First, Class Counsel are not set to receive a "disproportionate distribution of the settlement." *Id.* (quotations omitted). Class Counsel limited their fee request to 25% of the Settlement, the "benchmark" award in this Circuit, despite a significantly higher lodestar. (Dkt. 89-1, at 5-11.) Class Counsel also are not separately seeking reimbursement of their litigation expenses. (*See* Settlement ¶ 9.1.) Likewise, there is no clear sailing agreement, or provision for a reverter. Indeed, no funds will revert to the Defendants and any uncashed checks will be used to defray administrative fees and expenses of the TIP Plan going forward. (*Id.* ¶ 3.2(f)(i).)

Thus, even under the heightened scrutiny required of pre-certification settlements like this one, it is clear that the Settlement is free from collusion, and was negotiated at arm's-length with the Settlement Class's best interests in mind. This factor therefore favors final approval.

C. The relief provided for the Class is superb in light of the strength of the Settlement Class's case and the risks inherent in continued litigation.

Third, the Settlement secures outstanding relief for the Settlement Class, particularly in light of the stage of the case and the risks that lay ahead. *See* Fed. R. Civ. P. 23(e)(2)(C). As explained in Class Counsel's fee petition, given Class Counsel's estimates of the potential recovery on Bouvy's excessive-fees theory at trial, the Settlement returns between approximately 49% and 63% of the maximum

1 recovery back to Settlement Class Members. (Dkt. 89-2, ¶ 7.) This compares
2 favorably to other excessive-fees settlements. *See Diaz v. BTG Int'l, Inc.*, No. 19-cv-
3 1664-JMY, 2021 WL 2414580, at *7 (E.D. Pa. June 14, 2021) (approving settlement
4 securing approximately 37% of high-end estimate of excessive fees incurred by
5 ERISA plan participants); *Johnson v. Fujitsu Tech. & Bus. of Am., Inc.*, No. 16-cv-
6 03698-NC, 2018 WL 2183253, at *5 (N.D. Cal. May 11, 2018) (approving settlement
7 securing "nearly 40%" of estimated excessive fees); (*see* Exhibit 1, at 9). In real
8 terms what this means is that Settlement Class Members will receive hundreds, and in
9 many cases, thousands of dollars in their retirement accounts.[5]

10 Moreover, this Settlement was reached in the face of substantial risks on the
11 merits. As explained above, Bouvy's claim is that Defendants breached their
12 fiduciary duties to the Linear Technology 401(k) Plan by permitting it to incur
13 unreasonably high recordkeeping fees. This theory is actionable because an ERISA
14 fiduciary's duties include the duty to manager a retirement plan in a "cost-conscious"
15 manner. *Tibble*, 843 F.3d at 1197-98. But although ERISA's fiduciary duties are "the
16 highest known to the law," *Howard v. Shay*, 100 F.3d 1484, 1488 (9th Cir. 1996), this
17 is a still a fact-intensive claim that, experience shows, is not easy to prove. Bouvy's
18 claim regarding excessive recordkeeping fees involves the fiduciary duty of
19 prudence. *See Hughes v. Nw. Univ.*, 142 S. Ct. 737, 742 (2022). The duty of prudence
20 is "context specific." *Id.* (quotations omitted). To demonstrate a breach of the duty of
21 prudence, Bouvy would need to demonstrate a flawed decision-making process. At
22 bottom, the question is whether Defendants considered all of the relevant information
23 before retaining a recordkeeper who charged the rates the Plan ultimately incurred.
24 And to prevail class wide, he would need to show that this decision-making process

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[5] Current participants (approximately three-quarters of the Settlement Class) will receive their distributions automatically into their current retirement accounts. Former participants will receive a check in the mail by default, but had the option to submit the necessary information to receive a direct deposit into their current retirement accounts. 131 Former Plan Participants (approximately 17% of that population) elected to take that option by filing a Rollover Form. (Exhibit 2, ¶ 9.)

was flawed at all times over a six-year period. This would be no mean feat. "[C]ourts have readily determined that fiduciaries who act reasonably—i.e., who appropriately investigate the merits of an investment decision prior to acting—easily clear this bar." *Tatum v. RJR Pension Inv. Comm.*, 761 F.3d 346, 358 (4th Cir. 2014). And even if there is no investigation, or only a brief investigation, a plaintiff cannot prevail without showing that a hypothetical prudent fiduciary *would* have undertaken a more thorough investigation. Plaintiffs alleging claims similar to those alleged by Bouvy here have failed to prove a violation of this duty of prudence in recent cases. *See Wildman v. Am. Century Servs., LLC*, 362 F. Supp. 3d 685 (W.D. Mo. 2019); *Sacerdote v. New York Univ.*, No. 16-cv-6284 (KBF), 2018 WL 3629598 (S.D.N.Y. July 31, 2018). While each case of course turns on its own facts, these decisions demonstrate the difficulty with proving an ERISA fiduciary's breach of their duties.

Bouvy would also need to show damages—that is, that with a better decision-making process from Plan managers, the Plan, and by extension Settlement Class Members, would have expended less on recordkeeping and thus more money would have remained in the Plan and in Settlement Class Members' retirement accounts. *See Brotherston v. Putnam Invs., LLC*, 907 F.3d 17, 32 (1st Cir. 2018); *see id.* at 33 ("ERISA defendants are not liable for damages that the Plan would have suffered even with a prudent fiduciary at the helm."). Such a showing is often attempted by comparing the performance of one plan to the performance of another. *See id.* at 34. But in undertaking this analysis, one must remember that no two retirement plans are the same, so comparators must be selected carefully, utilizing appropriate benchmarks. This task has proven difficult for plaintiffs seeking to demonstrate a failure to manage a plan in a "cost-conscious" manner. At least two similar cases have made it all the way to trial only for plaintiffs to be unable to show damages with sufficient specificity to satisfy the trier of fact. *See Sacerdote*, 328 F. Supp. 3d at 280, 306-07; *Wildman*, 362 F. Supp. 3d at 710; *see also Karpik v. Huntington Bancshares*

Inc., No. 17-cv-1153, 2021 WL 757123, at *4 (S.D. Ohio Feb. 18, 2021) ("It is difficult to measure damages in cases alleging imprudent or otherwise improper investments.") (quotations omitted). Thus, even if Bouvy could show a breach of the duty of prudence, the Settlement Class's claims still may have failed on the issue of damages.

Apart from these significant hurdles on the merits and with respect to damages, any recovery would have taken years to obtain. Assuming the Settlement Class could defeat Defendants' inevitable motion for summary judgment, this case was likely headed for trial. *See Terraza v. Safeway, Inc.*, 241 F. Supp. 3d 1057, 1078 (N.D. Cal. 2017) (noting that "the prudence inquiry is fact intensive" and "rarely will such a determination be appropriate on a motion for summary judgment") (quotations omitted). Trial and trial preparations would have been lengthy in and of themselves, as ERISA trials are notoriously complex. *See Karpik*, 2021 WL 757123, at *4 ("The complexity inherent in class actions is amplified in ERISA class actions. . . . In fact, it is not unusual for ERISA 401(k) cases to extend for a decade or longer before final resolution."). The Class's claims may have also foundered at summary judgment itself. Class Counsel understands that Defendants were prepared to demonstrate, through both lay and expert evidence, that the Plan fiduciaries remained regularly informed about Plan costs, and that decisions about how to compensate the Plan's recordkeeper did not increase net costs. (Dkt. 85-2, ¶ 8.) While Class Counsel is confident they could and would have marshaled competing evidence, the Court may well have determined that there existed no material issues of fact for trial.

Of course, any judgment would be subject to appeal, and even more delay. In this case delay is particularly significant not only because of the time value of money, but also because the claims here are the subject of some disagreement among the Circuits. The Supreme Court recently took a case that presented the question whether allegations that plan managers allowed a retirement plan to incur excessive recordkeeping fees stated a claim under ERISA, but resolved the case on narrow

grounds without addressing the split. *See Hughes*, 142 S. Ct. at 742. The Supreme Court has therefore expressed a willingness to accept appeals concerning this type of ERISA claim, so any delay raises the chance of an adverse change in law that might narrow or vitiate the Settlement Class's claims. An immediate recovery now through this Settlement is therefore far preferable to the chance at a trial victory years from now.

Class Counsel's support of the Settlement can also be considered and also favors approval. *See Staton*, 327 F.3d at 959. Class Counsel has extensive experience litigating complex class actions, and it is their considered judgment that, given the complexity of the case, the time it would have taken to secure a judgment, and the risks faced by the Class in any trial, that the instant settlement is in the Settlement Class's best interests. (Dkt. 89-2, ¶ 7.)

And Class Counsel were sufficiently informed to make that judgment. The parties filed lengthy briefs at the motion to dismiss stage, exhaustively evaluating existing precedent and applying it to the facts of this case. (Dkts. 23, 24, 26.) The parties also analyzed the impact of brand-new Supreme Court precedent on this case (Dkts. 28, 30, 31), and Class Counsel stayed abreast of legal developments at the Supreme Court as the case progressed. Thus, Class Counsel was fully informed about the applicable law.

And although discovery had not closed when this Settlement was reached, Class Counsel also was thoroughly familiar with the facts of this case. Class Counsel reviewed nearly 48,000 pages of discovery prior to reaching the Settlement. (Dkt. 89-2, ¶ 4.) They were therefore fully informed about the strengths and weaknesses of the Settlement Class's case.

This factor therefore weighs in favor of final approval.

D. The Settlement treats class members equitably relative to each other.

Finally, the Settlement treats Settlement Class Members equitably relative to each other. *See* Fed. R. Civ. P. 23(e)(2)(D). Principally, the Settlement calls for the distribution of the common fund to Settlement Class Members in proportion to the fees they paid in excess of a reasonable administrative fee. This is the fairest, most equitable way to distribute the Settlement Fund.

And while the Settlement does require that a Settlement Class Member's share of the Settlement be more than $10 in order to receive a distribution (Settlement ¶ 3.2(c)(v)), courts have recognized that avoiding such de minimis distributions is appropriate. *See, e.g.*, *City of Livonia Employees' Ret. Sys. v. Wyeth*, No. 07-cv-10329 RJS, 2013 WL 4399015, at *2 (S.D.N.Y. Aug. 7, 2013) (noting that courts have approved payment thresholds as high as $50); (*see* Exhibit 1, at 7 (deeming the plan of allocation, including the *de minimis* threshold for payment, to be "cost-effective and fair to Class Members")). The problem with such *de minimis* payments is that the cost to administer them outweighs the payment itself, and these excessive administrative expenses are incurred by the class as a whole. *See Sims v. BB&T Corp.*, No. 15-cv-732, 2019 WL 1995314, at *4 (M.D.N.C. May 6, 2019). To foster more efficient settlement administration that benefits the Settlement Class as a whole, some payment threshold is required. Thus, the *de minimis* payment threshold does not evidence preferential treatment of any portion of the Class. Class Counsel estimates that only around 3% of the Settlement Class will not receive a distribution as a result of this *de minimis* threshold.

Thus, this factor favors final approval as well.

E. The reaction of the Settlement Class to the Settlement favors approval.

The only remaining factor for consideration from either Rule 23 or Ninth Circuit caselaw is the reaction of the Settlement Class to the Settlement. *See Staton*, 327 F.3d at 959. "The absence of a large number of objections to a proposed class

action settlement raises a strong presumption that the terms of the settlement are favorable to the class members." *Hartless v. Clorox Co.*, 273 F.R.D. 630, 641 (S.D. Cal. 2011). The reaction here can only be described as positive. As of the objection deadline of June 15, 2022, no objections to the Settlement have been received. This exceedingly positive response to the Settlement favors approval. *See id.* at 637, 641 (3 objections out of class of "millions" "weigh[ed] in favor of granting final approval"); *In re Immune Response Securities Litig.*, 497 F. Supp. 2d 1166, 1174 (S.D. Cal. 2007) (similar, zero objections).

CONCLUSION

The Court should therefore grant final approval to the Settlement and approve distribution of the Settlement funds to Settlement Class Members.

Respectfully submitted,

MICHAEL BOUVY, individually and on behalf of all others similarly situated,

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