UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

WILLIAM J. GRUBER, individually, and as a representative of a Class of Participants and Beneficiaries of the Grifols Employee Retirement Savings Plan,

Plaintiff,

v.

GRIFOLS SHARED SERVICES NORTH AMERICA, INC., ET AL.,

Defendants.

Case No. 2:22-cv-02621-SPG-AS

ORDER GRANTING, IN PART, AND DENYING, IN PART, PLAINTIFF'S MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT [ECF NO. 66]

Before the Court is Plaintiff William J. Gruber's unopposed motion for preliminary approval of class action settlement. (ECF No. 66). Having considered the parties' submissions, oral argument, the relevant law, and the record in this case, the Court GRANTS Plaintiff's Motion.

I. BACKGROUND

A. Plaintiff's Allegations

Plaintiff makes the following allegations in the Complaint:

Defendant Grifols provides employees, including Plaintiff, with a Section 401(k) "defined contribution" pension plan ("Plan"), meaning that the value of participants' investments is "determined by the market performance of employee and employer contributions, less expenses." (Compl. ¶ 29). As administrator of this Plan, Defendant was and is a fiduciary with responsibilities and discretionary authority to control the operation, management, and administration of the Plan. (*Id.* ¶ 27). In 2020, the Plan had approximately $1,035,952,055 in assets entrusted to Defendant's care as a fiduciary. (*Id.* ¶ 30). However, while this large amount of assets provided Defendant bargaining power regarding fees and expenses in managing the plan, Defendant did not properly exercise this bargaining power. (*Id.* ¶ 31). Instead, when hiring service providers to provide recordkeeping services for the plan ("RKA services"), Defendant allowed the RKA fees to be higher than they should have been, resulting in lost Plan income to participants. (*Id.* ¶¶ 50–63). Similarly, when contracting with Fidelity for the provision of managed account services for the Plan, Defendant allowed plan participants to pay excessive fees, rather than soliciting competing bids and periodically negotiating these managed account service fee rates down. (*Id.* ¶¶ 70—88). This resulted in a breach of fiduciary duty by Defendant, and Plan participants' losses of retirement account funds. (*Id.* ¶ 88).

B. The Settlement Agreement

Settlement discussions in this case began relatively early, shortly after discovery had begun in earnest. (ECF No. 67 ("Secunda Decl.") ¶¶ 8–11). The settlement efforts included a private mediation with Robert Meyers, of JAMS, on June 7, 2023. (*Id.* ¶ 10). Meyers was chosen due to his experience with ERISA mediations. (*Id.*); *see also* (ECF No. 67-6). The parties arrived at the current proposed class settlement on the date of the mediation with Meyers, after exchanging several offers and counteroffers. (Secunda Decl. ¶ 11). The parties reduced their agreement to a signed Term Sheet on June 21, 2023. (Mot.

at 8). The parties have provided the Court with a signed settlement agreement dated August 29, 2023. (ECF No. 67-1) ("Settlement Agreement"). The Settlement Agreement includes the following key provisions:

1. Class Definition

The Settlement Agreements defines the putative class as "[a]ll participants and beneficiaries of the Grifols Employee Retirement Savings Plan (excluding the Defendants or any participant/beneficiary who is a fiduciary to the Plan) during the Class Period." (Settlement Agreement § E). The Settlement Agreement goes on to define the "Class Period" as "April 19, 2016, through the date of preliminary approval of the settlement." (*Id.*).

2. Requested Relief

The proposed settlement amount is $1,475,000, which the parties represent to the Court amounts to approximately 20% of the total estimated losses. (Settlement Agreement ¶ 12). The settlement proposes that the total settlement amount be allocated among eligible class members on a pro rata basis, and states that current participants shall have their plan accounts automatically credited with their allocation. (*Id.* ¶ 31). Former participants will receive their allocation by check. (*Id.* ¶ 32).

3. Attorneys' Fees and Costs

The putative class will be represented by Walcheske & Luzi, LLC and Creitz & Serebin, LLP ("Class Counsel"). (Settlement Agreement ¶ 1). Defendant agrees not to oppose Class Counsel's application for attorney's fees, provided the requested amount is not higher than one-third, or 33.33%, of the Settlement Amount. (*Id.* ¶ 22). This amounts to an outer limit of $491,667 in attorneys' fees, and $50,000 in costs. (*Id.*). However, the parties state that this amount should be decided by the Court in a separate motion to be filed by Class Counsel no later than twenty-eight calendar days before the Court's final fairness hearing. (*Id.* ¶ 25). The total amount of attorneys' fees and costs, the parties agree, should come out of the Settlement Fund. (*Id.*). The parties also agree that named Plaintiff may apply to the Court for a contribution award not to exceed $10,000. (*Id.* ¶ 26).

4. Release of Claims

The Settlement Agreement, as originally proposed, required class members to release the following claims:

> any and all claims of any nature whatsoever concerning the Plan or any and all claims concerning the Plan (including claims for any and all losses, damages, unjust enrichment, attorneys' fees, disgorgement of fees, litigation costs, injunction, declaration, contribution, indemnification or any other type or nature of legal or equitable relief), including, without limitation, all claims asserted in the Complaint for losses suffered by the Plan, or by Plan participants or beneficiaries, whether accrued or not, whether already acquired or acquired in the future, whether known or unknown, in law or equity, brought by way of demand, complaint, cross-claim, counterclaim, third-party claim or otherwise, arising out of any or all of the acts, omissions, facts, matters, transactions or occurrences that are, were, or could have been alleged, asserted, or set forth in the Complaint, so long as they are related to any of the allegations or claims asserted in the Complaint or would be barred by principles of res judicata had the claims asserted in the Complaint been fully litigated and resulted in a final judgment or order, including but not limited to claims that Defendants and/or any fiduciaries of the Plan breached ERISA fiduciary duties during the Class Period or engaged in any prohibited transactions in connection with: (a) the selection, retention and/or monitoring of the investment options available in the Plan, or any of the investments referenced in the Complaint; (b) the appointment and/or monitoring of the Plan's fiduciaries and service providers; (c) the recordkeeping fees, managed account services fees, administrative fees, and expenses incurred by the Plan; (d) the prudence and loyalty of the Plan's fiduciaries; and/or (e) any claims that Defendants, or any other fiduciary or service provider to the Plan,

engaged in any transaction(s) prohibited by ERISA §§ 406-408, 29 U.S.C. 1106-1108, in connection with the operative facts set forth in the Complaint. (*Id.* ¶ 7). However, after the hearing on the matter, in which the Court expressed some concern about the broad scope of the release, the parties filed an amended release which allows for release of "any and all actual or potential claims . . . that: [a]re based on the facts alleged in the Complaint of the Action . . .; [w]ould be barred by the principles of res judiciata or collateral estoppel had the claims asserted in the operative complaint of the Class Action been fully litigated and resulted in a Final Judgment; [r]elate to the direction to calculate, the calculation of, and/or the method or manner of allocation of the Settlement Fund . . .; or [c]onstitute individual claims asserted or that could have been asserted" in the Action. (ECF No. 73-1).

C. Procedural History

Plaintiff commenced this case on April 19, 2022. (ECF No. 1) ("Compl."). Defendant filed an Answer on June 10, 2022. (ECF No. 36). On December 16, 2022, pursuant to stipulation by the parties, the Court entered a briefing schedule for any class certification motion to be filed by March 16, 2023. (ECF No. 57). However, on March 14, 2023, instead of filing a motion for class certification, the parties filed a joint stipulation requesting the case be stayed pending voluntary mediation. (ECF No. 62). The Court granted the stay to allow the parties to voluntarily engage in mediation. (ECF No. 63). The parties then settled during mediation, and the instant Motion for Preliminary Approval of the Settlement followed. (ECF No. 66).

II. LEGAL STANDARD

Parties seeking class certification for settlement purposes must satisfy the requirements of Federal Rule of Civil Procedure 23. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997). In considering such a request, the court must give the Rule 23 certification factors "undiluted, even heightened, attention in the settlement context." *Id.* Once a class is certified, Rule 23(e) provides that "[t]he claims, issues, or defenses of a certified class may be settled . . . only with the court's approval." Fed. R. Civ. P. 23(e).

"The purpose of Rule 23(e) is to protect the unnamed members of the class from unjust or unfair settlements affecting their rights." *In re Syncor ERISA Litig.*, 516 F.3d 1095, 1100 (9th Cir. 2008). Accordingly, before approving a class action settlement under Rule 23, a district court must conclude that the settlement is "fundamentally fair, adequate, and reasonable." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998). In the Ninth Circuit there is a "strong judicial policy that favors settlements, particularly where complex class action litigation is concerned." *Allen v. Bedolla*, 787 F.3d 1218, 1223 (9th Cir. 2015) (quoting *In re Syncor*, 516 F.3d at 1101).

Court approval of a class action settlement requires a two-step process—a preliminary approval followed by a later final approval. *See Tijero v. Aaron Bros., Inc.*, No. C 10–01089 SBA, 2013 WL 60464, *6 (N.D. Cal. Jan. 2, 2013) ("The decision of whether to approve a proposed class action settlement entails a two-step process."); *West v. Circle K Stores, Inc.*, No. CIV. S-04-0438 WBS GGH, 2006 WL 1652598, *2 (E.D. Cal. June 13, 2006) ("[A]pproval of a class action settlement takes place in two stages."). At the preliminary approval stage, the court "must make a preliminary determination on the fairness, reasonableness, and adequacy of the settlement terms." Fed. R. Civ. P. 23(e). However, the "settlement need only be *potentially* fair, as the Court will make a final determination of its adequacy at the hearing on Final Approval." *Acosta v. Trans Union, LLC*, 243 F.R.D. 377, 386 (C.D. Cal. 2007) (emphasis in original).

III. CONDITIONAL CLASS CERTIFICATION

The parties seek conditional certification of the settlement class pursuant to Rule 23. For the reasons stated below, the Court finds that all of Rule 23's factors have been satisfied and thereby conditionally certifies Plaintiff's proposed class for purposes of settlement.

A. Numerosity

A class satisfies the prerequisite of numerosity if it is so large that joinder of all class members is impracticable. *Hanlon*, 150 F.3d at 1019. To be impracticable, joinder must be difficult or inconvenient, but need not be impossible. *Keegan v. Am. Honda Motor Co.*, 284 F.R.D. 504, 522 (C.D. Cal. 2012). Although there "is no numerical cutoff for sufficient

numerosity," generally 40 or more members will satisfy the numerosity requirement. *Woodard v. Labrada*, No. EDCV 16-00189 JGB (SPx), 2019 WL 4509301, at *4 (C.D. Cal. Apr. 23, 2019).

Here, Plaintiff estimates the number of class members exceeds 70,000, with approximately 10,000 eligible for payout under the Settlement. (Mot. at 15–16). Although Plaintiff does not provide the exact number of people who so qualify, the Court finds that "general knowledge and common sense indicate that [the class] is large." *Inland Empire-Immigrant Youth Collective v. Nielsen*, No. EDCV 17–2048 PSG (SHKx), 2018 WL 1061408, at *7 (C.D. Cal. Feb. 26, 2018). As such, numerosity is satisfied.

B. Commonality

Plaintiff's claims meet the commonality requirement when they "depend upon a common contention . . . capable of classwide resolution—which means that a 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. v. Dukes*, 564 U.S. 338, 350 (2011). "So long as there is even a single common question, a would-be class can satisfy the commonality requirement of Rule 23(a)(2)." *Parsons v. Ryan*, 754 F.3d 657, 675 (9th Cir. 2014) (internal quotation marks omitted). Thus, where the circumstances of class members "vary but retain a common core of factual or legal issues with the rest of the class, commonality exists." *Id.* (internal quotation marks omitted).

This case presents sufficiently common issues of law and fact. The questions presented here revolve around the alleged breach of fiduciary duties by Defendant to the Plan's members. Specifically, the Complaint alleges that Defendant breached its fiduciary duties under ERISA by allowing excessive RKA fees and managed account fees. These questions have repeatedly been found sufficiently common in ERISA actions in this District. *See e.g.*, *Munro v. Univ. of Southern Cal.*, No 2:16-cv-06191-VAP-Ex, 2019 WL 7842551, at *4 (C.D. Cal. Dec. 20, 2019) (finding commonality satisfied in ERISA class action dealing with common questions to include whether defendant breached fiduciary duties); *see also Harris v. Amgen, Inc.*, No. CV 07-5442 PSG (PLAx), 2016 WL 7626161,

at *3 (C.D. Cal. Nov. 29, 2016) (citing *Dukes*, 131 S. Ct. at 2556–57) (finding sufficient commonality where ERISA action would require court to determine various common questions, to include whether defendant was a fiduciary, whether fiduciary duties were breached, and whether participants were injured); *In re Northrop Grumman Corp. ERISA Litig.*, No. 06-CV-06213-MMM-JCx, 2011 WL 3505264, at *8 (C.D. Cal. Mar. 29, 2011) (collecting cases).

C. Typicality

Rule 23(a)(3) requires that the claims or defenses of the class representatives be typical of the claims or defenses of the class they seek to represent. Fed. R. Civ. P. 23(a)(3). The purpose of the typicality requirement is to "ensure[] that the interest of the class representative 'aligns with the interests of the class.'" *Just Film, Inc. v. Bruono*, 847 F.3d 1108, 1116 (9th Cir. 2017) (quoting *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 plaintiff, and whether other class members have been injured by the same course of conduct." *Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168, 1175 (9th Cir. 2010) (quoting *Hanon*, 976 F.2d at 508). "A court should not certify a class if 'there is a danger that absent class members will suffer if their representative is preoccupied with defenses unique to it.'" *Just Film*, 847 F.3d at 1116 (quoting *Hanlon*, 976 F.2d at 508).

Here, Plaintiff's claims are typical of the class because he possesses an active account balance in Defendant's Employee Retirement Savings Plan, the management of which gives rise to the claims alleged in this action. (ECF No. 68 ("Gruber Decl.") ¶ 1). The Complaint does not allege that he suffered any kind of individual, or different injury. Instead, it alleges at a high level that Plaintiff, like the rest of the class, possessed funds in Defendant's Plan that were mismanaged, resulting in payment of higher fees. *See* (Compl. ¶¶ 5–22). Thus, Plaintiff satisfies the typicality requirement.

D. Adequacy of Representation

Rule 23(a)(4) requires the Court to determine if the proposed class representatives and proposed class counsel will fairly and adequately protect the interests of the entire class. Fed. R. Civ. P. 23(a)(4). Class representatives are adequate if they have no conflicts of interest with the potential class and will prosecute the action vigorously on behalf of the class. *Hanlon*, 150 F.3d at 1020.

Here, Plaintiff seeks the same relief as members of the proposed class and has no apparent conflicts of interest with the putative class members. In addition, Class Counsel has extensive experience with nationwide class actions, including ERISA actions, and has the resources to represent the class effectively. (Mot. at 11; Secunda Decl. ¶¶ 17–35). Accordingly, Plaintiff has satisfied the adequacy requirement.

E. Rule 23(b)(1)

"In addition to satisfying Rule 23(a)'s prerequisites, parties seeking class certification must show that the action is maintainable under Rule 23(b)(1), (2), or (3)." *Amchem*, 521 U.S. at 614. Plaintiff seeks to certify its proposed class under Rule 23(b)(1). (Mot. at 16). Rule 23(b)(1) provides for certification of a class where:

> Prosecuting 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 or 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 interest[s].

Fed. R. Civ. P. 23(b)(1). Therefore, Rule 23(b)(1)(A) analyzes possible prejudice to a defendant while 23(b)(1)(B) analyzes possible prejudice to the putative class members. *See Kanawi v. Bechtel Corp.*, 254 F.R.D. 102, 111 (N.D. Cal. 2008).

Here, Plaintiff satisfies both possible routes to certification under Rule 23(b)(1). First, as to Rule 23(b)(1)(A), Plaintiff alleges that there are tens of thousands of individuals who would potentially be members of Defendant's Plan. This means that there are thousands of potential plaintiffs who could individually file suit for damages arising from the same alleged conduct that is described in the Complaint. Therefore, this action presents a real risk of "inconsistent and varying adjudications," that could result in "incompatible standards of conduct" for Defendant. *See Harris*, 2016 WL 7626161, at *4 (internal citation omitted). Similarly, as to Rule 23(b)(1)(B), ERISA law generally requires all claims to be brought in a representative capacity on behalf of the entire class, meaning that other class members' or other parties' interests are generally represented by those of the named plaintiffs. *See id.*; *see also Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 140 (1985); *Ortiz v. Fibreboard*, 527 U.S. 815, 833 (1999).

Thus, based on the foregoing, the Court conditionally certifies the class for purposes of settlement under Rule 23(b)(1). Similarly, the Court finds that Plaintiffs' counsel has thus far demonstrated their ability to handle this matter competently as class counsel and appoints them as such. Finally, as described above, the Court finds Plaintiff adequately representative of the class, and therefore appoints Plaintiff as class representative.

IV. THE PROPOSED SETTLEMENT AGREEMENT

At the preliminary approval phase, the Court need only decide whether the settlement is *potentially* fair. *See Acosta*, 243 F.R.D. at 386. Once the Court approves the settlement and the class members have been notified and provided an opportunity to object, the Court will hold a formal fairness hearing to determine whether the Settlement is fair, reasonable, and adequate. *See* Manual for Complex Litigation (Fourth) §§ 21.632-34 (2012). "A full fairness analysis is unnecessary until the Court conducts the final fairness hearing." *Hollis v. Union Pac. R.R. Co.*, No. EDCV 17-2449 JGB (SHKx), 2018 WL 6273014, at *5 (C.D. Cal. Mar. 6, 2018) (citing *Campbell v. First Investors Corp.*, No. 11-CV-0548 BEN WMC, 2012 WL 5373423, at *4 (S.D. Cal. Oct. 29, 2012)). "Although closer scrutiny is reserved for the final approval hearing, the showing at the preliminary

approval stage – given the amount of time, money and resources involved in, for example, sending out new class notices – should be good enough for final approval." *Wright v. Renzenberger, Inc*., No. CV 13-6642 FMO (AGRx), 2019 WL 8163480, at *3 (C.D. Cal. Nov. 25, 2019) (internal citations and alterations omitted). "At this stage, the court may grant preliminary approval of a settlement and direct notice to the class if the settlement: (1) appears to be the product of serious, informed, non-collusive negotiations; (2) has no obvious deficiencies; (3) does not improperly grant preferential treatment to class representatives or segments of the class; and (4) falls within the range of possible approval." *Spann v. J.C. Penney Corp*., 314 F.R.D. 312, 327 (C.D. Cal. 2016) (internal quotation marks omitted)

A. The Settlement Agreement Negotiations

"This circuit has long deferred to the private consensual decision of the parties." *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 965 (9th Cir. 2009). The Ninth Circuit has "emphasized" that "the 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." *Id*. (internal quotation marks omitted). When the settlement is "the product of an arms-length, non-collusive, negotiated resolution[,]" courts afford the parties the presumption that the settlement is fair and reasonable. *Id*.; *see Spann*, 314 F.R.D. at 324 ("A presumption of correctness is said to attach to a class settlement reached in arm's-length negotiations between experienced capable counsel after meaningful discovery." (internal citation omitted)).

Here, the Settlement Agreement was reached after arms-length negotiations between counsel, including at a full day mediation, which resulted in the settlement now presented to the Court. (Mot. at 12; Secunda Decl. ¶¶ 9–11). This suggests the negotiations were "conducted in a manner that would protect and further the class interests." Fed. R. Civ. Pro. 23(e), 2018 Advisory Committee Notes; *see also Kaupelis v. Harbor Freight Tools*,

No. SACV 19-1203 JVS (DFMx), 2021 WL 4816833, at *9 (C.D. Cal. Aug. 11, 2021) (finding the Settlement to have been negotiated at arm's length where it was the result of a mediation session). Based on the Court's review of the underlying record, the parties had a sound basis for measuring the terms of the settlement against the risks of continued litigation, and there is no evidence that the settlement was "the product of fraud or overreaching by, or collusion between, the negotiating parties[.]" *Rodriguez*, 563 F.3d at 965 (quoting *Officers for Justice v. Civil Serv. Comm'n of S.F.*, 688 F.2d 615, 625 (9th Cir. 1982)). Accordingly, the Court finds the Settlement Agreement resulted from sufficiently serious, informed, non-collusive negotiations.

B. Release of Claims

The Court next considers whether the Settlement Agreement contains an overly broad release of liability. *See* 4 Newberg on Class Actions § 13:15, at p. 326–27 (5th ed. 2014) ("Beyond the value of the settlement, courts have rejected preliminary approval when the proposed settlement contains obvious substantive defects such as ... overly broad releases of liability."); *Hadley v. Kellogg Sales Co.*, No. 16-CV-04955-LHK, 2020 WL 836673, at *2 (N.D. Cal. Feb. 20, 2020) (finding the issue of whether a release is overly broad to be "sufficient to deny the motion for preliminary approval").

"A settlement agreement may preclude a party from bringing a related claim in the future 'even though the claim was not presented and might not have been presentable in the class action,' *but only* where the released claim is 'based on the identical factual predicate as that underlying the claims in the settled class action.'" *Hesse v. Sprint Corp.*, 598 F.3d 581, 590 (9th Cir. 2010) (quoting *Williams v. Boeing Co.*, 517 F.3d 1120, 1133 (9th Cir. 2008) (emphasis added)). "Put another way, a release of claims that 'go[es] beyond the scope of the allegations of the operative complaint' is impermissible." *Lovig v. Sears, Roebuck & Co.*, No. EDCV 11-00756-CJC, 2014 WL 8252583, at *2 (C.D. Cal. Dec. 9, 2014) (quoting *Willner v. Manpower Inc.*, No. 11–CV–02846–JST, 2014 WL 4370694, at *7 (N.D. Cal. Sept. 3, 2014)). Therefore, "[d]istrict courts in this Circuit have declined to approve settlement agreements where such agreements would release claims

based on different facts than those alleged in the litigation at issue." *Chavez v. PVH Corp.*, No. 13–CV–01797–LHK, 2015 WL 581382, at *5 (N.D. Cal. Feb. 11, 2015).

Here, the parties' Settlement Agreement initially proposed a broad release, involving:

> any and all claims *of any nature whatsoever* concerning the Plan or any and all claims concerning the Plan (including claims for any and all losses, damages, unjust enrichment, attorneys' fees, disgorgement of fees, litigation costs, injunction, declaration, contribution, indemnification or any other type or nature of legal or equitable relief), *including, without limitation*, all claims asserted in the Complaint for losses suffered by the Plan, or by Plan participants or beneficiaries, whether accrued or not, whether already acquired or acquired in the future, whether known or unknown, in law or equity, brought by way of demand, complaint, cross-claim, counterclaim, third-party claim or otherwise, arising out of any or all of the acts, omissions, facts, matters, transactions or occurrences that are, were, or could have been alleged, asserted, or set forth in the Complaint, so long as they are related to any of the allegations or claims asserted in the Complaint or would be barred by principles of *res judicata* had the claims asserted in the Complaint been fully litigated and resulted in a final judgment or order, including but not limited to claims that Defendants and/or any fiduciaries of the Plan breached ERISA fiduciary duties during the Class Period or engaged in any prohibited transactions in connection with: (a) the selection, retention and/or monitoring of the investment options available in the Plan, or any of the investments referenced in the Complaint; (b) the appointment and/or monitoring of the Plan's fiduciaries and service providers; (c) the recordkeeping fees, managed account services fees, administrative fees, and expenses incurred by the Plan; (d) the prudence and loyalty of the Plan's fiduciaries; and/or (e) any claims that Defendants, or any other fiduciary or service provider to the Plan,

engaged in any transaction(s) prohibited by ERISA §§ 406-408, 29 U.S.C. 1106-1108, in connection with the operative facts set forth in the Complaint. (Settlement Agreement ¶ 7) (emphasis added). As the Court noted during the October 11, 2023, hearing, the use of the phrase "any and all claims of any nature whatsoever" followed by "including, without limitation, all claims asserted in the Complaint" ran the risk of doing exactly what the Ninth Circuit has held it cannot—releasing more claims than those based on the identical factual predicate. *See, e.g.*, *Hadley*, 2020 WL 836673, at *2 (finding a release impermissibly broad where it precluded all claims "arising out of or related in any way to the transactions, occurrences, events, behaviors, conduct, practices, and policies alleged in the Actions"); *Rivera v. W. Express Inc.*, No. EDCV 18-1633 JGB (SHKx), 2020 WL 5167715, at *8 (C.D. Cal. May 1, 2020) (finding a release overbroad where it "covers all claims that are 'related to' claims pled in the [complaint], which could be read to include claims that could not have been asserted in the [complaint] but have some logical relationship to claims asserted in the [complaint]").

However, following oral argument and discussion with the Court regarding the scope of the release, the parties filed a notice of amended settlement agreement, which specifically clarified and narrowed the release language. The clause now allows for release of "any and all actual or potential claims . . . that: [a]re based on the facts alleged in the Complaint of the Action . . .; [w]ould be barred by the principles of res judiciata or collateral estoppel had the claims asserted in the operative complaint of the Class Action been fully litigated and resulted in a Final Judgment; [r]elate to the direction to calculate, the calculation of, and/or the method or manner of allocation of the Settlement Fund . . .; or [c]onstitute individual claims asserted or that could have been asserted" in the Action. (ECF No. 73-1). This modification sufficiently tailors the release to bring it within the Ninth Circuit's guidance.

C. Adequacy of the Relief

In assessing the consideration class members receive out of a class action settlement, "[i]t is the complete package taken as a whole, rather than the individual component parts,

that must be examined for overall fairness." *Officers for Justice*, 688 F.2d at 628. Therefore, a proposed settlement may be acceptable even if it amounts to a fraction of the potential recovery that might be available to class members at trial. *See Linney v. Cellular Alaska Partnership*, 151 F.3d 1234, 1242 (9th Cir. 1998) (internal citation omitted).

Here, under the settlement, Defendant will contribute $1.45 million to a common settlement fund. (Settlement Agreement ¶ 12). This amount represents approximately 20% of the total estimated losses based on the pleadings. (Mot. at 13). Furthermore, the parties have proposed a detailed plan for disbursement of funds. First, the selected Settlement Administrator will calculate the specific amounts payable to each class member and will make direct deposits into the accounts of class members with active accounts. (Settlement Agreement ¶ 30–31). Likewise, the selected Administrator will send checks to those class members who no longer have active accounts at the time of the distribution, without any need for those class members to file a claim. (*Id.* ¶ 32). If checks are not cashed, the unclaimed funds will revert back to the Plan as a whole, to help defray administrative expenses. (ECF No 67-3 at 4). This method of distribution and total monetary amount, while representing a fraction of the potential relief to be achieved at trial, is sufficient to withstand preliminary approval, particularly in light of the risks of continuing litigation. The parties represent that because the suit was still in its early stages at the time of settlement, Plaintiff would still have faced risks of a summary judgment ruling in Defendant's favor or even a long appeal process prior to disbursement of any funds. (Mot. at 13). Overall then, the settlement amount and the plan for its distribution are sufficiently fair, particularly in light of ongoing litigation risks, to weigh in favor of granting preliminary approval.

D. Attorney's Fees and Incentive Awards

When considering motions for preliminary approval of class settlements, courts are wary of attorneys' fees awards that demonstrate too great a recovery for counsel, thereby indicating potential collusion. *See Rodriguez*, 563 F.3d at 965. In considering the proposed award of attorney's fees, the Court scrutinizes 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 an agreed-upon attorney's fee; and (3) when the agreement contains a 'kicker' or 'reverter' clause that returns unawarded fees to the defendant, rather than the class." *Briseno v. Henderson*, 998 F.3d 1014, 1023 (9th Cir. 2021) (internal quotation marks and alterations omitted). Likewise, Courts are careful that compensation to class representatives for work undertaken on behalf of a class are "fair and typical." *See In re Online DVD-Rental Antitrust Litig.*, 779 F.3d at 943.

Here, the parties agreed that Defendant would "take no position directly or indirectly" on Class Counsel's future application for attorneys' fees and expenses, provided that the fee request was not greater than one-third of the total settlement amount. (Settlement Agreement ¶ 22). 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. *See Hanlon*, 150 F.3d at 1029 ("This circuit has established 25% of the common fund as a benchmark award for attorney fees."). Nevertheless, at this preliminary approval stage, the Court finds that Plaintiffs' requested fees are sufficiently reasonable. *See Campos v. Converse, Inc.*, No. EDCV 20-1576 JGB (SPx), 2022 WL 1843223, at *10 (C.D. Cal. Apr. 21, 2022) (finding an attorneys' fees request for one-third of the settlement amount reasonable at the preliminary approval stage, subject to further scrutiny at the final stage). However, the 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.

E. Equitable Treatment Among Class Members

"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(e), 2018 Advisory Committee Notes. As

evidenced by the Settlement Agreement's Plan of Allocation, members of the Class are provided recovery "on a *pro rata* basis, with no preferential treatment for the Class Representatives or any segment of the Settlement Class." (Mot. at 28). The calculation method provided by the Plan of Allocation is the same for each class member. (Settlement Agreement, Ex. B § 1.5). Accordingly, because the proposed settlement treats all class members equally, this factor weighs in favor of approval.

F. Notice

When reviewing settlements in Rule 23(b)(3) class actions, "the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B). Individual notice must be sent to all class members "whose names and addresses may be ascertained through reasonable effort." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173 (1974). District courts have "broad power and discretion" to determine the contours of appropriate class notice. *See Reiter v. Sonotone Corp.*, 442 U.S. 330, 344 (1979).

The proposed Settlement Notice describes the nature of the action and claims brought by Plaintiffs. (Secunda Decl., Ex. 2). The Notice also explains who qualifies as a member of the class and how a member can either recover under the settlement or file an objection to the Settlement Agreement. (*Id.*). The Notice makes clear how the funds can be obtained, depending on whether a class member has an active Plan account. (*Id.* at 3). Additionally, the Settlement Administrator will mail settlement notices individually to the last known address of each class member, which "constitutes the best practicable notice under the circumstances." *Trujillo v. UnitedHealth Grp. Inc.*, 5:17-cv-2547-JFW (KKx), 2019 WL 13240414, at *2 (C.D. Cal. July 19. 2019). The Notice also references that the Administrator will set up a Settlement Website and a toll-free number to provide class members with further information and locations to ask questions. (Secunda Decl., Ex. 2). Overall, for preliminary approval purposes, the proposed Settlement Notice and plan of notice sufficiently comport with due process.

V. CONCLUSION

For all the foregoing reasons, the Court GRANTS Plaintiffs' motion to (1) conditionally certify the class as defined in the Settlement Agreement; (2) appoint Plaintiff William J. Gruber as class representative; (3) appoint Creitz & Serebin LLP and Walcheske & Luzi, LLC as class counsel; (4) appoints Analytics Consulting LLC as the Settlement Administrator; and (4) preliminarily approve the proposed Settlement Agreement, including the Notice Plan and Plan of Allocation.

The hearing date for the Final Fairness Hearing is hereby set for Wednesday, March 13, 2024, at 1:30 p.m. in Courtroom 5C of the United States District Court for the Central District of California, First Street Courthouse, 350 West 1st Street, Los Angeles, California 90012.

IT IS SO ORDERED.

DATED: November 2, 2023

HON. SHERILYN PEACE GARNETT
UNITED STATES DISTRICT JUDGE