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23 **UNITED STATES DISTRICT COURT**
24 **NORTHERN DISTRICT OF CALIFORNIA**
25 **SAN FRANCISCO/OAKLAND DIVISION**

26 CAROL FOSTER and THEO FOREMAN,
27 on behalf of themselves, individually, and on
28 behalf of all others similarly situated,

Plaintiffs,

v.

ADAMS AND ASSOCIATES, INC., ROY
A. ADAMS, LESLIE G. ADAMS, DANIEL
B. NOREM, JOY CURRY NOREM and THE
DANIEL NOREM REVOCABLE TRUST
DATED JANUARY 9, 2002,

Defendants.

Case No. 18-cv-02723-JSC

**PLAINTIFFS’ NOTICE OF MOTION
AND MOTION FOR PRELIMINARY
APPROVAL OF SETTLEMENT**

Date: November 4, 2021
Time: 9:00 a.m.
Courtroom F, 15th Floor
Honorable Jacqueline Scott Corley

1 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

2 PLEASE TAKE NOTICE THAT on November 4, 2021 at 9:00 a.m., in Courtroom F,
3 15th Floor of the San Francisco Division of the United States District Court, Northern District of
4 California, 450 Golden Gate Avenue, San Francisco, California, Plaintiffs Carol Foster and Theo
5 Foreman will move, and hereby do move, the Court to enter an order under Rule 23 of the
6 Federal Rules of Civil Procedure:

7 1. Preliminarily approving the Settlement Agreement between Plaintiffs and
8 Defendants as fair, reasonable, and adequate under Rule 23(e) of the Federal Rules of Civil
9 Procedure;

10 2. Modifying the definition of the Class previously certified by the Court (ECF Nos.
11 89 & 94) to include an end date of December 31, 2020 as follows:

12 All participants of the Adams and Associates ESOP from October 25, 2012 to
13 December 31, 2020 who vested under the terms of the Plan and those participants'
14 beneficiaries.

15 Excluded from the Class are Defendants and their immediate family, any
16 fiduciary of the Plan; the officers and directors of Adams and Associates or of any
17 entity in which a Defendant has a controlling interest; and legal representatives,
18 successors, and assigns of any such excluded persons.

19 3. Approving the proposed Class Settlement Notice as to form and content and the
20 plan for dissemination of notice to the Class as satisfying the requirements of Rule 23(c)(2) and
21 (e)(1);

22 4. Appointing a Settlement Administrator;

23 5. Preliminarily approving the proposed Plan of Allocation; and

24 6. Setting dates and deadlines under Rule 23(d) and (e) of the Federal Rules of Civil
25 Procedure in order for the Court to evaluate whether the settlement should be given final
26 approval (after distribution of the proposed class notice to the Class and submission of any
27 objections to the settlement, and for a fairness hearing on final approval of the settlement), to
28

1 evaluate Class Counsel's request for an award of attorneys' fees and reimbursement of costs and
 2 expenses and Plaintiffs' request for a service award as follows:

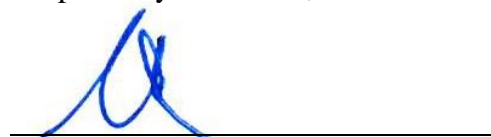
3	4	Deadline for Defendants to provide Class Data	October 6, 2021
5	6	Deadline for Settlement Administrator to provide notice to the Class	21 days after Preliminary Approval Order
7	8	Deadline for Settlement Administrator to provide declaration regarding Class Notice	30 days after Notice is sent
9	10	Deadline for Class Counsel to file motion for award of attorneys' fees and costs and for Service Award for Class Representatives	15 days before deadline for date for objections
11	12	Deadline for Class Members to file objections to the Settlement or submit any challenge to account data	60 days after the Preliminary Approval Order (and at least 35 days after the deadline to send Notice)
13	14	Deadline for Defendants to provide affidavit regarding indemnification and draft revised SPD	30 days before Motion for Final Approval is due
15	16	Deadline for Class Counsel to file Motion for Final Approval of Settlement	75 days after the Preliminary Approval Order (and at least 14 days after the deadline for Class Members to file objections)
17	18	Hearing on motion for final approval of settlement and application for attorneys' fees and costs and service awards	90 days after the Preliminary Approval Order

19 This Motion is supported by the accompanying Memorandum of Law, the Declaration of
 20 Daniel Feinberg ("Feinberg Decl."), the Declaration of R. Joseph Barton ("Barton Decl."), the
 21 Declaration of Vincent Cheng ("Cheng Decl."), and the Proposed Order filed herewith, all of the
 22 pleadings and documents on file with the Court in this action, and further evidence and argument
 23 as may be submitted prior to the Court's decision on this motion.

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Dated: September 24, 2021

Respectfully submitted,



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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiffs Carol Foster and Theo Foreman respectfully submit this Memorandum in
4 support of their Motion for Preliminary Approval of the proposed Class Action Settlement with
5 Defendants pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, to approve the
6 proposed notice to the Class, and to set various dates related to the approval of the Settlement.

7 Pursuant to the Settlement, Defendants have collectively agreed that Defendants, other
8 than Adams and Associates, Inc. (“AAI”), will pay \$3 million into a Settlement Fund to be
9 allocated to the Class and that AAI will not pay for the Settlement or indemnify any of the other
10 Defendants and will issue a revised summary plan description that is compliant with the
11 Employee Retirement Income Security Act (“ERISA”). In exchange, the Class will dismiss with
12 prejudice its claims asserted in the Second Amended Complaint against Defendants. The Class
13 will also release Defendants from any claims relating to or arising out of the allegations of the
14 Second Amended Complaint. Given the uncertainty of establishing both liability and damages,
15 the Settlement represents an excellent result for the Class and the Court should preliminarily
16 approve it.

17 **II. HISTORY AND STATUS OF THE CASE**

18 **A. The Factual Background of the Allegations**

19 Adams and Associates, Inc. (“AAI”) operates Job Corps Center under contract with the
20 U.S. Department of Labor. ECF. No. 65 (“SAC”) ¶ 2; ECF No. 102-3 at 12. The DOL generally
21 awards Job Corps Center contracts based on a competitive bidding process and sets aside many
22 contracts for small businesses whose annual revenue is under a certain limit. SAC & ECF NO.
23 70 (“Answ.”) ¶¶ 21, 22, 24. AAI’s annual revenue has exceeded that limit for many years. *Id.*
24 ¶ 24.

25 AAI adopted the Adams and Associates, Inc. ESOP (“the ESOP” or “the Plan”) effective
26 January 1, 2012. SAC ¶ 10; ECF No. 79-3 at 1. Before October 2012, AAI was owned by Roy
27 Adams, Leslie Adams, and The Daniel Norem Recoverable Trust. SAC & Answ. ¶ 20. In July
28 2012, Roy Adams, Leslie Adams, and Daniel Norem (“the Director Defendants”) appointed Alan

1 Weissman as the ESOP’s trustee to facilitate the sale of 100% of the AAI stock to the ESOP
2 (“the October 2012 Transaction” or “the ESOP Transaction”). *Id.* ¶ 28; ECF No. 153 at 2. A
3 month prior to his appointment, Weissman was sued in this District for embezzlement from
4 another ESOP for which he had served as trustee, in *Rickstrew v. Weissman*, No. 12-cv-03133-
5 WHA (N.D. Cal.). SAC ¶ 30; ECF No. 79-8. He was indicted in 2016 on various counts for,
6 among others, theft or embezzlement from two ESOPs dating back to at least 2010, pled guilty to
7 four counts, and was sentenced to thirty months in prison in 2017. SAC ¶ 31; ECF Nos. 102-6,
8 102-7 & 102-8.

9 The Director Defendants learned before the October 2012 Transaction that AAI could no
10 longer bid on three of its Job Corps Center contracts, which were up for renewal, because the
11 DOL had set them aside for small businesses. SAC ¶ 30; ECF Nos. 79-9 & 79-11; ECF No. 79-
12 10 ¶ 10; ECF No. 79-12 ¶ 9. In both June 2012 and the day after the October 2012 Transaction,
13 AAI filed bid protests in court challenging the DOL’s decision to designate two of those centers
14 as small business set-asides. SAC ¶¶ 34, 43; ECF Nos. 79-9 & 79-11. In support of the bid
15 protests, Roy Adams, President of Adams, averred that AAI would be “irreparably harmed” by
16 the DOL’s decision. SAC ¶¶ 35, 44; ECF No. 79-10 ¶¶ 11-13; ECF No. 79-12 ¶¶ 11-13.

17 As part of his pre-transaction due diligence requests, Weissman asked the Director
18 Defendants to provide, among others, information regarding any material litigation in which AAI
19 was or might become involved. SAC ¶¶ 55, 56; ECF No. 102-38 at 6, 9. But the Director
20 Defendants did not provide Weissman or his advisors information about any existing or
21 impending bid protests or the impending loss of the two Job Corps Center contracts in their due
22 diligence responses. SAC ¶¶ 56-57; ECF No. 102-40; ECF No. 102-41 ¶ 10. The loss of two of
23 the Job Corps Centers contracts was disclosed only the day before the ESOP Transaction in
24 lengthy disclosure schedules for the ESOP Transaction, but no change was made to the
25 transaction price. ECF No. 102-36; ECF No. 102-41 ¶ 11. On October 25, 2012, Weissman
26 caused the Plan to purchase 100% of the AAI stock from the Selling Shareholder Defendants
27 (*i.e.*, Roy Adams, Leslie Adams, Daniel Norem, and the Norem Trust) for \$33.5 million. SAC
28 ¶ 58; ECF No. 153 at 2.

1 Weissman remained the trustee of the ESOP until May 2016. SAC & Answ. ¶ 18. The
2 ESOP fiduciaries did not inform the participants of the appointment of a new trustee until May
3 2018— after this action was filed. *Id.*; ECF No. 79-3 at 3. As of April 2018, the Summary Plan
4 Description for the ESOP (“the SPD”) available to employees continued to identify Weissman as
5 the trustee. SAC & Answ. ¶ 18. The ESOP fiduciaries never disclosed his criminal conduct to
6 ESOP participants. *Id.* ¶ 32.

7 **B. The Claims and Relief Requested**

8 The Second Amended Complaint alleges five counts on behalf of a certified class of
9 participants and beneficiaries:

- 10 • **Count I** alleges that Weissman failed to ensure that the Plan paid no more than
11 fair market value for the AAI stock and caused the Plan to engage in a prohibited
12 transition pursuant to ERISA § 406(a) and the Selling Shareholder Defendants
13 were aware of those facts and have liability by knowingly participating in this
14 prohibited transaction. *Id.* ¶¶ 93-98.
- 15 • **Count II** alleges that the Selling Shareholder Defendants engaged in prohibited
16 transactions pursuant to ERISA § 406(b) and dealt with the assets of the Plan in
17 their own interest by selling their shares of AAI stock to the ESOP. *Id.* ¶¶ 100-05.
- 18 • **Count III** alleges that the Director Defendants breached their fiduciary duties
19 under ERISA § 404(a)(1) by failing to conduct an adequate investigation of
20 Weissman before or after October 2012, withholding material information from
21 him, permitting him to proceed with the October 2012 Transaction, and failing to
22 take sufficient steps or corrective action to protect participants in the Plan. *Id.*
23 ¶¶ 107-16.
- 24 • **Count IV** alleges that AAI violated ERISA § 104(b) by failing to furnish an
25 updated and correct SPD and breached its fiduciary duties by failing to inform
26 participants about Weissman. *Id.* ¶¶ 118-28.

- 1 • **Count V** alleges that certain indemnification provisions that purport to require the
2 Plan participants to be responsible for the liability or breaches of Defendants are
3 void as against public policy under ERISA § 410. *Id.* ¶¶ 130-45.

4 The Complaint seeks, among other relief, (1) declarations that Defendants have breached
5 their fiduciary duties and that the Selling Shareholder Defendants have engaged in prohibited
6 transactions; (2) an order removing Defendants as fiduciaries and requiring Defendants to restore
7 all the losses resulting from their fiduciary breaches and violations to the ESOP; (3) an order
8 requiring AAI as Plan Administrator to provide an updated SPD, disclose to ESOP participants
9 any investigation conducted concerning Weissman, and provide an accounting to the Class of the
10 financial accounts of the Plan; and (4) a declaration that any indemnification agreement between
11 Defendants and AAI or the ESOP is void. *Id.* Prayer for Relief ¶¶ A-B, D-G, J.

12 **C. Procedural History**

13 Plaintiffs filed their initial Complaint on May 9, 2018, alleging six counts under ERISA,
14 including a breach of fiduciary duty claim solely against Weissman. ECF No. 1. Defendants
15 AAI, Roy Adams, Leslie Adams, and Dan Norem moved to dismiss on statute of limitations and
16 other grounds on July 30, 2018. ECF No. 18. After Plaintiffs' counsel learned that Weissman had
17 died on May 10, 2018, Plaintiffs filed pursuant to Rule 25(a)(1) a motion to substitute his widow,
18 Janice U. Weissman for Mr. Weissman, which the Court granted on October 4, 2018. ECF Nos.
19 33 & 36. Plaintiffs filed on October 22, 2018 an Amended Complaint that was substantially the
20 same as the original Complaint. ECF Nos. 39, 39-1, 40, & 41. After learning that Mr. Weissman
21 had little assets from which to obtain a recovery, Plaintiffs voluntarily dismissed Ms. Weissman
22 from the action without prejudice on November 13, 2018. ECF No. 45.

23 *Motion to Dismiss*

24 The Court granted Defendants' motion to dismiss as to the original indemnification claim
25 but denied their motion as to the disclosure claim on January 24, 2019. ECF No. 58; ECF No. 61
26 at 1. On February 26, 2019, the Court denied Defendants' motion to dismiss as to the prohibited
27 transaction and breach of fiduciary duty claim and allowed Plaintiffs to amend their Complaint
28 with respect to their indemnification claim. *Id.* at 5. Plaintiffs filed their Second Amended

1 Complaint on March 5, 2019, alleging the current Counts I through V against the Director and
2 the Selling Shareholder Defendants and AAI. ECF No. 65; *supra* II.B. Plaintiffs moved for class
3 certification on June 27, 2019. ECF No. 79. The Court granted class certification as to all counts,
4 appointed Plaintiffs Carol Foster and Theo Foreman as class representatives, and appointed
5 Feinberg, Jackson, Worthman & Wasow LLP and Block & Leviton LLP as Co-Lead Counsel for
6 the Class on September 3, 2019. ECF No. 89 at 13; ECF No. 94 at 13.

7 *Discovery*

8 Over the course of fact and expert discovery between August 2018 and April 2020,
9 Plaintiffs served more than forty-five requests for production of documents on Defendants and
10 served more than five document subpoenas on non-parties and three document subpoenas on
11 Defendants' experts. Cheng Decl. ¶ 2. Defendants collectively produced more than 10,000 pages
12 of documents, and non-parties produced more than 25,000 pages. *Id.* ¶ 4. Plaintiffs served three
13 expert reports, two of which were rebuttal reports on Defendants' expert reports. *Id.* ¶ 7. Class
14 Counsel took the Rule 30(b)(6) deposition of AAI and four fact witness depositions, including
15 the depositions of Roy Adams, Daniel Norem, Joshua Edwards, the managing director at
16 Weissman's valuation advisor Eureka Capital Advisors LLC and Karen Ng, Weissman's legal
17 advisor. *Id.* ¶ 5. Class Counsel also took the depositions of Defendants' three experts and
18 defended the two named Plaintiffs' depositions and two expert witness depositions. *Id.* ¶ 8.

19 *Summary Judgment*

20 Plaintiffs filed a motion for partial summary judgment on Counts I and III on January 30,
21 2020. ECF No. 102. Defendants filed a motion for summary judgment on all counts on April 9,
22 2020. ECF No. 137. The Court denied Plaintiffs' motion, granted Defendants' motion as to
23 Count I under ERISA § 406(a) as to Defendants Leslie Adams and Joy Curry Norem, and Count
24 II under ERISA § 406(b) as to all Defendants, and denied the rest of Defendants' motion on July
25 6, 2020. ECF No. 153 at 21. The Court held as to Count I that no reasonable trier of fact could
26 find that Defendants were acting as fiduciaries for purposes of the October 2012 Transaction and
27 Roy Adams and Dan Norem were acting as non-fiduciaries, but that there was a fact issue as to
28 whether they had knowingly participated in the ESOP Transaction. *Id.* at 17. The Court also

1 found that at least the equitable remedy of rescission was available. *Id.* The Court held that
 2 Count II fails because Plaintiffs' § 406(b) claim is only available against a fiduciary. *Id.* at 17-18.

3 *Pretrial Proceedings*

4 The parties filed their respective motions *in limine* in February and March 2021. ECF
 5 Nos. 182-84, 187-88 & 197-98. The court held a hearing on the motions *in limine* and largely
 6 denied the motions *in limine*.

7 On June 22, 2021, the Court reset the trial date to August 30, 2021. ECF No. 214. The
 8 parties completed their respective pretrial submissions in early July 2021. ECF Nos. 204-07,
 9 209-10 & 215.

10 *Settlement Conferences*

11 The Court referred the case to Magistrate Judge Virginia K. DeMarchi on November 13,
 12 2020 for a settlement conference. ECF No. 163. The parties, including Plaintiffs Carol Foster and
 13 and Defendants Roy Adams and Daniel Norem, participated in a video settlement conference
 14 with Judge DeMarchi on December 4, 2020 and a further video settlement conference with her
 15 on January 21, 2021. ECF Nos. 166 & 176; Feinberg Decl. ¶ 2. The parties were not able to
 16 make significant progress during these settlement conferences, and it appeared that case was
 17 headed for trial. *Id.* In June 2021, the Parties agreed to renew settlement discussions. *Id.* The
 18 parties participated in a further settlement conference with Judge DeMarchi on July 22, 2021.
 19 ECF No. 222; Feinberg Decl. ¶ 2. By the end of the conference, the parties had made substantial
 20 progress on the non-monetary terms of a settlement, with Defendants agreeing to continue to
 21 consider Plaintiffs' offer on monetary terms and the parties providing a confidential status report
 22 to Judge DeMarchi by July 28, 2021. *Id.*; ECF No. 222. Judge DeMarchi issued on July 28, 2021
 23 a "mediator's proposal," which all parties accepted by noon on July 29, 2021. Feinberg Decl. ¶ 2.
 24 The parties subsequently entered into the formal Settlement Agreement on September 23, 2021.
 25 *Id.*

26 **III. THE TERMS OF THE SETTLEMENT AND PLAN OF ALLOCATION**

27 The terms of the proposed Settlement are set forth in the Settlement Agreement
 28 ("Agmt."). In short, the Settlement Agreement provides for a payment of \$3 million, inclusive of

1 payments to the Class, Class Counsel’s attorneys’ fees and litigation expenses, and incentive
2 awards to the Class Representatives. Agmt. §§ I.G, III.1, VIII.1. AAI will not pay for the
3 Settlement or provide an indemnification to any of the other Defendants and will aver that AAI
4 has made no such payments or will aver that any such amounts have been refunded to AAI and
5 state the amounts refunded. *Id.* § VI.1. Non-AAI Defendants will pay \$3 million into the
6 Settlement Fund by September 24, 2021. *Id.* § III.1. In addition to the settlement payment, non-
7 AAI Defendants will bear all costs for settlement administration including those associated with
8 distribution of the Settlement to the Class. *Id.* § IV.7. AAI will issue a revised SPD compliant
9 with ERISA. *Id.* § VI.2. The class defined in the Settlement is identical to the certified Class,
10 with the addition of an end date to the class period. *Id.* § I.H. The Settlement Agreement does not
11 provide for any reversion to Defendants.

12 In exchange, Plaintiffs and the Class will dismiss the claims asserted in the Second
13 Amended Complaint with prejudice and release Defendants from any and all claims that the
14 Class asserted or could have asserted that relate to or arise out of the facts alleged or the claims
15 set forth in the Second Amended Complaint, including: (a) the October 2012 Transaction or (b)
16 disclosure violations based on the same factual predicate as those set forth in Count IV of the
17 Second Amended Complaint through the date of settlement. Agmt. § XIV.1.

18 Pursuant to Plaintiffs’ proposed Plan of Allocation, after deductions for attorneys’ fees,
19 cost reimbursements, and incentive awards to the Class Representatives, each Class Member will
20 be allocated a pro rata share of the net settlement proceeds based upon the number of vested AAI
21 shares allocated to that Class Member’s ESOP Account, as a fraction of the total number of
22 vested shares allocated to the ESOP accounts of all Class Members. Cheng Decl. Ex. A. After
23 final approval becomes non-appealable, the net settlement proceeds allocated to Class Members
24 will be distributed based on whether they are eligible for a distribution from the ESOP or the
25 Adams and Associates, Inc. 401(k) Profit Sharing Plan (“the AAI 401(k) Plan”). *Id.* If they are
26 former employees or otherwise eligible for an immediate distribution, they will have the option
27 to receive a check for their share of the net settlement proceeds, to elect a rollover to an IRA or
28 another eligible retirement account or to have their settlement monies remain in the AAI 401k

1 Plan. *Id.*; Agmt. § IV.5(a). If they are not eligible for an immediate distribution from the AAI
 2 401(k) Plan (i.e. most current employees), their shares of the proceeds will be transferred to their
 3 existing account in the AAI 401(k) Plan. Cheng Decl. Ex. A; Agmt. § IV.5(b). If they do not
 4 already have an account in the AAI 401(k) Plan, an account will be established for them. Cheng
 5 Decl. Ex. A; Agmt. § IV.5.

6 **IV. SERVICE AWARDS AND ATTORNEYS' FEES AND COSTS**

7 Pursuant to the District's Procedural Guidance for Class Action Settlements for
 8 preliminary approval, Class Counsel provides the information below regarding their future
 9 requests for attorneys' fees and costs and service awards. The Settlement Agreement
 10 contemplates that Class Counsel will request payment of attorneys' fees and costs and incentive
 11 awards to the Class Representatives from the Settlement Fund. Agmt. § VIII.1. As of September
 12 22, 2021, Class Counsel's combined lodestar is approximately \$2.6 million . Feinberg Decl. ¶ 3;
 13 Barton Decl. ¶ 3. Class Counsel will expend additional hours in, for example, preparing for
 14 preliminary and final approval, answering questions from Class Members, and monitoring the
 15 administration of the Settlement. Barton Decl. ¶ 3. Class Counsel has also incurred
 16 approximately \$162,000 in expenses as of September 22, 2021. Feinberg Decl. ¶ 3; Barton Decl.
 17 ¶ 4. Each of the two Class Representatives has been actively engaged in the litigation since its
 18 inception and participated in discovery and the settlement conferences with Judge DeMarchi.
 19 ECF No. 79-17 ¶¶ 4-11; ECF No. 79-19 ¶¶ 4-11; ECF Nos. ECF Nos. 166, 176 & 222. Class
 20 Counsel expects to request a fee award of \$1,000,000—i.e., 33.3% of the Settlement Fund and
 21 less than 40% of Class Counsel's current lodestar—reimbursement for expenses incurred up to
 22 the final approval hearing, and an incentive award of \$5,000 to each of the two Class
 23 Representatives. Class Counsel will address the propriety of these requests in their motion for
 24 fees, costs, and service award.

25 Pursuant to the District's Procedural Guidance for Class Action Settlements, Class
 26 Counsel provides the following summary of information for a class settlement in *Cunningham v.*
 27 *Wawa, Inc.*, No. 2:18-cv-03355-PD (E.D. Penn.), an ERISA class action brought by both Class
 28 Counsel involving an ESOP:

Total Settlement Fund	\$21,600,000
Total Number of Class Members	4,043
Total Number of Class Member to Whom Notice Was Sent	4,043
Method of Notice	By U.S. mail: 4,029 class members By email: 31 class members
Number of Claim Forms Submitted	N/A: No claim form was required for class members to receive payment. All ESOP participants received payment
Average Recovery Per Class Member	\$4,265 per ESOP participant (after attorneys' fees and costs were deducted)
Amount Distributed to Cy Pres	There may be a small amount (approximately \$100) to be distributed cy pres as a result of a tax refund to the Settlement Fund
Settlement Administrative Costs	N/A: Defendants paid all settlement administration costs
Attorneys' Fees and Costs	Fees: \$4,322,500 Costs: \$153,851.05

Barton Decl. ¶ 5. The case concerned certain amendments to Wawa, Inc.'s ESOP and class members allegedly receiving less than fair market values for their shares of the company stock, which were liquidated as a result of the amendments. *Cunningham v. Wawa, Inc.*, CV 18-3355, 2021 WL 1626482, at *1 (E.D. Pa. Apr. 21, 2021). The net settlement proceeds in that case were distributed pro rata to each class member based on his or her Wawa shares as a fraction of all class members' company shares, with no submission of any claim form required. *Id.* at *3. Because the defendants agreed to pay and paid for all costs of notice and settlement administration in that case, those costs were not deducted from and did not reduce the settlement fund. *Id.* ¶ 5.

V. THE PROPOSED SETTLEMENT MERITS PRELIMINARY APPROVAL

“[T]here is a strong judicial policy that favors settlements, particularly where complex class action litigation is concerned.” *In re Syncor ERISA Litig.*, 516 F.3d 1095, 1101 (9th Cir. 2008); *Campbell v. Facebook, Inc.*, 951 F.3d 1106, 1121 (9th Cir. 2020) (recognizing same policy). This policy is also evident in the Federal Rules of Civil Procedure and the Local Rules of this District. *See In re Syncor ERISA Litig.*, 516 F.3d at 1101 (citing Fed. R. Civ. R. 16(a)(5));

1 Fed. R. Civ. P. 16(a)(5) (one of the purposes of a pretrial conference is “facilitating settlement”);
2 L.R. 16-8(a) (“At any time after an action has been filed, the Court on its own initiative or at the
3 request of one or more parties may refer the case to one of the Court’s ADR programs.”). To
4 protect the interests of the class, Federal Rule of Civil Procedure 23(e) provides that a class
5 action cannot be settled without court approval. Fed. R. Civ. P. 23(e). Approval under Rule 23(e)
6 involves “a two-step process”: “First, the Court decides whether the class action settlement
7 deserves preliminary approval. Second, after notice is given to class members, the Court
8 determines whether final approval is warranted.” *Vikram v. First Student Mgt., LLC*, No. 17-CV-
9 04656-KAW, 2019 WL 1084169, at *3 (N.D. Cal. Mar. 7, 2019).

10 The request for preliminary approval only requires an “initial evaluation” of the fairness
11 of the proposed settlement. *Manual for Complex Litigation* § 21.632 (4th ed. 2004). The purpose
12 of preliminary approval is to determine “whether to direct notice of the proposed settlement to
13 the class, invite the class’s reaction, and schedule a fairness hearing.” William B. Rubenstein, *et*
14 *al.*, *Newberg on Class Actions* § 13:10 (5th ed. 2013). As approval is only preliminary, courts
15 generally undertake a limited review of the proposed settlement. *Id.* Courts conduct the ultimate
16 assessment of whether a proposed settlement is fair, adequate, and reasonable pursuant to the
17 factors of Rule 23(e)(2) at final approval because “[t]he Court cannot, however, fully assess such
18 factors until the final approval hearing.” *De Leon v. Ricoh USA, Inc.*, No. 18-CV-03725, 2019
19 WL 6311379, at *10 (N.D. Cal. Nov. 25, 2019) (J. Corley). “At the preliminary approval stage,
20 ‘the settlement need only be potentially fair.’” *Johnson v. Serenity Transp., Inc.*, No. 15-CV-
21 02004, 2021 WL 3081091, at *4 (N.D. Cal. July 21, 2021) (J. Corley) (citation omitted).
22 “Preliminary approval is thus appropriate where ‘the proposed settlement appears to be the
23 product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not
24 improperly grant preferential treatment to class representatives or segments of the class, and falls
25 within the range of possible approval.’” *Id.* (citation omitted); *Etter v. Allstate Ins. Co.*, No. C
26 17-00184, 2018 WL 5761755, at *1 (N.D. Cal. May 30, 2018) (stating same). Here, the proposed
27 Settlement readily satisfies the requirements for preliminary approval.

1 **A. The Settlement Is the Result of Serious, Informed, and Non-Collusive**
2 **Negotiations**

3 “To approve a proposed settlement, a court must be satisfied that the parties ‘have
4 engaged in sufficient investigation of the facts to enable the court to intelligently make . . . an
5 appraisal of the settlement.’” *De Leon*, 2019 WL 6311379, at *10 (J. Corley) (citation omitted).
6 ““A court is more likely to approve a settlement if most of the discovery is completed because it
7 suggests that the parties arrived at a compromise based on a full understanding of the legal and
8 factual issues surrounding the case.”” *Norton v. LVNV Funding, LLC*, No. 18-CV-05051-DMR,
9 2021 WL 3129568, at *7 (N.D. Cal. July 23, 2021) (citation omitted). “An initial presumption of
10 fairness is usually involved if the settlement is recommended by class counsel after arm’s-length
11 bargaining.” *Viceral v. Mistras Grp., Inc.*, No. 15-CV-02198, 2016 WL 5907869, at *8 (N.D.
12 Cal. Oct. 11, 2016); *see Tadepalli v. Uber Techs., Inc.*, No. 15-CV-04348-MEJ, 2015 WL
13 9196054, at *9 (N.D. Cal. Dec. 17, 2015) (“Settlements are entitled to ‘an initial presumption of
14 fairness’ because they are the result of arm’s-length negotiations among experienced counsel.”).
15 The fact that a settlement was reached after one or more settlement conferences with a
16 Magistrate Judge further evidences the non-collusive nature of the negotiations. *See Foster v.*
17 *Advantage Sales & Mktg., LLC.*, No. 18-CV-07205-LB, 2019 WL 6699793, at *6 (N.D. Cal.
18 Dec. 9, 2019) (finding the factor met where the settlement “was reached after a settlement
19 conference with Judge Westmore”); *Etter*, 2018 WL 5761755, at *3 (granting preliminary
20 approval where the proposed settlement agreement resulted from “extensive mediation efforts
21 supervised by Magistrate Judge Jacqueline Corley, including two in-person settlement
22 conferences and subsequent deliberations”).

23 Here, fact discovery closed on December 13, 2019. ECF No. 67 at 1. A settlement was
24 not reached until after Class Counsel had completed extensive fact and expert discovery, the
25 Court had ruled on the parties’ respective motions for summary judgment in July 2020, and
26 Plaintiffs had completed their pretrial submissions in July 2021 and the case was approximately
27 only a month away from trial. ECF No. 153; ECF Nos. 204-07, 209-10 & 215. Over the course
28 of this litigation, Class Counsel issued more than forty-five requests for production and more
than ten document subpoenas and obtained more than 35,000 pages of documents from

1 Defendants and non-parties. Cheng Decl. ¶ 4. Class Counsel met and conferred with Defendants
2 and non-parties on discovery matters throughout the case in an effort to resolve disputes without
3 the Court’s involvement. *Id.* ¶ 6. Class Counsel served one expert report on valuation and two
4 expert rebuttal reports to Defendants’ experts on valuation and fiduciary standards. *Id.* ¶ 7. Class
5 Counsel took a total of eight depositions, including a Rule 30(b)(6) deposition of AAI, the
6 depositions of two named individual Defendants, two of Weissman’s advisors, and Defendants’
7 three experts. *Id.* ¶¶ 5, 8.

8 The terms of the Settlement resulted from hard-fought negotiations. The Parties
9 negotiated the principal terms of the agreement over the course of three video settlement
10 conferences facilitated by Judge DeMarchi on December 4, 2020, January 21, 2021, and July 22,
11 2021. ECF Nos. 166, 176 & 222. After the third conference, the parties continued to deliberate
12 the proposed terms of a settlement and reported to Judge DeMarchi, which resulted in her issuing
13 a mediator’s proposal on July 28, 2021 that included both monetary and non-monetary terms.
14 ECF No. 222; Feinberg Decl. ¶ 2. Both Plaintiffs and Defendants accepted the proposal on July
15 29, 2021. *Id.* The parties entered into the Settlement Agreement on September 23, 2021. *Id.*

16 “The recommendations of plaintiffs’ counsel should be given a presumption of
17 reasonableness.” *Urakhchin v. Allianz Asset Mgt. of Am., L.P.*, SACV151614, 2018 WL
18 3000490, at *5 (C.D. Cal. Feb. 6, 2018) (quoting *In re Omnivision Techs., Inc.*, 559 F.Supp.2d
19 1036, 1043 (N.D. Cal. 2008) and granting preliminary approval). This presumption is especially
20 warranted based on the opinion of “experienced plaintiffs’ advocates and class action lawyers.”
21 *Does I v. Gap, Inc.*, No. CV-01-0031, 2002 WL 1000073, at *13 (D.N. Mar. Is. May 10, 2002);
22 *Walsh v. CorePower Yoga LLC*, No. 16-CV-05610, 2017 WL 589199, at *10 (N.D. Cal. Feb. 14,
23 2017) (holding that settlements that are “the result of arms’-length negotiations among
24 experienced counsel” weigh in favor of preliminary approval). This Court previously recognized
25 that Class Counsel are “experienced class actions lawyers who specialize in employee benefit
26 cases.” *Foster v. Adams and Assocs., Inc.*, No. 18-CV-02723-JSC, 2019 WL 4305538, at *6
27 (N.D. Cal. Sept. 11, 2019). Other courts have likewise recognized the extensive experience of
28 Class Counsel in ERISA class actions. *E.g.*, *Cunningham v. Wawa, Inc.*, 387 F.Supp.3d 529, 539

1 (E.D. Pa. 2019) (finding Class counsel in an ESOP class action – including Feinberg Jackson
 2 Worthman & Wasow LLP and Block & Leviton LLP – “have substantial experience with both
 3 class actions and ERISA litigation, and their performance here and in [prior litigation before the
 4 same judge] well confirms their competence”). As such, Class Counsel’s endorsement of the
 5 Settlement Agreement favors preliminary approval.

6 In short, the parties entered into the Settlement Agreement after (a) Class Counsel had
 7 completed discovery and obtained a full understanding of the legal and factual issues
 8 surrounding the case and (b) the parties had engaged in extensive arms-length negotiations
 9 involving informed and experienced Class Counsel and facilitated by a Magistrate Judge.
 10 Accordingly, the Settlement Agreement is the product of serious, informed, non-collusive
 11 negotiations.

12 **B. The Settlement Is Well Within the Range of Possible Approval**

13 “In determining whether the settlement agreement ‘falls within the range of possible
 14 approval,’ the Court must focus on ‘substantive fairness and adequacy’ and consider Plaintiffs’
 15 ‘expected recovery balanced against the value of the settlement offer.’” *Johnson*, 2021 WL
 16 3081091, at *5 (quoting *In re Tableware Antitrust Litig.*, 484 F.Supp.2d 1078, 1080 (N.D. Cal.
 17 2007)); *Dickey v. Adv. Micro Devices, Inc.*, No. 15-CV-04922, 2019 WL 4918366, at *5 (N.D.
 18 Cal. Oct. 4, 2019) (stating same). While the Court’s ultimate assessment at final approval of
 19 whether the proposed settlement is fair, reasonable, and adequate depends upon the factors set
 20 forth in Rule 23(e)(2) and *In re Bluetooth Headset Products Liability Litig.*, 654 F.3d 935 (9th
 21 Cir. 2011), in order to determine whether preliminary approval is appropriate, “the settlement
 22 need only be potentially fair.” *De Leon*, 2019 WL 6311379, at *10; *Noriesta v. Konica Minolta*
 23 *Bus. Sols. U.S.A., Inc.*, No. EDCV19620, 2020 WL 5044418, at *6 (C.D. Cal. May 7, 2020)
 24 (“the court need only decide whether the settlement is potentially fair . . . in light of the strong
 25 judicial policy in favor of settlement of class actions”). “It is well-settled law that a proposed
 26 settlement may be acceptable even though it amounts only to a fraction of the potential recovery
 27 that might be available to class members at trial.” *Toolajian v. Air Methods Corp.*, No. 18-CV-

1 06722, 2020 WL 8674094, at *10 (N.D. Cal. Apr. 24, 2020); *Philips v. Munchery Inc.*, No. 19-
2 CV-00469, 2020 WL 6135996, at *8 (N.D. Cal. Oct. 19, 2020) (J. Corley) (stating same).

3 Here, the Settlement Agreement provides that the non-AAI Defendants will pay \$3
4 million into a Settlement Fund. Agmt. § III.1. Plaintiffs' valuation expert concluded that
5 Weissman's advisor, Eureka, had made errors in valuing the AAI stock for the October 2012
6 Transaction that resulted in the ESOP overpaying and therefore incurring a loss of \$10.5 million.
7 ECF No. 206 at 65-66. The monetary component of the Settlement represents approximately
8 31.5% of the maximum amount of the loss determined by Plaintiffs' expert. This amount would
9 be the maximum loss that that Class Members could recover if the case were successfully
10 litigated through trial on Counts I and III, and the Court agreed with Plaintiffs on the measure of
11 recovery based on AAI stock's fair market value at the time of the Transaction, and the resulting
12 judgment could be collected.

13 The Settlement also provides important non-monetary relief. In addition to Defendants
14 paying for all costs of the Settlement Administration, the Settlement ensures that all Class
15 Members can take advantage of the favorable tax-deferred benefits of the settlement. Agmt.
16 § VII.5. In settlement of Count V, the anti-indemnification claim, the Settlement Agreement
17 provides that AAI will not pay for the Settlement or indemnify any of the other Defendants, and
18 require Defendants to aver that it has made no such payments or to aver that any such amounts
19 have been refunded to AAI and state the amounts refunded. Agmt. § VI.1. On Count IV, the SPD
20 claim, the Settlement requires AAI to issue a revised SPD compliant with ERISA. *Id.* § VI.2.

21 "ERISA actions are notoriously complex cases, and ESOP cases are often cited as the
22 most complex of ERISA cases." *Pfeifer v. Wawa, Inc.*, No. CV16-497, 2018 WL 4203880, at *7
23 (E.D. Pa. Aug. 31, 2018). In this case, Class Counsel has had the benefit of several decisions
24 from the Court, including the summary judgment order, which set forth the substantive law and
25 analytical framework applicable to Plaintiffs' claims. ECF Nos. 89, 94 & 153. Class Counsel
26 recognizes the expense, risk, and length of continued proceedings necessary to prosecute the
27 litigation against Defendants through trial and appeals, based on the Courts' decisions and the
28 risks that any or all of Plaintiffs' claims might fail following a trial on the merits or on appeal.

1 For example, Count III depended in part upon establishing an underlying fiduciary breach by a
2 deceased ESOP trustee to be proved to establish the Director Defendants' failure to remedy that
3 breach or monitor the breaching trustee. *See* SAC ¶¶ 111-16. The derivative character introduces
4 difficult issues regarding the knowledge of individual Defendants that would present challenges
5 at trial. "In most situations, unless the settlement is clearly inadequate, its acceptance and
6 approval are preferable to lengthy and expensive litigation with uncertain results." *Knapp v.*
7 *Art.com, Inc.*, 283 F.Supp.3d 823, 832 (N.D. Cal. 2017) (quoting *Nat'l Rural Telecomms. Coop.*
8 *v. DIRECTV, Inc.*, 221 F.R.D. 523, 526 (C.D. Cal. 2004)). Class Counsel believes that the
9 Settlement is well within the range of reasonableness.

10 The reasonableness of the monetary relief provided by the Settlement is further supported
11 by settlements reached in many other ERISA class actions. *E.g.*, *Urakhchin*, 2018 WL 3000490,
12 at *4 (preliminarily approving ERISA class action settlement that recovered \$12 million or
13 25.5% of estimated maximum damages); *O'Dowd v. Anthem, Inc.*, No. 14-CV-02787, 2019 WL
14 4279123, at *14 (D. Colo. Sept. 9, 2019) (finding 29% recovery fair and adequate in ERISA
15 class action); *Karpik v. Huntington Bancshares Inc.*, No. 2:17-CV-1153, 2021 WL 757123, at *8
16 (S.D. Ohio Feb. 18, 2021) (approving settlement representing "approximately 30% of the total
17 damages that Plaintiffs claimed at the mediation were associated with Defendants' alleged
18 fiduciary breaches"); *Sims v. BB&T Corp.*, No. 1:15-CV-732, 2019 WL 1995314, at *5
19 (M.D.N.C. May 6, 2019) (finding that recovery representing "19% of the total investment and
20 recordkeeping damages sought by the plaintiffs" was substantial and adequate); *Boyd v.*
21 *Coventry Health Care Inc.*, 299 F.R.D. 451, 463 (D. Md. 2014) (approving settlement that
22 recovered 3.2% of estimated maximum damages).

23 The scope of the releases in a proposed settlement is acceptable where the claims released
24 are limited to those based upon the facts set forth in the complaint. *Nen Thio v. Genji, LLC*, 14
25 F.Supp.3d 1324, 1332 (N.D. Cal. 2014); *Hesse v. Sprint Corp.*, 598 F.3d 581, 590 (9th Cir. 2010)
26 ("A settlement agreement may preclude a party from bringing a related claim in the future even
27 though the claim was not presented and might not have been presentable in the class action, but
28 only where the released claim is based on the identical factual predicate as that underlying the

1 claims in the settled class action”). Here, the Settlement only releases relating to or arising out of
2 facts alleged or claims set forth in the Second Amended Complaint. Agmt. § XIV.1.

3 **C. The Settlement Grants No Preferential Treatment to Any Class Members**

4 In determining whether preliminary approval is appropriate, the Court “must consider
5 whether the Settlement Agreement ‘provides preferential treatment to any class member.’”
6 *Philips*, 2020 WL 6135996, at *7 (quoting *Villegas v. J.P. Morgan Chase & Co.*, No. CV 09-
7 00261, 2012 WL 5878390, at *7 (N.D. Cal. Nov. 21, 2012)). The Settlement and proposed Plan
8 of Allocation do not unduly favor the Class Representatives or segments of the Class.

9 The Settlement Agreement and proposed Plan of Allocation treat all members of the
10 Class the same in that each of them will receive a monetary distribution from the Settlement
11 Fund on a *pro rata* basis based on the number of vested AAI shares allocated to the Class
12 Member’s ESOP account, as a fraction of all the vested shares allocated to all Class Members’
13 ESOP accounts. Agmt § IV.4; Cheng Decl. Ex. A. Thus, the Settlement Fund will be allocated
14 based on each Class member’s underlying economic loss from the alleged overpayment for
15 ESOP shares. In *Kaplan v. Houlihan Smith & Co.*, No. 12 C 5134, 2014 WL 2808801, (N.D. Ill.
16 June 20, 2014), the court approved the plan of allocation in an ESOP class action as reasonable
17 where “[t]he way the settlement proceeds will be divided among the class members” is that
18 “[t]he settlement amount (after fees and expenses) will be divided pro rata, based on the number
19 of shares each class member held in his/her ESOP account on [a specified date].” *Id.* at *3; *see*
20 *De Leon*, 2019 WL 6311379, at *11 (finding no preferential treatment where “[u]nder the
21 Agreement, each Class Member may claim their pro rata share of the Net Settlement Amount
22 based on their respective number of workweeks worked during the class period”). Here, under
23 the proposed Plan of Allocation, each Class Member’s share of the net settlement proceeds is
24 calculated and determined on a *pro rata* basis by comparing the number of AAI shares held in
25 his or her ESOP account to the total number of AAI shares held in the ESOP accounts of all
26 Class Members.

27 Class Counsel will request a service award of \$5,000 to each Class Representative.
28 “Incentive awards are fairly typical in class action cases.” *Chen v. Chase Bank USA, N.A.*, No.

1 19-CV-01082, 2020 WL 264332, at *7 (N.D. Cal. Jan. 16, 2020) (J. Corley) (citing *Rodriguez v.*
2 *W. Publ'g Corp.*, 563 F.3d 948, 958 (9th Cir. 2009)). “Their purpose is to ‘compensate class
3 representatives for work done on behalf of the class, and to make up for financial or reputational
4 risk undertaken in bringing the action.’” *Johnson*, 2021 WL 3081091, at *4. “Incentive awards of
5 \$5,000 have been deemed ‘presumptively reasonable’ in this District.” *Chen*, 2020 WL 264332,
6 at *7. Accordingly, the Settlement does not provide preferential treatment to the named Plaintiffs
7 or any Class Member.

8 **D. The Settlement Has No Obvious Deficiencies**

9 The final factor the Court must consider is “whether there are obvious deficiencies in the
10 Settlement Agreement.” *Philips*, 2020 WL 6135996, at *7. “Obvious deficiencies can include
11 collusive negotiation, ‘unduly preferential treatment of class representatives or segments of the
12 class, or excessive compensation of attorneys.’” *Johnson*, 2021 WL 3081091, at *4 (quoting
13 *Harris v. Vector Mktg. Corp.*, No. C-08-5198, 2011 WL 1627973, at *8 (N.D. Cal. Apr. 29,
14 2011)). The Ninth Circuit has advised courts to be concerned (a) “when counsel receive a
15 disproportionate distribution of the settlement, or when the class receives no monetary
16 distribution but class counsel are amply rewarded”; (b) “when the parties negotiate a ‘clear
17 sailing’ arrangement providing for the payment of attorneys’ fees separate and apart from class
18 funds, which carries ‘the potential of enabling a defendant to pay class counsel excessive fees
19 and costs in exchange for counsel accepting an unfair settlement on behalf of the class’”; and (c)
20 “when the parties arrange for fees not awarded to revert to defendants rather than be added to the
21 class fund.” *In re Bluetooth*, 654 F.3d at 947; *see Briseno v. Henderson*, 998 F.3d 1014, 1023
22 (9th Cir. 2021). Such signs do not necessarily mean that a settlement is improper, but only that it
23 is supported by an explanation of why the fee is justified and does not betray the class's interests.
24 *In re Bluetooth*, 654 F.3d at 949.

25 Class Counsel will seek a percentage of the Settlement Fund not to exceed 33.3%. In
26 conjunction with final approval, Class Counsel will file a motion for attorney’s fees and
27 litigation expenses explaining why the requested amounts are reasonable and justified in light of
28 the circumstances of the case including the attorney lodestar. *See Johnson*, 2021 WL 3081091, at

1 *3 (granting preliminary approval where the plaintiff was not requesting fees or a service award
 2 but requiring class counsel to articulate attorney’s fees and service payment requests in separate
 3 application). While Defendants have agreed not to oppose Class Counsel’s requests for
 4 attorney’s fees so long as the fee motion does not exceed 33.3%, the Settlement does not provide
 5 for the payment of attorneys’ fees separately from class funds or for the reversion of amounts not
 6 paid as fees to the Defendants. *See Urakhchin*, 2018 WL 3000490, at *6 (holding that “clear
 7 sailing” provision did not signal collusion where fees would be paid from capped settlement
 8 fund). As discussed above, the Settlement provides no preferential treatment to any Class
 9 Member. *Supra V.C.*

10 At this stage, the question is merely whether the agreement is preliminarily fair. The
 11 specific amounts of attorney’s fees and any class representative incentive award can be reserved
 12 on this preliminary approval motion to the final approval hearing and the discretion of the Court.
 13 *See Anderson-Butler v. Charming Charlie Inc.*, No. 14 CV 1921, 2015 WL 4599420, at *11
 14 (E.D. Cal. July 29, 2015) (preliminarily approving settlement and declining to “evaluate the fee
 15 award at length” in “considering whether the settlement is adequate,” because “[i]f the court, in
 16 ruling on the fees motion, finds that the amount of the settlement warrants a fee award at a rate
 17 lower than what plaintiff’s counsel requested” the court has the power to reduce the award
 18 accordingly).

19 **VI. THE CLASS DEFINITION SHOULD BE MODIFIED TO HAVE AN END DATE**

20 An order granting class certification “may be altered or amended before final judgment.”
 21 Fed. R. Civ. P. 23(c)(1)(C). Holding a plaintiff to the original class definition “would ignore the
 22 ongoing refinement and give-and-take inherent in class action litigation, particularly in the
 23 formation of a workable class definition.” *In re Monumental Life Ins. Co.*, 365 F.3d 408, 414
 24 (5th Cir. 2004); *see Sampson v. Knight Transp., Inc.*, C17-0028-JCC, 2021 WL 2255129, at *2
 25 (W.D. Wash. June 3, 2021) (“the district court retains flexibility and is free to modify a class
 26 definition in light of developments during the course of litigation”); *Howell v. Advantage RN,*
 27 *LLC*, 401 F.Supp.3d 1078, 1085 (S.D. Cal. 2019) (courts retain discretion to modify the class
 28 definition “in light of subsequent developments in the litigation”). Among other things, courts

1 generally agree that at some point, a class definition should have an end date although there is no
 2 set rule as to what the end date should be. *See Guidry v. Wilmington Tr.*, 333 F.R.D. 324, 329 (D.
 3 Del. 2019) (surveying law and setting an end date as of the court’s decision); *Sampson*, 2021 WL
 4 2255129, at *2-3 (survey law and setting an end date as of the court’s order).

5 Although an open-ended date made sense in the class definition while the litigation was
 6 ongoing, the Parties agree that an end date of December 31, 2020 for the Class makes sense for
 7 purposes of settlement. Agmt. § I.H. The Settlement Agreement defines December 31, 2020 as
 8 the end date for the Class because that is the most recent date for which Defendants have data for
 9 the Class Members’ numbers of vested shares in their ESOP accounts. Feinberg Dec. ¶ 4; Agmt.
 10 § I.H. This is a sensible and workable modification.

11 **VII. THE NOTICE AND PLAN OF NOTICE SHOULD BE APPROVED**

12 Once the parties obtain preliminary approval of the settlement, Rule 23(e) requires that
 13 the Court to direct notice in a reasonable manner to all Class Members who would be bound by
 14 the settlement. A proper notice should “(i) the nature of the action; (ii) the definition of the class
 15 certified; (iii) the class claims, issues, or defenses; (iv) that a class member may enter an
 16 appearance through an attorney if the member so desires; (v) that the court will exclude from the
 17 class any member who requests exclusion; (vi) the time and manner for requesting exclusion;
 18 and (vii) the binding effect of a class judgment on members under Rule 23(c)(3).” Fed. R. Civ. P.
 19 23(c)(2)(B); *see* Manual for Complex Litigation, *supra*, § 21.312. “Notice is satisfactory if it
 20 ‘generally describes the terms of the settlement in sufficient detail to alert those with adverse
 21 viewpoints to investigate and to come forward and be heard.’” *Churchill Village, L.L.C. v. Gen.*
 22 *Elec.*, 361 F.3d 566, 575 (9th Cir. 2004). In addition to the requirements of Rule 23(c), this
 23 District’s procedural guidelines for notice requires information such as class counsel’s contact
 24 information, the address for the class settlement website, and instructions on how to access the
 25 case docket. *See* Procedural Guidance for Class Action Settlements, *available at*
 26 <https://cand.uscourts.gov/forms/procedural-guidance-for-class-action-settlements/>; *De Leon*,
 27 2019 WL 6311379, at *13 (approving notice containing this information in addition to that
 28 required by Rule 23(c)). Here, the proposed notice to the Class provides information on all of

1 these subjects and informs Class Members about their rights under the Settlement as well as their
2 right to be heard at the final fairness hearing. *See* Cheng Decl. Ex. B.

3 It is well-established that notice sent by first class mail is sufficient when the names and
4 addresses of the class members are known. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173-77
5 (1974); *Peters v. Nat'l R.R. Passenger Corp.*, 966 F.2d 1483, 1486 (D.C. Cir. 1992) (“It is
6 beyond dispute that notice by first class mail ordinarily satisfies rule 23(c)(2)’s requirement that
7 class members receive ‘the best notice practicable under the circumstances.’”); *see* Manual for
8 Complex Litigation, *supra*, § 21.311 (explaining that individual notice via mail is preferred when
9 names and addresses are known). Here, the members of the Class will receive notice by U.S.
10 Mail. Agmt. § II.3. Defendants have agreed to provide Class Counsel with the names and contact
11 information of all Class Members by October 6, 2021. *Id.* § II.7. Publication notice is not
12 necessary in this case, because Defendants’ data identifies the names and addresses of all Class
13 Members. In these circumstances, courts have regularly authorized notice by mail only. *See, e.g.,*
14 *Uschold v. NSMG Shared Servs., LLC*, 333 F.R.D. 157, 166 & 173 (N.D. Cal. 2019) (J. Corley)
15 (approving notice by mail only); *Urakhchin*, 2018 WL 3000490, at *7 (same). Thus, the
16 proposed procedures satisfy due process, meet the requirements of Rule 23, and should be
17 approved.

18 The settlement administrator’s responsibilities will include, among others, mailing the
19 settlement Notice to Class Members, paying the net settlement amount allocated to each Class
20 Member by check or to the AAI 401(k) Plan, and setting up and maintaining a settlement website
21 consistent with Class Counsel’s instructions or the court-approved Plan of Allocation. Agmt.
22 §§ VII.2. Class Counsel has solicited bids for class notice and administration services through a
23 competitive process. Class Counsel solicited responses to a request for proposals from reputable
24 service providers, of which four submitted bids. Cheng Decl. ¶ 9. Following review of the bids
25 and discussion with the respondents to ensure an apples-to-apples comparison of services, Class
26 Counsel proposes that the Court appoint RG/2 Claims Administration LLC as Settlement
27 Administrator. *See* Cheng Decl. ¶ 12 and Ex. C. Non-AAI Defendants have agreed to pay for all
28 costs for settlement administration. Agmt. § IV.7. As such, those expenses will not be deducted

1 from the Settlement Fund. *See Schuchardt v. L. Off. of Rory W. Clark*, 314 F.R.D. 673, 691
2 (N.D. Cal. 2016) (J. Corley) (finding the settlement administrative costs reasonable and
3 appropriate where the defendants were responsible for paying those costs and they “do not come
4 from a common fund with the Class Members’ recovery”). Block & Leviton LLP is currently
5 using the notice and settlement administration services of RG/2 Claims Administration in
6 another class action. Barton Decl. ¶ 6. In its response to Class Counsel’s solicitation for this case,
7 RG/2 Claims Administration estimated the administrative costs to be approximately \$23,194 –
8 \$25,000, based on an estimated class size of 2,800 individuals. Cheng Decl. ¶ 11. This amount is
9 within the range of those that courts have approved for class action settlements of less monetary
10 value. *See, e.g., Chavez v. Converse, Inc.*, No. 15-CV-03746, 2020 WL 10575028, at *7 (N.D.
11 Cal. Nov. 25, 2020) (approving settlement administration costs of \$25,000.00 as fair and
12 reasonable in \$1,875,000 settlement); *Bellinghausen v. Tractor Supply Co.*, 306 F.R.D. 245, 251
13 & 266 (N.D. Cal. 2015) (J. Corley) (approving settlement administration costs of \$16,500 in \$1
14 million settlement); *Francisco v. Emeritus Corp.*, No. 217CV02871, 2019 WL 7856768, at **2,
15 8 (C.D. Cal. Sept. 24, 2019) (approving settlement administration costs of \$21,552 as reasonable
16 in \$250,000 settlement). Defendants have approved use of RG/2 Claims Administration. Cheng
17 Decl. ¶ 10. Class Counsel recommends that the Court appoint RG/2 Claims Administration as
18 the Settlement Administrator (subject to Class Counsel and Defendants entering into an
19 acceptable engagement agreement with RG/2). *Id.* ¶ 12.

20 Pursuant to the Settlement Agreement, Defendants will prepare and provide, at their own
21 expense, notice pursuant to the Class Action Fairness Act of 2005 (“CAFA”), including notices
22 to the United States Department of Justice and Department of Labor and to the Attorneys
23 General of all states in which the Class Members reside within 21 days of the execution of the
24 Settlement Agreement or by October 14, 2021. Agmt. § XIII.1. Defendants will provide Class
25 Counsel with a copy of the CAFA notice and materials that Defendants sent, within three
26 business days after such notices have been sent. *Id.* § XIII.2.

VIII. THE PLAN OF ALLOCATION SHOULD BE PRELIMINARILY APPROVED

“Approval of a plan of allocation of settlement proceeds in a class action . . . is governed by the same standards of review applicable to approval of the settlement as a whole: the plan must be fair, reasonable and adequate.” *Thomas v. MagnaChip Semiconductor Corp.*, No. 14-CV-01160, 2017 WL 4750628, at *8 (N.D. Cal. Oct. 20, 2017) (citation omitted). “Allocation of the settlement funds based on the extent of class members’ injuries or the strength of their claims on the merits” meets the standard. *In re Lithium Ion Batteries Antitrust Litig.*, No. 13-MD-02420, 2020 WL 7264559, at *12 (N.D. Cal. Dec. 10, 2020). “A plan of allocation need only have a reasonable, rational basis, particularly if recommended by experienced and competent counsel.” *In re Nexus 6P Prods. Liab. Litig.*, No. 17-CV-02185, 2019 WL 6622842, at *9 (N.D. Cal. Nov. 12, 2019) (citation omitted). A pro rata distribution based on each class member’s loss relative to that of the class as whole “has frequently been determined to be fair, adequate, and reasonable.” *Hefler v. Wells Fargo & Co.*, No. 16-CV-05479, 2018 WL 6619983, at *12 (N.D. Cal. Dec. 18, 2018) (collecting cases).

The Proposed Plan of Allocation here determines the monetary recovery of each Class Member based on the number of vested AAI shares allocated to the Class Member’s ESOP account, as a fraction of all the vested shares allocated to all Class Members’ ESOP accounts. Cheng Decl. Ex. A. Thus, the Plan of Allocation disburses the net settlement proceeds to each Class Member on a pro rata basis based on his or her shares of the overvalued AAI stock the ESOP purchased relative to the totality of all Class Members’ shares of the same stock. Because the Plan of Allocation proposes a pro rata distribution based on the relative size of each Class Member’s loss resulting from the ESOP’s alleged overpayment, it is reasonable, fair, and adequate.

IX. THE COURT SHOULD ESTABLISH DATES FOR EFFECTUATING FINAL APPROVAL OF THE SETTLEMENT

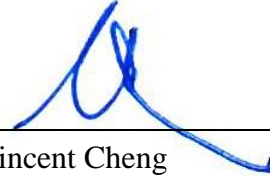
In order to effect notice, fix a date for the final approval hearing, and provide a deadline for the submission of objections, Plaintiffs request that the Court establish the dates set forth in Plaintiffs’ motion.

1 **X. CONCLUSION**

2 For the forgoing reasons, the Court should grant Plaintiffs' motion to preliminarily
3 approve the proposed Settlement, approve the proposed Class notice, authorize its distribution to
4 the Class, and set dates outlined above.

5
6 Dated: September 24, 2021

Respectfully submitted,

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