UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

STEVE RABIN, et al.,

Plaintiffs,

v.

PRICEWATERHOUSECOOPERS LLP,

Defendant.

Case No. 16-cv-02276-JST

ORDER GRANTING PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT AND REQUIRING REVISIONS TO PROPOSED NOTICES

Re: ECF No. 312

Before the Court is Plaintiffs' motion for preliminary settlement approval. ECF No. 312. The Court will grant the motion but will require Plaintiffs to revise and re-file the proposed notices before the Court authorizes their dissemination to the members of the settlement classes.

I. BACKGROUND

A. Parties and Claims

Defendant PricewaterhouseCoopers, LLP ("PwC") is a global accounting and auditing firm. ECF No. 42 ¶ 2. Plaintiff Steve Rabin is a Certified Public Accountant who applied for a Seasonal Experienced Associate position with PwC when he was 50 years old. *Id.* ¶¶ 25-26. Plaintiff John Chapman "has a Master's degree in accounting with ten years of experience in bookkeeping" and applied for a Tax Transfer Pricing Associate position with PwC when he was 47 years old. *Id.* ¶¶ 27-28. PwC rejected Rabin's and Chapman's applications for employment. *Id.* ¶¶ 26, 28. Both men allege that PWC denied employment to them because of their age. *Id.* ¶¶ 72, 81.

Plaintiffs bring this putative class and collective action on behalf of individuals 40 years of age or older who applied for and were denied positions as Associates, Experienced Associates, or Senior Associates (the "Covered Positions") in PwC's Tax and Assurance lines of service. ECF

No. 312-2 §§ 1.3, 1.13, 1.28, 1.43. Plaintiffs allege that PwC "maintains hiring policies and practices for giving preference to younger employees that result in the disproportionate employment of younger applicants." ECF No. 42 ¶ 6. In particular, PwC allegedly discriminates against older applicants by willfully "utilizing a biased recruiting system for entry-level accounting hiring," "implementing a mandatory early retirement policy," and "refusing to hire applicants ages 40 and over for the Covered Positions." *Id.* ¶ 54. Plaintiffs' operative first amended complaint ("FAC") asserts seven causes of action: (1) intentional discrimination in violation of the federal Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. § 623(a)(1); (2) disparate impact discrimination in violation of the ADEA, 29 U.S.C. § 623(a)(2); (3) intentional discrimination in violation of the California Fair Employment and Housing Act ("FEHA"), Cal. Gov. Code § 12940(a); (4) disparate impact discrimination in violation of FEHA, Cal. Gov. Code §§ 12940(a), 12491; (5) violation of the California Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code §§ 17200, *et seq.*; (6) intentional discrimination in violation of the Elliott-Larsen Civil Rights Act ("MCRA"), Mich. Comp. Laws § 37.22202(a); and (7) disparate discrimination in violation of MCRA, Mich. Comp. Laws § 37.2202(b). *Id.* ¶¶ 1, 82-135.

B. Procedural History

On April 27, 2016, Plaintiff Steve Rabin filed the original complaint on behalf of a nationwide ADEA collective and a California class. ECF No. 1 ¶¶ 47, 53. On September 8, 2016, John Chapman joined as a plaintiff asserting Michigan class claims. ECF No. 42 ¶ 58. PwC moved for judgment on the pleadings on December 1, 2016, arguing that the ADEA does not permit job applicants to bring disparate impact claims. ECF No. 55 at 7-11. The Court denied PwC's motion. ECF No. 74 at 10.

After denying Plaintiffs' first motion for conditional certification of their proposed collective action, ECF No. 236, the Court granted Plaintiffs' renewed motion for collective certification of a nationwide ADEA collective on March 28, 2019. ECF No. 274 at 7. Of the approximately 17,000 potential collective members who received notice, 3,456 individuals opted in. ECF No. 312-1 ¶ 21.

On September 21, 2018, the parties attended a full-day mediation overseen by Robert Meyer of JAMS. ECF No. 312-1 ¶ 22. After several additional months of negotiation, the parties then reached a tentative agreement regarding programmatic relief. *Id.* ¶ 23. On January 21, 2020, in a second full-day mediation overseen by David A. Rotman, "one of the preeminent employment class action mediators in the country," the parties reached an agreement on a monetary settlement amount. *Id.* ¶¶ 25-26. On March 3, 2020, Plaintiffs filed this unopposed motion for preliminary approval of the class and collective action settlement agreement. ECF No. 312.

C. Terms of the Settlement Agreement

The proposed settlement agreement ("Settlement") includes a federal ADEA collective and two classes to be certified under Rule 23. The ADEA collective, which the Court conditionally certified on March 28, 2019, includes:

> all the applicants (a) who applied to and were denied Covered Positions on or after October 18, 2013, (b) who were aged 40 or older at the time of application, and (c) who opted in to this Litigation pursuant to the federal Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. §§ 621, et seq. ("ADEA") on or before January 21, 2020.

ECF No. 312-2 § 1.43. "Covered Position" refers to the one of three positions - Associate, Experienced Associate, and Senior Associate - in PwC's Tax or Assurance lines of service. *Id.* § 1.13. The classes to be certified under Rule 23 include a California Class and a Michigan Class:

> "California Class" means all applicants who, between September 8, 2013 and January 21, 2020 (inclusive), (a) applied for and were denied a Covered Position in California or (b) resided in California at the time they applied to a Covered Position and were denied; and were aged 40 or older at the time of application.
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> "Michigan Class" means all applicants who, between September 8, 2013 and January 21, 2020 (inclusive), (a) applied for and were denied a Covered Position in Michigan or (b) resided in Michigan at the time they applied to a Covered Position and were denied; and were aged 40 or older at the time of application.

Id. §§ 1.28, 1.3. The proposed California and Michigan classes are "substantially the same as those proposed in the First Amended Complaint."[1] ECF No. 312 at 24 n.14; *see* ECF No. 42

[1] Consistent with the Court's order denying conditional certification of an ADEA collective that included unqualified and deterred applicants, ECF No. 103, the Rule 23 classes have been amended to exclude unqualified and deterred applicants. ECF No. 312 at 24 n.14. In addition,

¶¶ 57-58.

To compensate class and collective members who file claim forms, the Settlement provides a common fund of $11,625,000.00. ECF No. 312-2 §§ 1.25, 4.1. The following amounts will be deducted from the common fund: (1) up to $4.65 million in attorney's fees and up to $295,000 in costs to class counsel; (2) service awards of $20,000 for each of the two named plaintiffs, plus $2,000 for each of the 28 declarants, for a total of $96,000; (3) up to $105,330 in settlement administration costs; (4) up to $20,000 for an implementation expert to advise on programmatic relief; and (5) a $300,000 reserve fund for class and collective members who file forms "for any alleged and valid age discrimination claims based on PwC's failure to hire them into a Covered Position" during a 15-month window following Finality.[2] *Id.* §§ 4.2, 5.1, 6.1, 10.1; *see* ECF No. 312 at 16. A portion of the remaining Net Fund will then be distributed to individual claimants. ECF No. 312-2 §§ 4.2.7, 4.3. Individual awards will be calculated using a point system that accounts for claimants' settlement class and their qualifications to work at PwC.[3] *Id.*; *see* ECF No. 312 at 17. Any remaining funds will be redistributed to claimants *pro rata* or given as a *cy pres* donation to Experience Works, Inc., "a nationwide nonprofit dedicated to helping people age with dignity and purpose and improve quality of life through training, community service, and

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"by agreement of the Parties" the California and Michigan classes reach back three years from the date of the operative complaint instead of four years, as was set forth in the FAC. ECF Nos. 42, 312 at 24 n.14.

[2] "Finality" is defined as "the first court day after the date on which the Court has entered the Final Approval Order, provided that no timely objection has been made or that all timely objections have been resolved or withdrawn." ECF No. 312-2 § 1.24.

[3] The settlement administrator, in consultation with class counsel, will score each claim form. *See* ECF No. 312-2 § 4.3; ECF No. 312 at 17. In determining claimants' scores, the settlement administrator will consider "whether [claimants] are a California/Michigan opt-in class member (2 points), an opt-in non-class member (i.e., an opt-in from a different state) (1.5 points), or a California/Michigan non-opt-in (i.e., a class member but not an opt-in)." ECF No. 312 at 17; *see* ECF No. 312-2 §§ 4.3.1-4.3.3. The settlement administrator will also make "a general assessment of the strength of any individual's argument that they were qualified to work at PwC." ECF No. 312 at 17; *see* ECF No. 312-2 § 4.3.3. A 10x multiplier will be applied for those selected by PwC to interview for a Covered Position. *Id.* For all others, a 0x, 1x, 2x, or 3x multiplier will be applied, "based on basic information provided by the Claimants in their Claim Forms regarding educational background . . . and professional background." ECF No. 312 at 17; *see* ECF No. 312-2 § 4.3.3.

employment." ECF No. 312 at 18; ECF No. 312-2 § 10.4.

In addition to monetary relief, the Settlement includes programmatic relief for a period of two years to "enhance [PwC's] recruiting and hiring process for Older workers who may wish to apply for Covered Positions in the future." ECF No. 312 at 16; ECF No. 312-2 § 3. Key features of the programmatic relief include PwC's agreement to (1) hire an implementation expert to advise on training and recruitment matters; (2) advertise directly to older applicants; (3) refrain from asking pre-offer applicants their graduation date; (4) include age as an aspect of PwC's nondiscrimination policy; (5) permit alumni to apply for on-campus openings of Covered Positions; and (6) institute an age discrimination complaint procedure. ECF No. 312-2 §§ 3.2-3.3.

In exchange, participating class and collective members will waive the following claims:

> [A]ny claims against the Released Parties up until January 21, 2020, including but not limited to all known and unknown claims, promises, causes of action, or similar rights of any kind that they presently have or may have for discrimination because of age arising out of or relating in any way to any of the legal, factual, or other allegations made in the Litigation, or any legal theories that could have been raised based on the allegations in the First Amended Complaint, including, without limitation, claims under the Age Discrimination in Employment Act of 1967 ("ADEA") or parallel state or local laws except that Participating Class Members who are not Participating Collective Members and do not submit Claim Forms will not release ADEA claims, since they have not opted into the ADEA Collective (the "Released Claims").

ECF No. 312-2 § 12.1. In addition, the named plaintiffs and any declarants who receive a service award must execute a general release of all claims. *Id.* § 12.3; *id.* at 56-61.

To inform the classes and collective of the settlement, the settlement administrator will send notice by first class mail and email to the settlement class and collective members (collectively, "Covered Individuals") within 21 days of receiving the applicant data from PwC. *Id.* §§ 1.11, 8.2, 9.2.2. The settlement administrator will also maintain a website where Covered Individuals can review the settlement notice and submit claim forms. *Id.* § 9.2.4.

Covered Individuals will have 60 days to object or opt out of the Settlement and 60 days to submit a claim form. *Id.* § 9.2.7. Individuals may opt out by sending to the settlement administrator a statement that they are opting out of the Settlement, along with their name, address, and telephone number. *Id.* § 9.3.1. Individuals may object to the Settlement by sending

to the Court a statement of their objection, along with their name, address, and telephone number. *Id.* § 9.4.1.

To receive a payment, Covered Individuals must submit a completed claim form on the settlement website or via email, mail, or fax within the 60-day claims period. *Id.* §9.1.1(5); *id.* at 41. Approximately halfway through the claims period, the settlement administrator will send reminder emails to Covered Individuals who have not responded to the notice. *Id.* § 9.2.3. No later than 20 business days after Finality, the settlement administrator will mail claimants their settlement award checks with clear notice that checks expire in 180 days. *Id.* § 7.1. The settlement administrator will undertake reasonable efforts to encourage claimants to cash their settlement award checks. *Id.*

II. JURISDICTION

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

III. CLASS CERTIFICATION

A. Legal Standard

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

Second, a plaintiff must establish that the action meets one of the bases for certification in Rule 23(b). "[I]n cases where a plaintiff seeks both declaratory and monetary relief, [courts] may certify a damages-seeking class under Rule 23(b)(3), and an injunction-seeking class under Rule 23(b)(2)." *West v. California Services Bureau, Inc*., 323 F.R.D. 295, 306 (N.D. Cal. 2017) (citing *Wang v. Chinese Daily News, Inc.*, 737 F.3d at 544). Under Rule 23(b)(3), Plaintiffs must establish that "questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). Under Rule

23(b)(2), Plaintiffs must show that "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). "Class certification under Rule 23(b)(2) is appropriate only where the primary relief is declaratory or injunctive." *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 986 (9th Cir. 2011) (citation omitted).

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

B. Discussion

For the reasons set forth below, the Court grants conditional certification of the settlement classes and affirms its prior certification of the settlement collective.

1. California and Michigan Classes

a. Rule 23(a)

Rule 23(a)(1) requires that the class be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). The proposed classes, which include an estimated 5,000 individuals, satisfy the numerosity standard. ECF No. 312 at 31; *see Hernandez v. Cnty. of Monterey*, 305 F.R.D. 132, 152–53 (N.D. Cal. 2015) (finding a class or subclass with more than forty members "raises a presumption of impracticability [of joinder] based on numbers alone").

Rule 23(a)(2) requires that there be "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). A common question "is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart*, 564 U.S at 350. For the purposes of Rule 23(a)(2), "even a single common question" is sufficient. *Id.* at 359 (quotation marks and internal alterations omitted). Proposed class members in this case share the common question of "whether PwC's recruitment and hiring systems are discriminatory." ECF No. 312 at 24; ECF No. 42 ¶ 61. The existence of this question satisfies the commonality requirement.

Rule 23(a)(3) requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed R. Civ. P. 23(a)(3). "The purpose of the typicality requirement is to assure that the interest of the named representative aligns with the interests of the class." *Hanon v. Dataproducts Corp*., 976 F.2d 497, 508 (9th Cir. 1992). "The test of typicality 'is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct.'" *Id*. (quoting *Schwartz v. Harp*, 108 F.R.D. 279, 282 (C.D. Cal. 1985)). Since named plaintiffs, Rabin and Chapman, are challenging the same allegedly discriminatory PwC policies and practices as the class members, their claims are typical of the class. ECF No. 312 at 25.

Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). This "requires that two questions be addressed: (a) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (b) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *In re Mego Fin. Corp. Sec. Litig*., 213 F.3d 454, 462 (9th Cir. 2000). The Court is preliminarily satisfied that the representative parties will fairly and adequately protect the interests of the class. Rabin and Chapman both allege being denied employment at PwC as older applicants, despite being qualified. ECF No. 42 ¶¶ 6, 70-71, 77-79. They seek the same relief as the class members and have every incentive to vigorously prosecute the action on behalf of the classes. *See id.* ¶¶ 6, 63, 70-71, 77-79, 140. In addition, class counsel have submitted declarations highlighting their extensive experience litigating employment discrimination class actions. *See* ECF Nos. 312-1 ¶ 5, 312-4 ¶¶ 7-9. The Court thus concludes that Rabin, Chapman, and class counsel will adequately represent the proposed class members.

b. Rule 23(b)(3)

To certify a Rule 23 damages class, the Court must find that "questions of law or fact common to class members predominate over any questions affecting only individual members, and [that] a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). The predominance inquiry "tests whether

proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Prods., Inc.*, 521 U.S. at 623. "When common questions present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication, there is clear justification for handling the dispute on a representative rather than on an individual basis." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1022 (9th Cir. 1998) (citation omitted) *overruled on other grounds by Wal-Mart*, 564 U.S. at 338.

Here, the Court finds that the common questions raised by Plaintiffs' claims predominate over any questions affecting only individual members of the proposed classes. Plaintiffs and the class members applied to one of three positions in PwC's Tax or Assurance lines of service and were subject to common policies and practices regarding recruitment and hiring. ECF No. 312 at 26; *see* ECF No. 42 ¶¶ 16, 32, 51, 65. Furthermore, resolving the disputes in a single class action would be far more efficient than litigating their individual cases. There is no indication that individual litigation is already pending in other forums, nor are there any reasons why it would be undesirable to litigate the case in this forum. ECF No. 312 at 26-27. Therefore, the Court concludes that the proposed classes satisfy the requirements of Rule 23(b)(3).

c. Rule 23(b)(2)

Rule 23(b)(2) requires that "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). Rule 23(b)(2) is satisfied where "class members complain of a pattern or practice that is generally applicable to the class," even if not all class members have been injured by the challenged practice. *Rodriguez v. Hayes*, 591 F.3d 1105, 1125 (9th Cir. 2010) (quoting *Walters v. Reno*, 145 F.3d 1032, 1047 (9th Cir.1998)). The Supreme Court in *Wal–Mart* recognized that '"[c]ivil rights cases against parties charged with unlawful, class-based discrimination are prime examples' of what (b)(2) is meant to capture." 564 U.S. at 361 (citation omitted).

Here, Plaintiffs allege that PwC applied the same discriminatory recruitment and hiring practices to each member of the proposed classes. *See* ECF No. 42 ¶¶ 51-56. While the application of those practices "may not affect every member of the proposed class[es] . . . in

exactly the same way," Plaintiffs seek uniform injunctive relief to "modify PwC's recruitment and hiring practices and eradicate discrimination." *See Parsons v. Ryan*, 754 F.3d 657, 688 (9th Cir. 2014); ECF No. 312 at 27; ECF No. 42 ¶ 140. Accordingly, the Court finds that Plaintiffs have satisfied the requirements for certification under Rule 23(b)(2).

2. Federal ADEA Collective

In the Settlement, the proposed ADEA collective is unchanged from the collective the Court conditionally certified on March 28, 2019. *See* ECF No. 274 at 7-8, ECF No. 312 at 28. Had PwC moved to decertify the class, the Court would apply a stricter standard to evaluate the settlement collective. *See Campbell v. City of Los Angeles*, 903 F.3d 1090, 1110 (9th Cir. 2018) (instructing district courts to "take a more exacting look at the plaintiffs' allegations and the record" when the employer moves for decertification). In the absence of such a motion, the Court continues to find certification of the federal ADEA collective to be proper.

IV. APPOINTMENT OF CLASS REPRESENTATIVES AND CLASS COUNSEL

Because the Court finds that Plaintiffs Steve Rabin and John Chapman meet the commonality, typicality, and adequacy requirements of Rule 23(a), the Court appoints Plaintiffs as class representatives. In addition, when a court certifies a class, the court must appoint class counsel. In doing so, courts must consider: (1) "the work counsel has done in identifying or investigating potential claims in the action;" (2) "counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;" (3) "counsel's knowledge of the applicable law;" and (4) "the resources that counsel will commit to representing the class." Fed. R. Civ. P. 23(g)(1)(A). Additionally, courts "may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class." Fed. R. Civ. P. 23(g)(1)(B).

Plaintiffs' counsel have thus far vigorously prosecuted this action by: (1) filing and amending Plaintiffs' complaint, ECF Nos. 1, 42; (2) successfully defending against a motion for judgment on the pleadings, ECF Nos. 55, 74; (3) filing two motions for conditional certification of their proposed collective action, ECF Nos. 198, 241, 270; (4) investigating class members' potential claims, ECF No. 312-1 ¶ 18; (5) conducting extensive discovery, *id.* ¶ 19; (6) working

with expert consultants to analyze PwC's application data, *id.* ¶ 20; (7) representing Plaintiffs in two full-day mediation sessions and post-mediation settlement discussions, *id.* ¶¶ 22-25; and (8) briefing the instant motion for preliminary approval, ECF No. 312. In addition, Plaintiffs' counsel have significant prior experience prosecuting discrimination, class, and collective actions. *See* ECF Nos. 312-1 ¶ 5, 312-4 ¶¶ 7-9. For these reasons, the Court appoints Outten & Golden LLP, AARP Foundation Litigation, and the Liu Law Firm, P.C. as class counsel.

V. MOTION FOR PRELIMINARY APPROVAL

A. Legal Standard

The Ninth Circuit maintains a "strong judicial policy" that favors the settlement of class actions. *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992). Courts generally employ a two-step process in evaluating a class action settlement. First, courts make a preliminary determination concerning the merits of the settlement and, if the class action has settled prior to class certification, the propriety of certifying the class. *See* Manual for Complex Litigation (Fourth) § 21.632 (2004).

Second, courts must hold a hearing and make a final determination of whether the settlement is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). At the preliminary approval stage, the court must determine whether the settlement falls "within the range of possible approval." *In re Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078, 1080 (N.D. Cal. 2007) (quotation omitted). To assess a settlement proposal, courts must balance a number of factors:

> the strength of the plaintiffs' case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed and the state of the proceedings; the experience and views of counsel; the presence of a governmental participant; and the reaction of the class members to the proposed settlement.

Hanlon, 150 F.3d at 1026. The proposed settlement must be "taken as a whole, rather than the individual component parts" in the examination for overall fairness. *Id.* Courts do not have the ability to "delete, modify, or substitute certain provisions," *id.* (quoting *Officers for Justice v. Civ. Serv. Comm'n of San Francisco*, 688 F.2d 615, 630 (9th Cir. 1982)); the settlement "must stand or

fall in its entirety," *id.*

The proposed settlement need not be ideal, but it must be "fair, adequate and free from collusion." *Id.* at 1027. Preliminary approval of a settlement is appropriate if "the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class, and falls within the range of possible approval." *In re Tableware*, 484 F. Supp. 2d at 1079 (quotation omitted). "The initial decision to approve or reject the settlement under Fed. R. Civ. P. 23(e) is committed to the sound discretion of the trial judge." *City of Seattle*, 955 F.2d at 1276. Courts "must be particularly vigilant not only for explicit collusion, but also for more subtle signs that class counsel have allowed pursuit of their own self-interests and that of certain class members to infect the negotiations." *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 947 (9th Cir. 2011).

B. Discussion

As set forth below, the Court finds that the settlement falls within the range of possible approval, but will require that the notices be amended before setting a final approval date.

1. Plaintiffs' Case; Risk, Expense, Complexity, and Likely Duration of Further Litigation; and Risk of Maintaining Class Status Throughout Trial

The risk, expense, complexity, and likely duration of further litigation weigh in favor of preliminary approval. Although Plaintiffs and class counsel believe their allegations have merit, they also acknowledge PwC's ability to raise factual and legal defenses that may prevent class certification or recovery. PwC could argue that Plaintiffs' claims are not suitable for class certification because individualized determinations related to the multiple job titles, lines of service, specialties, geographic locations, and management teams at issue could overwhelm common issues. ECF No. 312 at 29; *see Berndt v. California Dep't of Corrections*, No. 03-cv-3174-PJH, 2012 WL 950625, at *13 (N.D. Cal. Mar. 2, 2012) ("[T]he potential for multiple mini-trials, even solely as to damages, [] weakens the case for a finding of superiority."). PwC could also point to differences in education, training, and experience to attempt to explain away any

statistically significant disparities between the ages of hired applicants. ECF No. 312 at 29.

In addition, should they prevail at trial, Plaintiffs risk losing on appeal given the Seventh Circuit's recent *en banc* decision, agreeing with the Eleventh Circuit, that the ADEA does not permit job applicants to bring disparate impact claims. *See Kleber v. CareFusion Corp.*, 914 F.3d 480, 481-485 (7th Cir.) (*en banc*), *cert. denied*, 140 S. Ct. 306 (2019); *Villarreal v. R.J. Reynolds Tobacco Co*. 839 F.3d 958, 963 (11th Cir. 2016) (*en banc*). In denying PwC's motion for judgement on the pleadings in February 2017, this Court found that job applicants may bring disparate impact claims. ECF No. 74 at 2-10. A Ninth Circuit Decision in favor of Plaintiffs would create a circuit split and "increase[e] the likelihood that the Supreme Court might weigh in and reverse." ECF No. 312 at 29.

2. Amount Offered in Settlement

To evaluate the adequacy of the settlement amount, "courts primarily consider plaintiffs' expected recovery balanced against the value of the settlement offer." *In re Tableware*, 484 F. Supp. 2d at 1080. But "[i]t is well-settled law that a cash settlement amounting to only a fraction of the potential recovery does not per se render the settlement inadequate or unfair." *Officers for Justice*, 688 F.2d at 628.

Plaintiffs provide several methods to assess the reasonableness of the settlement based on the expected recovery. First, Plaintiffs compare the settlement amount in this action, $11.625 million, to the recent settlement amount reached in *Heath v. Google*, No. 15-cv-01824 (N.D. Cal. Aug. 15, 2019), ECF No. 433.[4] By comparing opt-ins, employee salaries, and weeks of unemployment provided by the defendant in each action, Plaintiffs estimate that the settlement value of the present case would be $3.1 million if the same metrics used in *Heath* were applied here. ECF No. 312 at 31-32. The proposed settlement amount, $11.625 million, far exceeds this estimated value. Next, Plaintiffs evaluate the settlement amount by calculating the total potential recovery for the presumed class based on three-year and 20-year time horizons of underpayment.

[4] *Heath v. Google* was a collective action in which the named plaintiff alleged that Google violated the ADEA "by engaging in a systematic pattern or practice of discrimination against applicants age forty and older for three positions at Google across the United States." No. 15-cv-01824, ECF No. 433 at 1. *Heath* settled for $11,000,000 in 2019. *Id.* at 3, 11-13.

Id. at 30. Plaintiffs average the two damage figures and multiply the resulting $73.6 million figure by a "50% chance of prevailing at Rule 23 certification and FLSA decertification (together), summary judgment, and trial," which yields an expected value of $9.2 million. *Id*. at 30-31. Alternatively, using Plaintiffs' figures without adjusting for the probability of prevailing at litigation, the $11.625 million settlement represents approximately 56 percent of the total potential recovery for a three-year horizon of underpayment and approximately 9 percent of the total potential recovery for a twenty-year horizon of underpayment. *See id*. at 31. Given the defenses available to PwC, a Settlement of $11.625 million falls within the range of possible approval. *See e.g. In re Mego Fin. Corp. Sec. Litig*., 213 F.3d at 459 ($2 million settlement was fair even though potential damages were $12 million); *Dyer v. Wells Fargo Bank*, 303 F.R.D. 326, 331 (N.D. Cal. 2014) (even though the settlement was a third of the potential recovery, it was fair due to the uncertainties of continued litigation); *Cordy v. USS-Posco Induss.*, No. 12-cv-00553-JST, 2014 WL 212587, at *3 (N.D. Cal. Jan. 17, 2014) (finding a proposed distribution to class members between 16 percent and 26 percent of the total damages to be within the range of reasonableness).

3. Non-Collusive Negotiations

When parties present a proposed settlement before a class has been certified, courts "must be particularly vigilant not only for explicit collusion, but also for more subtle signs that class counsel have allowed pursuit of their own self-interests and that of certain class members to infect the negotiations." *In re Bluetooth*, 654 F.3d at 947. Signs of collusion include: (1) a disproportionate distribution of the settlement fund to counsel; (2) negotiation of a "clear sailing provision;" and (3) a reversionary clause, i.e., an arrangement for funds not awarded to revert to defendant. *Id.* at 947. If "multiple indicia of possible implicit collusion" are present, a district court has a "special 'obligat[ion] to assure itself that the fees awarded in the agreement were not unreasonably high.'" *Id.* (quoting *Staton v. Boeing Co.*, 327 F.3d 938, 965 (9th Cir. 2003)).

In examining both the terms and means by which the parties arrived at settlement, the Court concludes that the Settlement is non-collusive. It was reached after the parties engaged in motion practice and participated in two arms-length settlement negotiations overseen by experienced and neutral mediators. ECF No. 312 at 13; ECF No. 312-1 ¶¶ 22-26; *see* Advisory

Committee Notes, Fed. R. Civ. P. 23, subdiv. (e)(2) (2018) ("[T]he involvement of a neutral or court-affiliated mediator or facilitator in [] negotiations may bear on whether they were conducted in a manner that would protect and further the class interests."); *Satchell v. Fed. Exp. Corp.*, No. C 03-2659 SI, 2007 WL 1114010, at *4 (N.D. Cal. Apr. 13, 2007) ("The assistance of an experienced mediator in the settlement confirms that the settlement is non-collusive.").

Additionally, the Settlement contains neither a "clear sailing provision" nor a reversionary arrangement. After claimants receive individual awards based on the Settlement's point system distribution method, ECF No. 312-2 §§ 4.3, the remainder of the Net Fund will be redistributed to claimants *pro rat*a or given as a *cy pres* donation to Experience Works, Inc. ECF No. 312-2 § 104. Class counsel do have the right to request up to 40 percent in attorney's fees, which departs from the Ninth Circuit's 25-percent benchmark. ECF No. 312-2 § 5.1; *Williams v. MGM-Pathe Commc'ns Co.*, 129 F.3d 1026, 1027 (9th Cir. 1997) (The "benchmark for an attorneys' fee award in a successful class action is twenty-five percent of the entire common fund."). Nonetheless, the Court finds that this provision of the settlement does not signal collusion. As explained below, the requested fee falls within the range of reasonableness based on considerations that are well-established in the caselaw. Moreover, the Court will determine the actual attorney's fee.

4. Attorney's Fees and Expenses

"Under the 'common fund' doctrine, 'a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole.'" *Staton*, 327 F.3d at (quoting *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980)). In the Ninth Circuit, the "benchmark for an attorneys' fee award in a successful class action is twenty-five percent of the entire common fund." *Williams*, 129 F.3d at 1027. Although the benchmark is 25 percent, courts may adjust this amount depending on:

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

Rodman v. Safeway Inc., No. 11-cv-03003-JST, 2018 WL 4030558, at *3 (N.D. Cal. Aug. 23,

2018) (citations and quotation marks omitted). Courts use class counsel's lodestar to cross-check the amount of fees requested. *Id.*

Here, the Settlement permits class counsel to request fees of up to 40 percent of the gross settlement amount, and Plaintiffs' counsel indicate they intend to request a 35 percent fee. ECF No. 312 at 21; ECF No. 312-2 § 5.1. In requesting this amount, counsel provide a lodestar of over $6.48 million and note that a 35 percent fee, or $4,068,750, will equate to a "negative" lodestar multiplier of 0.63x. *Id.* Class counsel also note that the multiplier will decrease even further as class counsel continue to work for Plaintiffs through approximately 2022. *Id.*

The Court need not determine an appropriate attorney's fee now. At the preliminary approval stage, however, the Court finds that class counsel's request falls within the range of possible approval. Courts have exceeded the 25-percent benchmark in cases involving significant effort and risk. *See Smith v. Am. Greetings Corp.*, No. 14-cv-02577-JST, 2016 WL 2909429, at *8-9 (N.D. Cal. May 19, 2016) (finding a 28 percent attorney's fee award reasonable because counsel's efforts compensated class members and remedied many of the policies giving rise to the lawsuit); *Cordy v. USS-POSCO Induss.*, No. 12-cv-00553-JST, 2014 WL 1724311, at *2 (N.D. Cal. Apr. 28, 2014) (finding a 30 percent attorney's fee award appropriate due to the "vigorousness of the litigation, the result achieved, the risk of non-recovery, the injunctive relief achieved, the special burdens borne by Class Counsel, and the fact that no member of the Class has objected to the requested award"). This Court has also exceeded the 25-percent benchmark when the total fee award is lower than the lodestar calculation. *See Cabiness v. Educ. Fin. Sols.*, No. 16-cv-01109-JST, 2019 WL 1369929, at *7 (N.D. Cal. Mar. 26, 2019) (finding an attorney's fee of 30 percent, which would result in 76 percent of the counsel's claimed lodestar, to be reasonable because the requested award would not '"yield windfall profits for class counsel in light of the hours spent on the case"' (quoting *In re Bluetooth*, 654 F.3d at 942)); *Bennett v. SimplexGrinnell LP*, No. 11-cv-01854-JST, 2015 WL 12932332, at *6 (N.D. Cal. Sept. 3, 2015) (finding an award which represented 38.8 percent of the common fund, but only 59.7 percent of class counsel's lodestar, to be reasonable given the "unusual lodestar amount relative to the monetary recovery obtained for the class").

While this fee is within the range of possible approval, Ninth Circuit precedent dictates "that only special circumstances justify departure" from the 25-percent benchmark. *Reyes v. Bakery & Confectionery Union & Indus. Int'l Pension Fund*, No. 14-cv-05596-JST, 2017 WL 7243239, at *8 (N.D. Cal. Jan. 23, 2017) (internal quotation marks omitted). As such, Class Counsel should be prepared in future briefing to justify any departure from this benchmark. *See Hawthorne v. Umpqua Bank*, No. 11-cv-06700-JST, 2015 WL 1927342, at *5 (N.D. Cal. Apr. 28, 2015) (adjusting class counsel's 33 percent attorney's fee request downward to 25 percent because "the results obtained and time and effort expended in this litigation [were] not so 'unusual' or 'exceptional' as to compel an enhanced attorneys' fee award").

5. Service Awards

"[N]amed plaintiffs, as opposed to designated class members who are not named plaintiffs, are eligible for reasonable incentive payments." *Staton*, 327 F.3d at 977. Incentive awards are "discretionary . . . and are intended to compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, and, sometimes, to recognize their willingness to act as a private attorney general." *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 958-59 (9th Cir. 2009) (internal citation omitted). Courts evaluate incentive awards individually, "using relevant factors including the actions the plaintiff has taken to protect the interests of the class, the degree to which the class has benefitted from those actions, the amount of time and effort the plaintiff expended in pursuing the litigation and reasonable fears of workplace retaliation." *Staton*, 327 F.3d at 977 (citation, internal quotations, and alterations omitted). A higher award may also be appropriate "where the incentive awards represent an insignificant percentage of the overall recovery." *Wren v. RGIS Inventory Specialists*, No. 06-cv-05778 JCS, 2011 WL 1230826, at *32 (N.D. Cal. Apr. 1, 2011), *supplemented*, No. 06-cv-05778 JCS, 2011 WL 1838562 (N.D. Cal. May 13, 2011). "[C]ourts must [also] be vigilant in scrutinizing all incentive awards to determine whether they destroy the adequacy of the class representatives." *Radcliffe v. Experian Info. Sols., Inc.*, 715 F.3d 1157, 1164 (9th Cir. 2013).

Here, the Settlement provides service awards of $20,000 each to Rabin and Chapman for serving as named plaintiffs. ECF No. 312-2 § 6.1. Such an award is four times the presumptively

reasonable amount of $5,000 for service awards. *See Smith v. Am. Greetings Corp.*, No. 14-cv-02577-JST, 2016 WL 362395, at *10 (N.D. Cal. Jan. 29, 2016) ("Several courts in this District have indicated that incentive payments of $10,000 or $25,000 are quite high and /or that, as a general matter, $5,000 is a reasonable amount." (quoting *Harris v. Vector Marketing Corp.*, No. C-08-5198 EMC, 2012 WL 381202, at *7 (N.D. Cal. Feb. 6, 2012)). However, courts in this district have awarded more than $5,000 to compensate representatives for investing significant time and energy into litigation, as well as for taking risks on behalf of other class members. *See, e.g., Galeener v. Source Refrigeration & HVAC, Inc.*, No. 13-cv-04960-VC, 2015 WL 12976106, at *3 (N.D. Cal. Aug. 20, 2015) (granting $27,000 and $25,000 service awards from a $10 million settlement fund in acknowledgement of the named plaintiffs' initiation of the suit, which "caused them personal exposure and potential adverse consequences with future employers"); *Dyer*, 303 F.R.D. at 335-36 (granting $10,000 incentive awards from a $14.7 million settlement fund where class representatives "invested significant time and energy and suffered some risk to their professional reputations by participating in this action as class representatives"); *Ross v. U.S. Bank Nat'l Ass'n*, No. C 07-02961 SI, 2010 WL 3833922, at *4 (N.D. Cal. Sept. 29, 2010) (approving $20,000 service awards for four named representatives).

In addition to service awards for the named plaintiffs, class counsel also request service award payments of $2,000 for each of the 28 individuals who submitted sworn declarations in support of Plaintiffs' motions for collective action certification. ECF No. 312-2 §§ 1.14, 6.1. Class members can be paid for identifiable services rendered to the class. *Staton*, 327 F.3d at 976. Courts should consider whether these service award payments are "fair, adequate, and reasonable in light of [the testifying declarants'] efforts on behalf of the class and the risk they took in participating publicly in the lawsuit." *Vedachalam v. Tata Consultancy Servs.*, No. 06-cv-0963, 2013 WL 3929129, at *2 (N.D. Cal. July 18, 2013). A $2,000 award falls within the range of approved awards for testifying declarants in this district. *See, e.g., id.* (awarding $1,000 to each testifying declarant in recognition of the hours they spent in preparation for their depositions and the "courage" they showed by stepping forward and giving "testimony in support of claims when many [] employees expressed fears that the company might retaliate"); *Wellens v. Sankyo*, No. C

13-00581 WHO, 2016 WL 8115715 at *3 (N.D. Cal. Feb. 11, 2016) (finding service awards of $1,000 to $6,000 reasonable for opt-in class members who submitted declarations or were deposed).

"The Court need not resolve the specific amount of the [service] award[s] at this time as the matter will be conclusively determined at the Final Fairness and Approval Hearing." *Edenborough v. ADT*, No. 16-cv-02233-JST, 2017 WL 4641988, at *8 (N.D. Cal. Oct. 16, 2017). "However, Plaintiffs should be mindful of addressing these issues and providing appropriate detail and documentation in connection with their motion for final approval and motion for a service enhancement award." *Id*. At this stage, without determining the size of any award, the Court finds that the service awards for the named plaintiffs and testifying declarants fall within the range of possible approval.

6. Extent of Discovery

The Settlement is a product of nearly four years of litigation, which involved over one million pages of discovery, interviews with class members and other witnesses, and consultation with experts to analyze various types of potential discrimination in hiring. ECF No. 312-1 ¶¶ 18-20. The discovery process has permitted the parties to collect "sufficient information to make an informed decision about the Settlement." *In re Mego*, 213 F.3d at 459.

7. Experience and Views of Counsel

As noted above, class counsel have extensive experience in litigating class action and employment discrimination cases. *See* ECF Nos. 312-1 ¶ 5, 312-4 ¶¶ 7-9. Class counsel also advocate in favor of this settlement.[5] Thus, both the experience and views of counsel weigh in favor of preliminary approval.

8. Presence of Obvious Deficiencies

The Court has reviewed the Settlement and did not find any obvious deficiencies. The

[5] The Court considers this factor but gives it little weight. "[A]lthough a court might give weight to the fact that counsel for the class or the defendant favors the settlement, the court should keep in mind that the lawyers who negotiated the settlement will rarely offer anything less than a strong, favorable endorsement." *Principles of the Law of Aggregate Litigation* § 3.05 cmt. a (Am. Law. Inst. 2010); *see also id.* (stating that this factor is of "questionable value").

Settlement falls within the range of possible approval. Nonetheless, issues with the notice plan, as set forth below, preclude the Court from giving notice of the Settlement to the proposed classes and collective. *See* Fed. R. Civ. P. 23(e)(1).

9. Notice Plan

The Court must separately evaluate the proposed notice procedure. Under Federal Rule of Civil Procedure 23(c)(2)(B), "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." The notice must state:

> (i) the nature of the action; (ii) the definition of the class certified; (iii) the class claims, issues, or defenses; (iv) that a class member may enter an appearance through an attorney if the member so desires; (v) that the court will exclude from the class any member who requests exclusion; (vi) the time and manner for requesting exclusion; and (vii) the binding effect of a class judgment on members under Rule 23(c)(3).

Fed. R. Civ. P. 23(c)(2)(B).

The parties propose to use JND Legal Administrator as the settlement administrator. ECF No. 312-2 § 1.41. The settlement administrator will provide notice to class members via U.S. mail and email and maintain a website where individuals can review the notice and submit claim forms. *Id.* § 9.1.1(2), (5). Class members will have 60 days to object or opt out of the settlement and 60 days to submit a claim form. *Id.* § 1.8. To ensure class members receive and understand the notice, the settlement administrator will send a reminder email halfway through the claims period to individuals who have not responded. *Id.* § 9.2.3. The proposed notice dissemination plan and claims period comply with due process requirements and this district's guidelines. Northern District of California, *Procedural Guidance for Class Action Settlements* § 3 ("Northern District Guidance"), https://www.cand.uscourts.gov/ClassActionSettlementGuidance.

However, the procedures for objecting and opting out of the settlement do not conform with this district's guidance. Class Members who wish to object to a Settlement need only submit a statement to the Court that (1) "state[s] with specificity the ground for objection" and (2) "state[s] whether it applies to the objector, to a specific subgroup of a class, or to the entire class." *Livingston v. MiTac Digital Corp.*, 18-cv-05993-JST, 2019 WL 8504695, at *7 (N.D. Cal.

Dec. 4, 2019); Fed. R. Civ. P. 23(e)(5)(A); *see* Northern District Guidance § 5. Class Members who wish to opt out of a settlement need only "provide in a letter to the Settlement Administrator [] (1) the class member's name, (2) a statement that the class member wishes to be excluded from the settlement class in [*Rabin v. PricewaterhouseCoopers LLP*, No. 4:16-cv-02276-JST], and (3) the class member's signature." *Haralson v. U.S. Aviation Servs. Corp.*, 383 F. Supp. 3d 959, 975-76 (N.D. Cal. 2019); *see* Northern District Guidance § 4. However, both the Settlement and proposed Class and Collective Action Settlement Notice ("Notice") require that individuals who wish to object or opt out provide their addresses and telephone numbers. ECF No. 312-2 §§ 9.3.1, 9.4.1; *id.* at 44. The Notice should require only the information needed to object and opt out of the settlement and no "extraneous information." *See* Northern District Guidance § 4; *Livingston v. MiTAC Digital Corp.*, No. 18-cv-05993-JST, 2019 WL 8504695, at *6 (N.D. Cal. Dec. 4, 2019) ("[C]lass members do not need to provide their telephone numbers and addresses" to request exclusion from the settlement). The Court directs Plaintiffs to file an amended Notice which corrects these deficiencies.

CONCLUSION

For the foregoing reasons, the Court grants Plaintiff's motion for preliminary approval.

Within seven days of the date this order is issued, Plaintiffs shall carefully review each of the proposed notices, shall correct the errors described above, and shall file revised proposed notices for the Court's review, as well as redlines showing any changes made to the proposed notices. The Court will set a date for the final fairness hearing once the Court approves the revised proposed notices and authorizes the dissemination of such notices to the settlement classes.

IT IS SO ORDERED.

Dated: August 19, 2020

JON S. TIGAR
United States District Judge