

United States District Court
Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

IN RE: HIGH-TECH EMPLOYEE
ANTITRUST LITIGATION

Case No. 11-CV-02509-LHK

THIS DOCUMENT RELATES TO:
ALL ACTIONS

**ORDER GRANTING PLAINTIFFS’
MOTION FOR FINAL APPROVAL OF
CLASS ACTION SETTLEMENT WITH
DEFENDANTS ADOBE SYSTEMS
INCORPORATED, APPLE INC.,
GOOGLE INC., AND INTEL
CORPORATION**

This matter is before the Court on Plaintiffs’ motion for final approval of the proposed class action settlement (“Settlement”) between individual and representative Plaintiffs Michael Devine, Mark Fichtner, Siddharth Hariharan, and Daniel Stover, and the Class they represent (collectively, “Plaintiffs”), and Adobe Systems, Incorporated, Apple Inc., Google Inc., and Intel Corporation (collectively, “Defendants”).¹ Having considered the Motion, the Settling Parties’ Settlement Agreement, the pleadings, and other papers filed in this Action, the statements of

¹ Representative Plaintiff Brandon Marshall died on December 10, 2013. Mr. Marshall’s estate shall receive the settlement share to which Mr. Marshall is entitled pursuant to the terms of the Settlement.

1 counsel and the parties, and all of the arguments and evidence presented at the Final Approval
 2 Hearing held on July 9, 2015, and for good cause shown, IT IS HEREBY ORDERED as follows:

3 Unless otherwise defined herein, all terms that are capitalized herein shall have the
 4 meanings ascribed to those terms in the Settlement Agreement.

5 The Court has jurisdiction over the subject matter of the Settlement Agreement with
 6 respect to and over all parties to the Settlement Agreement, including all Class Members and
 7 Defendants.

8 **I. The Settlement Is Fair, Adequate, and Reasonable**

9 In evaluating a proposed class action settlement under Federal Rule of Civil Procedure
 10 23(e), the standard is whether the settlement “is fundamentally fair, adequate, and reasonable.”
 11 *Officers for Justice v. Civil Serv. Comm’n*, 688 F.2d 615, 625 (9th Cir. 1982); *accord Torrisi v.*
 12 *Tucson Elec. Power Co.*, 8 F.3d 1370, 1375 (9th Cir. 1993). A district court may consider some or
 13 all of the following factors when making this determination: “the strength of plaintiffs’ case; the
 14 risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class
 15 action status throughout the trial; the amount offered in settlement; the extent of discovery
 16 completed and the stage of the proceedings; the experience and views of counsel; the presence of a
 17 governmental participant; and the reaction of the class members to the proposed settlement.”
 18 *Officers for Justice*, 688 F.2d at 625. The Court finds that the Settlement is fair, adequate, and
 19 reasonable in light of these factors.

20 First, the Settlement reflects the strength of Plaintiffs’ case as well as the Defendants’
 21 position. This Court has been “exposed to the litigants and their strategies, positions and proof,”
 22 *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1988) (quoting *Officers for Justice*, 688
 23 F.2d at 626), and finds that the judicial policy favoring the compromise and settlement of class
 24 action suits is applicable here. *See Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th
 25 Cir. 1992). The Court is also satisfied that the Settlement was reached after arm’s length

1 negotiations by capable counsel, and was not a product of fraud, overreaching, or collusion among
2 the parties. *Id.* at 1290-91.

3 Second, the risks, expense, complexity, and likely duration of further litigation also
4 support the Court's final approval of the Settlement. Following the Court's August 8, 2014 denial
5 of preliminary approval of an earlier attempt to settle this case, ECF No. 974,² the parties resumed
6 litigation of pretrial matters. Plaintiffs filed a reply in support of their motion for application of
7 the *per se* standard, ECF No. 988, and Defendants requested leave to file a supplemental
8 opposition, ECF Nos. 990, 990-1, which Plaintiffs opposed, ECF No. 992. Plaintiffs also filed a
9 motion to unseal all papers associated with their motion to compel, ECF No. 991, which
10 Defendants opposed, ECF No. 994; *see also* ECF No. 1029.

11 Meanwhile, on September 4, 2014, Defendants filed a Petition for a Writ of Mandamus
12 with the United States Court of Appeals for the Ninth Circuit, seeking an order vacating the
13 Court's denial of preliminary approval and directing the Court to preliminarily approve the
14 \$324,500,000 settlement. 9th Cir. Case No. 14-72745, Dkt. ("9th Cir. Dkt.") 1. On September 22,
15 2014, the Ninth Circuit issued an order stating that Defendants' "petition for a writ of mandamus
16 raises issues that warrant a response," ordered Plaintiffs to file a response, set a date for
17 Defendants' reply, and ordered that upon completion of briefing the matter be placed on the next
18 available merits panel calendar for oral argument. 9th Cir. Dkt. 2; ECF No. 993. Plaintiffs (and
19 Michael Devine separately) opposed Defendants' petition, 9th Cir. Dkts. 4, 6, and Defendants
20 filed a reply, 9th Cir. Dkt. 10. Putative amici curiae Chamber of Commerce of the United States
21 of America, California Chamber of Commerce, and economic scholars filed motions for leave to
22 file amici curiae briefs in support of the petition, 9th Cir. Dkts. 8, 9, which the Ninth Circuit
23 referred to the panel to be assigned to hear the merits of the petition, 9th Cir. Dkt. 15. Plaintiffs
24

25 ² All "ECF" references are to the docket of Case No. 11-CV-02509-LHK in the Northern
26 District of California.

1 (and Michael Devine separately) opposed the motions for leave to file amici curiae briefs. 9th Cir.
 2 Dkts. 13, 16. The Ninth Circuit scheduled oral argument on the petition for March 13, 2015. 9th
 3 Cir. Dkt. 19. In light of the Settlement with Plaintiffs, Defendants filed an unopposed motion to
 4 dismiss the mandamus petition on January 30, 2015. 9th Cir. Dkt. 23. The Ninth Circuit granted
 5 the motion to dismiss on February 2, 2015. 9th Cir. Dkt. 24.

6 At the time of the current Settlement, the following motions remained pending:
 7 Defendants' motion to exclude Dr. Matthew Marx's testimony; Plaintiffs' motion to exclude
 8 Defendants' experts' testimony; Plaintiffs' motion for application of the *per se* standard; and
 9 Defendants' motions *in limine*. In addition, Plaintiffs and Defendants continued to engage in the
 10 exchange of pretrial disclosures and conferences regarding trial exhibits, witnesses, the joint
 11 pretrial statement, the authentication of business records and potential depositions related thereto,
 12 and many other issues. ECF No. 1033, Declaration of Kelly M. Dermody in Support of
 13 Preliminary Approval ("Dermody Decl.") ¶¶ 12, 14. The outcome at trial was uncertain,
 14 providing additional risks to both sides. In addition, any trial outcome would be subject to
 15 potential appeals, which would have (at best) substantially delayed any potential recovery
 16 achieved for the Class at trial.

17 Third, the extent of discovery completed and the stage of proceedings support approval.
 18 The factual investigation and legal analysis in the four years of this litigation were substantial.
 19 During the discovery process, Class Counsel reviewed over 3.2 million pages of documents, and
 20 took or defended nearly 100 depositions, including deposing Defendant fact witnesses, taking or
 21 defending numerous expert depositions, and defending the five Class Representative depositions.
 22 Dermody Decl. ¶ 4. Defendants also propounded document requests, for which Plaintiffs
 23 produced over 31,000 pages. *Id.* With expert assistance, Class Counsel analyzed over 15
 24 gigabytes of employment-related compensation and recruiting data, and studied all Defendants'

1 compensation systems. *Id.* ¶ 5. The discovery process, which is now complete, has been
2 thorough.

3 Fourth, the Settlement provides for substantial consideration—a total of \$415 million (in
4 addition to the \$20 million secured earlier through settlements with Intuit, Inc., Lucasfilm Ltd.,
5 and Pixar).

6 Fifth, the views of Plaintiffs’ counsel, who are experienced in litigating and settling
7 antitrust and employment class actions, weigh in favor of final approval. *See Linney v. Cellular*
8 *Alaska P’Ship*, No. 96-3008-DJL, 1997 WL 450064, at *5 (N.D. Cal. July 18, 1997), *aff’d* 151
9 F.3d 1234 (9th Cir. 1998). Plaintiffs’ counsel endorse the Settlement as fair, adequate, and
10 reasonable.

11 Finally, the reaction of the Class Members supports the Court’s final approval of the
12 Settlement. Out of 64,466 Class Members, only 11 submitted objections (about .017 percent of
13 the Class, or about one in every 5,860 Class Members). ECF No. 1089, Supplemental Declaration
14 of Kenneth Jue (“Jue Supp. Decl.”) ¶ 3. In addition, only 56 Class Members have opted out of the
15 Settlement (less than .09 percent of the Class). *Id.* ¶ 2. This number of opt-outs is only about one-
16 third the number of Class Members who opted-out of the prior approved settlements with Intuit,
17 Lucasfilm, and Pixar. *See* ECF No. 915-1. This number of opt-outs is also substantially below the
18 2,579 opt-outs (a rate of 4%) that was required to provide Defendants with a pro rata reduction in
19 the Settlement amount. Thus, Defendants will pay the full \$415 million. Such low rates of
20 objections and opt-outs are “indicia of the approval of the class.” *Hughes v. Microsoft Corp.*, No.
21 C93-0178C, 2001 WL 34089697, at *8 (W.D. Wash. Mar. 26, 2001) (finding indicia of approval
22 when nine class members out of 37,155, or just over .02%, who received notice submitted
23 objections, and “less than 1%” opted out); *see Sugarman v. Ducati N. Am., Inc.*, No. 5:10-CV-
24 05246-JF, 2012 WL 113361, at *3 (N.D. Cal. Jan. 12, 2012) (objections from 42 of 38,774 class
25 members—more than 0.1 percent, or more than five times the rate of objection as here—is a
26

1 “positive response”); *see also Churchill Vill., LLC v. Gen. Elec.*, 361 F.3d 566, 577 (9th Cir. 2004)
 2 (affirming district court’s approval of settlement where forty-five of 90,000 class members
 3 objected to the settlement (.05 percent), and 500 class members opted out (about .56 percent)).

4 None of the objections here warranted rejection of the Settlement. *See Browne v. Am.*
 5 *Honda Motor Co.*, No. CV 09-06750 MMM DTBX, 2010 WL 9499072, at *15 (C.D. Cal. July 29,
 6 2010) (“The fact that there is opposition does not necessitate disapproval of the settlement.
 7 Instead, the court must independently evaluate whether the objections being raised suggest serious
 8 reasons why the proposal might be unfair.” (brackets and internal quotation marks omitted)).
 9 Overall, the positive response from the Class favors Settlement approval.³

10 Six Class Members out of 64,466 object on the basis (in whole or in part) that the
 11 Settlement should be rejected because it should be larger: Shash Basavaraju (aka Shash Schaekar),
 12 David Hsu, Loren Kohnfelder, Dimitrios Loulourgas, Devesh Parekh, and Delia Terra. Jue Supp.
 13 Decl., Exs. C, D, F, G, H, I, K.

- 14 • **Mr. Basavaraju** contends that he was underpaid at Intel beginning in 2004. Jue
 15 Supp. Decl., Ex. I. He then says he discussed job opportunities with recruiters from
 16 Apple and Google in 2007, and applied to other companies that are not alleged to
 17 be part of the misconduct at issue (AMD, IBM, and Honeywell). *Id.* Mr.
 18 Basavaraju asserts that, in the last 9 years, he has lost approximately \$400,000 in
 19 compensation, and lost other personal opportunities. *Id.*
- 20 • **Dr. Hsu** believes his pay was suppressed by “at least \$10,000 per year” due to
 21 Defendants’ actions. Jue Supp. Decl., Ex. C. In support of his claim, Dr. Hsu
 22 notes that the U.S. Department of Energy offered him a salary that was only \$2,000
 23 less than his ending salary at Intel. *Id.* Dr. Hsu objects to any settlement that
 24 would pay him less than the full amount of his own estimate of his damages:
 25 \$40,000. *Id.*

26 ³ Class Members Dr. Hsu, Dr. Veach, and Mr. Zavislak also objected to the request for
 27 attorney’s fees or the request for Class Representative service awards, which will be addressed
 28 separately in the Court’s order granting in part and denying in part Class Counsel’s requests for
 fees, costs, and service awards.

- 1 • **Mr. Kohnfelder** asserts that the Court should reject the Settlement “as far too low”
2 because it will not discourage similar misconduct in the future. Jue Supp. Decl.,
3 Ex. D. He also believes that each Class Member should be notified by letter of
4 “their approximate compensation” before they have to decide whether to object. *Id.*
5 “The lump sum,” says Mr. Kohnfelder, “is not so useful.” *Id.*
- 6 • **Mr. Loulourgas** objects to the Settlement because it is too low to compensate for
7 his estimate of his damages, should reflect the potential for “punitive damages,”
8 and should take into account the “miniscule” probability of a loss at trial. Jue
9 Supp. Decl., Ex. F.
- 10 • **Mr. Parekh** objects because damages to the Class are likely larger than what the
11 Class will receive from the Settlement, and he prefers a trial to a settlement. Jue
12 Supp. Decl., Ex. G. Mr. Parekh also objects to the formula for allocating the
13 Settlement, which he says does not adequately redress Google employees whose
14 compensation structure consisted of a relatively low base salary plus a relatively
15 high target bonus. *Id.*, Ex. H.
- 16 • **Ms. Terra** objects to the Settlement because it is too low to compensate for her
17 estimate of his damages, should reflect the potential for “punitive damages,” and
18 should take into account the “small” probability of a loss at trial. Jue Supp. Decl.,
19 Ex. K.

20 In objecting to the size of the Settlement, none of these Class Members adequately take
21 into account the risks and delays involved in proceeding to trial. They ignore that the Settlement
22 provides the Class with a timely, certain, and meaningful cash recovery, while a trial—and any
23 subsequent appeal—is uncertain, would entail significant additional costs, and in any event would
24 substantially delay any recovery achieved. “[T]he very essence of a settlement is compromise, a
25 yielding of absolutes and an abandoning of highest hopes.” *Linney v. Cellular Alaska P’ship*, 151
26 F.3d 1234, 1242 (9th Cir. 1998) (quoting *Officers for Justice*, 688 F.2d at 624) (affirming
27 settlement approval). “Estimates of what constitutes a fair settlement figure are tempered by
28 factors such as the risk of losing at trial, the expense of litigating the case, and the expected delay
in recovery (often measured in years).” *Browne*, 2010 WL 9499072, at *12. Thus, “[t]he fact that
a proposed settlement may only amount to a fraction of the potential recovery does not, in and of

1 itself, mean that the proposed settlement is grossly inadequate and should be disapproved.”
 2 *Linney*, 151 F.3d at 1242 (internal quotation marks omitted).

3 The reasonableness of the Settlement is also confirmed by comparing it to Plaintiffs’
 4 damages estimate. The total settlements achieved in this action exceed 14 percent of Plaintiffs’
 5 proposed single damages estimate,⁴ a damages estimate Defendants were prepared to vigorously
 6 contest. District courts in the Ninth Circuit routinely approve settlements with much larger
 7 differences between the settlement amount and estimated damages.⁵ The risks Plaintiffs faced in
 8 proceeding to trial are discussed in Plaintiffs’ prior reply memorandum in support of preliminary
 9 approval. *See* ECF No. 938 at 10-14; *see also* ECF No. 1032 at 18-20.

10 That certain Class Members evaluate the risks differently, or would prefer to go to trial
 11 despite those risks, does not prevent the Court from granting final approval to the Settlement. *See*
 12 *Browne*, 2010 WL 9499072, at *15 (“The fact that there is opposition does not necessitate
 13 disapproval of the settlement. Instead, the court must independently evaluate whether the
 14 objections being raised suggest serious reasons why the proposal might be unfair.” (brackets and
 15 internal quotation marks omitted)).

16 Class Members Dr. Hsu, Mr. Kohnfelder, Mr. Loulourgas, Mr. Mills, and Ms. Terra offer
 17 details of their individual employment histories to suggest that the amounts they will receive under
 18 the Settlement are insufficient to compensate them in full for the amount of wage suppression they

19 _____
 20 ⁴ \$435,000,000 ÷ \$3,065,184,307 (ECF No. 856-8, at 21) = ~14.2 percent.

21 ⁵ *See, e.g., In re Toys R Us-Del., Inc.–Fair & Accurate Credit Transactions Act (FACTA)*
 22 *Litig.*, 295 F.R.D. 438, 453-54 (C.D. Cal. 2014) (granting final approval of a settlement providing
 23 for consideration reflecting 3% of possible recovery (\$391.5 million value on exposure up to
 24 \$13.05 billion)); *Reed v. 1-800 Contacts, Inc.*, No. 12-CV-02359 JM BGS, 2014 WL 29011, at *6
 25 (S.D. Cal. Jan. 2, 2014) (granting final approval where settlement represented 1.7% of possible
 26 recovery (net settlement fund of \$8,288,719.16, resolving claims worth potentially
 \$499,420,000)); *In re LDK Solar Sec. Litig.*, No. C 07-5182 WHA, 2010 WL 3001384, at *2
 (N.D. Cal. July 29, 2010) (granting final approval where settlement was 5% of estimated
 damages); *In re Linerboard Antitrust Litig.*, 296 F. Supp. 2d 568, 581 & n.5 (E.D. Pa. 2003)
 (gathering cases where courts approved settlements achieving single-digit percentages of potential
 recoveries).

1 would attribute to the alleged conspiracy. Even if individual employees were able to calculate
 2 with precision what their individual salaries would have been absent the alleged collusion, such
 3 assessments do not take into account the risk, delay, and further costs associated with trial and
 4 subsequent appeals.

5 Lastly, Class Members Mr. Parekh, Mr. Basavaraju, Mr. Smith, and Ms. Terra state that
 6 the Settlement is not enough to punish the Defendants for their wrongdoing. These objections fail
 7 to account for the gravity of the \$415 million settlement, which should send a strong message to
 8 Defendants. ECF No. 1073-1, Declaration of Prof. William B. Rubenstein ¶ 41. A settlement
 9 does not need to provide for all possible recoverable damages to deter wrongdoing. *See, e.g.,*
 10 *United States v. New Jersey*, No. CIV. 87-2331 (HAA), 1995 WL 1943013, at *14 (D.N.J. Mar.
 11 14, 1995) (“The \$7.125 million settlement amount satisfies the United States’ desire to provide a
 12 reasonable amount of compensation to identifiable victims of alleged discrimination and sends a
 13 strong message to deter discrimination by other employers.”).⁶

14 Class Member Kenneth Caviasca objects on the basis that “the case makes no sense,”
 15 specifically that “[c]ross hiring among companies that pay at a similar pay range would have no
 16 significant impact on the company expenses or have even have [sic] a long term benefit for the
 17 moving employees.” Jue Supp. Decl., Ex. B. This objection does not comment on any aspect of
 18 the Settlement, but rather opposes Plaintiffs’ alleged claims as being entirely baseless. *See id.*
 19 (urging “all benefactors to donate 100% of proceeds to non-profit charity cause”). Because this
 20 objection supports no recovery for the Class, it appears Mr. Caviasca’s interests are adverse to the
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 23 ⁶ An additional Class Member submitted an anonymous comment, stating that the
 24 “settlement is too low.” Jue Supp. Decl., Ex. O. This anonymous comment fails to comply with
 25 the requirements for objecting to the Settlement. *See* ECF No. 1086-1 (“Notice”) at 10. In
 26 addition, Nelson Minar submitted a comment with his opt-out request, stating: “I do not feel that
 the settlement is sufficient.” Jue Supp. Decl., Ex. P. The Court concludes that these comments
 lack merit for the same reasons explained above regarding Class Members who objected on the
 basis that the Settlement should be larger.

1 Class, and the objection should therefore be overruled. *See Wren v. RGIS Inventory Specialists*,
2 No. C-06-05778 JCS, 2011 WL 1230826, at *13 (N.D. Cal. Apr. 1, 2011) (overruling objections
3 submitted that “do not go to the fairness of the settlement”).

4 Class Member Albert Smith objects because he prefers to have the case proceed to trial,
5 regardless of *any* settlement amount or potential recovery at trial. “If the jury finds that these
6 corporations did nothing, the defendants deserve to be completely exonerated in public. If the jury
7 finds that they violated the law, I do not care what the jury decides to award the class; I care only
8 that the companies are found guilty.” Jue Supp. Decl., Ex. J. Mr. Smith’s desire for a trial,
9 regardless of the probability of success or amount of recovery for the Class, is arguably adverse to
10 the interests of the Class, and inconsistent with the well-established principle that “voluntary
11 conciliation and settlement are the preferred means of dispute resolution.” *Officers for Justice*,
12 688 F.2d at 625.

13 Class Member Prabhakar Kotla objects because he incorrectly estimates that each Class
14 Member will receive an average of only “1%” of what each Class Member received from the
15 earlier settlements with Intuit, Lucasfilm, and Pixar. Jue Supp. Decl., Ex. E. Mr. Kotla
16 erroneously believed that Class Members in the earlier settlements received \$140,000 per person.
17 *Id.* In fact, the average Class Member will receive roughly *thirty-three times* more from this
18 Settlement than what the average Class Member received from the earlier settlements with Intuit,
19 Lucasfilm, and Pixar: approximately \$5,770 here compared to approximately \$173.73 there.

20 Class Member Davesh Parekh objects to the formula for allocating the Settlement, which
21 he says does not adequately redress Google employees whose compensation structure consisted of
22 a relatively low base salary plus a relatively high target bonus. Jue Supp. Decl., Ex. H. The plan
23 of allocation is based upon each Class Member’s relative share of base salary paid on the basis of
24 their employment during the Class period. Settlement Agreement, Ex. B. While each Defendant
25 used a different balance of base salary, bonuses, and equity compensation, all Defendants used
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1 base salary structures in a consistent and uniform manner, linked by systems of internal equity (as
2 confirmed by the expert reports of Dr. Kevin Hallock) that caused the salary structures to move
3 together. Thus, the formula’s reliance on base salary provides a neutral and uniform metric by
4 which to allocate the Settlement, consistent with Plaintiffs’ expert opinions. “A plan of allocation
5 that reimburses class members based on the extent of their injuries is generally reasonable.” *In re*
6 *Oracle Sec. Litig.*, No. C-90-0931-VRW, 1994 WL 502054, at *1 (N.D. Cal. June 18, 1994). The
7 Settlement’s plan of allocation is appropriate.

8 Class Members Dr. Hsu, Mr. Kohnfelder, Eric Veach, and Mark Zavislak argue that each
9 Class Member should have been provided with estimates of their individual allocation amounts.
10 Jue Supp. Decl., Exs. C, L, N. However, a precise award estimate for each Class Member cannot
11 be computed until the Notice Administrator confirms and processes all opt-outs (taking into
12 account opt-outs who thereby will receive nothing and reallocating their shares of the Settlement
13 fund to the remaining Class Members); considers the Court’s determination of the requests for
14 attorney’s fees, unreimbursed out-of-pocket costs, Named Plaintiff service awards, and Settlement
15 administration costs; processes Defendants’ Class Member data; and resolves all data questions.
16 The Notice provided the Settlement’s plan of allocation, apprising Class Members of how the
17 Settlement would be divided. *See* Notice at 6 (“How much money can I get from the
18 Settlement?”). The Notice also provided the gross Settlement amount, as well as proposed
19 deductions for attorney’s fees, unreimbursed out-of-pocket costs, Class Representative service
20 awards, and costs of administering the Settlement. *Id.* at 6, 8. Additionally, the Notice provided
21 contact information for Class Counsel. Hundreds of Class Members contacted Class Counsel
22 directly, through email or telephone, to ask questions. ECF No. 1090, Declaration of Dean M.
23 Harvey in Support of Final Approval (“Harvey Decl.”) ¶ 2. When Class Members asked questions
24 regarding their individual allocation from the Settlement, Class Members were informed about

1 how the Settlement’s plan of allocation worked, the likely average net recovery, and why a more
2 precise allocation estimate would not be possible until further information became available.⁷ *Id.*

3 Even if an estimate of individual allocation amounts were not provided, Dr. Veach and Mr.
4 Zavislak argue that the Notice should have contained the tools to allow Class Members to estimate
5 their individual fractions of recovery. In particular, Dr. Veach and Mr. Zavislak object to the
6 Notice’s failure to include the “Total of base salaries of all Class Members paid on the basis of
7 employment in Class Positions during the Class Period,” which is the denominator in the proposed
8 allocation formula. *Id.*, Exs. L, N. The denominator, however, is a fluid number, which will
9 change depending not only on how many potential Class Members opt out, but also on the
10 individual salaries of those who opt out. That number also could not be calculated with precision
11 at the time the Notice was approved because Defendants were entitled to a pro rata reduction if the
12 number of opt-outs reached 4% of the potential Class. *See* ECF No. 1033-1, Settlement
13 Agreement, Part VIII.T. The Notice’s failure to include the allocation formula’s denominator,
14 which could not have been calculated with precision at the time the Notice was approved, was
15 therefore not error.

16 Accordingly, the Court finds that the Settlement is fair, adequate, and reasonable within
17 the meaning of Rule 23(e) of the Federal Rules of Civil Procedure.

18 **II. The Notice Program Was Appropriate**

19 Federal Rule of Civil Procedure 23(c)(2)(B) requires that the settling parties provide
20 settlement Class Members with “the best notice that is practicable under the circumstances,
21

22
23 ⁷ The Court notes that subsequent to the July 9, 2015 hearing on final approval, Class
24 Counsel consulted with the Settlement Administrator and created individual allocation estimates
25 for Dr. Hsu, Mr. Kohnfelder, Dr. Veach, and Mr. Zavislak. ECF No. 1106. Class Counsel
26 provided those estimates to the four objectors on July 16, 2015, and asked whether, after receiving
27 this information, any would request a late opt-out of the pending Settlement if given the option.
Id. All four objectors declined to seek a late opt-out upon receiving estimates of their individual
28 allocations. ECF No. 1109.

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1 including individual notice to all members who can be identified through reasonable effort. The
2 notice must clearly and concisely state in plain, easily understood language: (i) the nature of the
3 action; (ii) the definition of the class certified; (iii) the class claims, issues, or defenses; (iv) that a
4 class member may enter an appearance through an attorney if the member so desires; (v) that the
5 court will exclude from the class any member who requests exclusion; (vi) the time and manner
6 for requesting exclusion; and (vii) the binding effect of a class judgment on members under Rule
7 23(c)(3).”

8 The Court finds that the notice program, previously approved by the Court, ECF No. 1054
9 at 5, has been implemented and complies with Rule 23(c)(2)(B). Notice was sent to all Class
10 Members by first class mail. The Notice, which was reviewed and approved by this Court,
11 provided a clear description of who is a member of the Class, Class Members’ rights, and options
12 under the Settlement. The Notice explained how to receive money from the Settlement, how to
13 opt out of the Settlement, how to object to the Settlement, how to obtain copies of relevant papers
14 filed in the case, and how to contact Class Counsel and the Notice Administrator.

15 The Court ordered Heffler Claims Group (the claims administrator previously appointed
16 regarding the prior settlements with Intuit, Inc., Lucasfilm Ltd., and Pixar) to transmit Class
17 Member information in a secure manner to Gilardi & Co., LLC (the notice administrator
18 appointed to administer the instant Settlement; “Notice Administrator”). ECF No. 1054 at 6-7.
19 Heffler did so. ECF No. 1086, Declaration of Kenneth Jue (“Jue Decl.”) ¶ 2. The Court ordered
20 that the Notice Administrator shall, by April 6, 2015, “cause the Settlement Notice to be mailed by
21 first-class mail, postage prepaid, to Class Members pursuant to the procedures described in the
22 Settlement, and to any Class Member who requests one; and, in conjunction with Class Counsel,
23 shall maintain the case-specific website providing case information, court documents relating to
24 the Settlement and the Notice.” The Notice Administrator did so. *Id.* ¶¶ 3-7. The Court found
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1 that this notice “satisfies the requirements of the Federal Rules of Civil Procedure and of due
2 process and, accordingly, is approved for dissemination to the Class.” ECF No. 1054 at 5.

3 Class Members had a variety of methods by which to view relevant documents, contact the
4 Notice Administrator or Class Counsel, opt out of the Settlement, or object to the Settlement.
5 These methods included mail, telephone, a case-specific website, and email. Jue Decl. ¶¶ 3-7. For
6 instance, the Notice Administrator received 780 calls to its toll-free telephone number. *Id.* ¶ 6.
7 The Notice Administrator received 56 requests for mailed copies of the Notice over the phone, by
8 email, and by mail. *Id.* ¶ 7. The Notice Administrator sent a copy of the Notice whenever one
9 was requested. *Id.* Class Members also contacted Class Counsel, through both email and
10 telephone, with questions and requests. Harvey Decl. ¶ 2. Class Counsel answered Class Member
11 questions and responded to requests. *Id.*

12 **III. The Plan of Allocation Is Fair, Reasonable, and Adequate**

13 The Plan of Allocation is fair, reasonable, and adequate. It will provide each Class
14 Member with a fractional share based upon each Class Member’s total base salary received during
15 the alleged conspiracy period. *See In re Oracle Sec. Litig.*, 1994 WL 502054, at *1 (“A plan of
16 allocation that reimburses class members based on the extent of their injuries is generally
17 reasonable.”). The Plan of Allocation here is a simple, efficient way to allocate the Settlement
18 funds to Class Members based on the extent of their injuries, which are proportional to their
19 differing salaries. Such fractional shares are “cost-effective, simple, and fundamentally fair.” *In*
20 *re Airline Ticket Comm’n Antitrust Litig.*, 953 F. Supp. 280, 285 (D. Minn. 1997); *see also In re*
21 *Elec. Carbon Prods. Antitrust Litig.*, 447 F. Supp. 2d 389, 404 (D.N.J. 2006) (finding pro rata
22 distribution “eminently reasonable and fair to the class members.”). The Court also notes that
23 there will be no reversion of unclaimed funds to any Defendant. Accordingly, the Plan of
24 Allocation is approved.

25 **IT IS SO ORDERED.**

1 Dated: September 2, 2015

Lucy H. Koh

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3 LUCY H. KOH
United States District Judge

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United States District Court
Northern District of California