Gary A. Gotto (admitted pro hac vice)
KELLER ROHRBACK L.L.P.
3101 N. Central Ave., Ste. 1400
Phoenix, AZ 85012
(602) 248-0088
ggotto@kellerrohrback.com

Juli E. Farris (CA Bar No. 141716)
KELLER ROHRBACK L.L.P.
801 Garden Street, Ste. 301
Santa Barbara, CA 93101
(805) 456-1496
jfarris@kellerrohrback.com

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

KRISTOPHER A. SCHWARTZ,

Plaintiff,

v.

ART COOK; ROGER STANGER; RONALD ZIMMERMAN; BUCKLES-SMITH ELECTRIC COMPANY; BANKERS TRUST COMPANY OF SOUTH DAKOTA; AND JOHN DOE DEFENDANTS NUMBERED 1-5,

Defendants,

and

BUCKLES-SMITH ELECTRIC COMPANY EMPLOYEE STOCK OWNERSHIP PLAN,

Nominal Defendant.

No. 3:15-cv-03347

PLAINTIFF'S MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT

Judge: Hon. Beth Labson Freeman

TABLE OF CONTENTS

I. INTRODUCTION 1

II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY 1

III. LEGAL ANALYSIS 3

A. Standards for Final Approval of a Class Action Settlement. 3

B. The Settlement is Fair, Reasonable, and Adequate and Should Be Approved 4

IV. CONCLUSION 7

TABLE OF AUTHORITIES

Page(s)

Cases

City P'ship Co. v. Atl. Acquisition Ltd. P'ship,
100 F.3d 1041 (1st Cir. 1996) 4

Class Plaintiffs v. City of Seattle, 955 F.2d 1268, 1276 (9th Cir. 1992) 5

Ficalora v. Lockheed Cal. Co.,
751 F. 2d 995 (9th Cir. 1985) 4

Hanlon v. Chrysler Corp.,
150 F.3d 1011 (9th Cir. 1998) 4, 5

Marshall v. Holiday Magic, Inc.,
550 F.2d 1173 (9th Cir. 1977) 6

Mullane v. Cent. Hanover Bank & Trust Co.,
339 U.S. 306 (1950) 6

Officers for Justice v. Civ. Serv. Comm'n,
688 F.2d 615 (9th Cir. 1982) 4

Rodriguez v. West Publ'g Corp.,
563 F.3d 948 (9th Cir. 2009) 4

Statutes

ERISA § 404, 29 U.S.C. § 1104 1

ERISA § 405, 29 U.S.C. § 1105 2

ERISA § 406, 29 U.S.C. § 1106 2

Other Authorities

Fed. R. Civ. P. 23 ..... 1, 2, 4

I. INTRODUCTION

Plaintiff Kristopher A. Schwartz ("Plaintiff")—individually and on behalf of the Settlement Class as defined below—respectfully requests that the Court grant final approval of the settlement agreed to by the parties on January 6, 2017 (the "Settlement"), and preliminarily approved by the Court on March 20, 2017. *See* ECF No. 125. All of the factors the Court must evaluate for final approval under Ninth Circuit law support Plaintiff's request. The Settlement represents a successful outcome for the Class, and was reached after substantial discovery, motion practice, and arm's-length negotiations, including a mediation conducted by the Honorable Edward A. Infante. If approved, the Settlement will provide significant monetary benefits to the Class, while removing the risk and delay associated with further litigation. The Settlement is fair, reasonable, and adequate pursuant to Fed. R. Civ. P. 23(e), and the undersigned are pleased to present it to the Court for final approval.

II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY[1]

Plaintiff initiated this action pursuant to the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), on July 20, 2015. Plaintiff's ERISA claims arise from Defendants' involvement in the 2014 termination and buyout of the Buckles-Smith Electric Company Employee Stock Ownership Plan ("ESOP" or "Plan"). Plaintiff specifically alleges that the Plan, and by extension the participants and beneficiaries of the Plan, received far less than the actual fair market value of the shares it held in connection with the 2014 buyout as a result of Defendants' unlawful conduct. As a result, Plaintiff alleges that Defendants were fiduciaries under ERISA that exercised discretionary control over the Plan, and (1) violated the fiduciary duties imposed by ERISA § 404, 29 U.S.C. § 1104,

[1] The Court is well aware of the facts and procedural history of this litigation, and Plaintiff only summarizes them for the Court's convenience here.

(2) caused direct or indirect prohibited transactions under ERISA § 406, 29 U.S.C. § 1106, and (3) are liable as co-fiduciaries under ERISA § 405, 29 U.S.C. § 1105. *See, e.g.*, ECF No. 65, Plaintiffs' First Amended Complaint, ¶¶ 254-284.

After more than a year of litigation, including dispositive motion practice and discovery, the parties conducted a mediation with the Hon. Edward A. Infante in San Francisco on September 8, 2016. The mediation was successful and the parties reached a preliminary agreement to settle the case, which the parties finalized the agreement on January 6, 2017. Plaintiff subsequently submitted the Settlement for preliminary approval to the Court shortly thereafter. *See* ECF No. 116. As set forth in that motion and the Settlement Agreement previously submitted to the Court, the parties agreed to resolve all claims asserted by Plaintiff in this lawsuit against all Defendants for $350,000. *Id.* at 2. In addition, the Settlement provides for the claims to be resolved on behalf of a non-opt out Class certified under Fed. R. Civ Pro. 23(b)(1) and (2), and required Class Counsel to provide notice via U.S. mail and email to all Class Members. *Id.* at 3.

On March 20, 2017, the Court granted preliminary approval of the Settlement, and found the proposed Settlement (a) was fair, reasonable and adequate, (b) was the product of serious, informed, arm's-length, and non-collusive negotiations, (c) did not suffer from any obvious deficiencies, (d) did not improperly grant preferential treatment to Class representatives or segments of the Class, (e) fell within the range of possible approval, and (f) warranted notice to Class Members of a formal fairness hearing. ECF No. 125 at 3, ¶ 4. The Court also granted preliminary approval of a Settlement Class defined as follows:

> All Persons who were participants in or beneficiaries of the Plan at any time from and after September 1, 2012. Excluded from the Class are (i) the Defendants; and (ii) any beneficiary of any Defendant.

Id. at 2-3, ¶ 2. The Court further found the Class was cohesive and well-defined. *Id.* at 3, ¶ 1(a). In addition, the Court appointed Plaintiff as class representative for the Class, Keller Rohrback L.L.P. as Counsel for the Class, and set a final fairness hearing for June 15, 2017 to determine whether the Settlement should be finally approved, including whether to award attorneys' fees and expenses. ECF No. 125 at 3-4, ¶¶ 3, 5.[2]

Class Counsel, as administrator of the Settlement, also prepared and transmitted the Notice of Settlement within the deadlines approved and established by the Court following the Court's preliminary approval of the Settlement. In particular, Class Counsel mailed the Notice of the Settlement—in an identical format as approved by the Court—to all Settlement Class Members by U.S. Mail on March 27, 2017 at their last known addresses provided by Defendant Buckles-Smith. *See* Gotto Decl., ¶ 6. In addition, the Notice was provided to the United States Department of Labor that same day. *Id.* Defense counsel also informed Class Counsel that Defendant Art Cook, CEO of Buckles-Smith, delivered a notice to all Buckles-Smith employees regarding the Settlement on March 27, 2017. *Id.*, ¶ 7. Finally, Class Counsel posted the Notice on its website, also on March 27, 2017. *Id.*, ¶ 8.

III. LEGAL ANALYSIS

A. Standards for Final Approval of a Class Action Settlement.

Approval of a class action settlement has three principal steps:

1. Preliminary approval, where the court considers whether the proposed settlement is within the range of reasonableness and possibly meriting final approval;

2. Class members are notified of the proposed settlement and given an opportunity to express any objections; and

3. A "formal fairness hearing," or final approval hearing, at which the court decides whether the proposed settlement should be approved as fair, adequate, and reasonable to the class.

[2] Plaintiff's Counsel's motion for attorneys' fees and expenses is being filed separately with the Court.

See Manual for Complex Litigation (Fourth) §§ 21.632-34 (2004). As summarized above, the first two steps are complete. Plaintiff now seeks final approval of the proposed settlement.

B. The Settlement is Fair, Reasonable, and Adequate and Should Be Approved.

A proposed class action settlement may be approved if, after allowing absent class members an opportunity to be heard, the Court finds that the settlement is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). In making this determination,

> the court's intrusion upon what is otherwise a private consensual agreement negotiated between the parties to a lawsuit must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned.

Rodriguez v. West Publ'g Corp., 563 F.3d 948, 965 (9th Cir. 2009) (quoting *Officers for Justice v. Civ. Serv. Comm'n*, 688 F.2d 615, 625 (9th Cir. 1982)) ("[V]oluntary conciliation and settlement are the preferred means of dispute resolution. This is especially true in complex class action litigation . . .").

In addition, "[b]efore approving a class action settlement, the district court must reach a reasoned judgment that the proposed agreement is not the product of fraud or overreaching by, or collusion among, the negotiating parties[.]" *Ficalora v. Lockheed Cal. Co.*, 751 F. 2d 995, 997 (9th Cir. 1985); *see also Rodriguez*, 563 F.3d at 965. If a settlement is negotiated at arms-length, there is a presumption that the settlement is procedurally sound. *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1027 (9th Cir. 1998); (finding that courts are deferential to "the private consensual decision[s] of the parties"); *see also City P'ship Co. v. Atl. Acquisition Ltd. P'ship*, 100 F.3d 1041, 1043 (1st Cir. 1996) (holding that where "parties have bargained at arms-length, there is a presumption in favor of the settlement").

Here, there is no doubt that the Settlement was negotiated and agreed to by the parties in good faith, and was not the result of fraud, overreaching, or collusion. The Settlement was the product of arm's-length negotiations, including a formal mediation facilitated by an experienced mediator, the

Honorable Edward A. Infante. When the settlement was reached, there had been substantial documentary discovery and motion practice, including a then-pending motion to dismiss the claims against Defendant Bankers Trust Co. of South Dakota. Accordingly, Plaintiff and his counsel well understood the factual and legal issues involved in this case. In addition, Class Counsel have extensive experience litigating claims of this type, and are capable of evaluating the potential strengths and weaknesses of this case.

Similar to the preliminary approval process, courts evaluate the same factors in determining whether a settlement is fair, adequate, and reasonable, including: (1) the strength of the plaintiff's case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the risk of maintaining class action status throughout the trial; (4) the amount offered in settlement; (5) the extent of discovery completed and the stage of proceedings; (6) the experience and views of counsel; (7) the presence of a governmental participant; and (8) the reaction of the class members to the settlement. *Hanlon*, 150 F.3d at 1026. When applying these criteria, courts are guided by the "strong judicial policy that favors settlements, particularly where complex class action litigation is concerned." *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992).

As set forth in Plaintiffs' motion for preliminary approval, Plaintiff and his counsel considered these factors carefully in assessing the Settlement. While Plaintiff and his counsel believe greatly in the strength of the case and their ability to establish liability at trial, they recognize the significant uncertainty as to the ultimate outcome, whether liability could be established and the measure of damages.

The $350,000 settlement represents approximately $6 per Buckles-Smith share held by Class Members (approximately 58,000 shares in the aggregate).[3] Had the matter been litigated to a conclusion, Class Counsel believes it is unlikely that damages in excess of $18.33 per share could have been established. Class Counsel also believes that at trial Defendants would have denied any liability whatsoever and would have offered evidence in support of their position and in support of damages at a level much lower than $18.33 per share. A settlement of nearly one-third of the likely maximum damages is plainly adequate, particularly in light of the significant legal and factual issues remaining to be resolved in the litigation.

Nothing has changed with respect to the fairness and adequacy analysis since Plaintiff submitted his motion for preliminary approval. In addition, as discussed above, notice was distributed to every Class Member by Class Counsel, and Defendants delivered notice of the Settlement to every Buckles-Smith employee, thereby confirming that any due process concerns have been addressed. *See Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950); *see also Marshall v. Holiday Magic, Inc.*, 550 F.2d 1173, 1177 (9th Cir. 1977) (finding that due process requires notice to "present a fair recital of the subject matter and proposed terms and give[] an opportunity to be heard to all class members"). Thus, Plaintiff respectfully submits that under the applicable factors set forth in *Hamlon*, this Settlement is fair, adequate and reasonable.[4]

[3] If the Court grants Class Counsel's Motion for Award of Attorneys' Fees and Expenses, the net recovery to Class Members would be approximately $3.61 per share. Class Counsel is working with Defendants to determine the exact number of shares held by Class Members, and will report that amount to the Court at the Fairness Hearing.

[4] With respect to evaluating the Class Members' reaction to the Settlement, pursuant to the schedule approved by the Court, Class Members have until May 15, 2017 to file and submit objections to the Court. Plaintiff will address any objections if filed in accordance with the schedule established by the Court.

IV. CONCLUSION

For the reasons set forth above, the Settlement is a fair, adequate, and reasonable resolution of the claims asserted against Defendants in this action. Thus, Plaintiff respectfully requests that the Court grant final approval of the Settlement. A Proposed Order governing both this motion and the simultaneously filed Plaintiffs' Motion for Attorneys' Fees and Costs is submitted herewith.

DATED this 1st day of May, 2017.

KELLER ROHRBACK L.L.P.

By: */s/ Gary A. Gotto*

Gary A. Gotto (admitted pro hac vice)
ggotto@kellerrohrback.com
3101 North Central Avenue, Suite 1400
Phoenix, Arizona 85012
Telephone: (602) 248-0088
Facsimile: (602) 248-2822

Juli E. Farris
jfarris@kellerrohrback.com
801 Garden Street, Suite 301
Santa Barbara, California 93101
Telephone: (805) 456-1496
Facsimile: (805) 456-1497

Attorneys for Plaintiff Kristopher A. Schwartz

CERTIFICATE OF SERVICE

I, Gary A. Gotto, hereby certify that on May 1, 2017, a true copy of the above document was served on the Defendants, through their counsel of record, via ECF.

By: */s/ Gary A. Gotto*
Gary A. Gotto