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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

IN RE ANIMATION WORKERS ANTITRUST LITIGATION	Master Docket No. 14-CV-4062-LHK
THIS DOCUMENT RELATES TO: ALL ACTIONS	NOTICE OF MOTION AND MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT WITH BLUE SKY STUDIOS, INC. Date: June 16, 2016 Time: 1:30 p.m. Courtroom: 8, 4th Floor Judge: The Honorable Lucy H. Koh

NOTICE OF MOTION AND MOTION

PLEASE TAKE NOTICE that on June 16, 2016 at 1:30 pm or as soon thereafter as the matter may be heard by the Honorable Lucy H. Koh of the United States District Court of the Northern District of California, San Jose Division, located at 280 South 1st Street, San Jose, CA 95113, plaintiffs will and hereby do move the Court pursuant to Federal Rules of Civil Procedure 23 for an order:

1) Preliminarily approving a proposed class action settlement with Blue Sky Studios, Inc.;

2) Certifying the proposed Settlement Class;

3) Appointing Cohen Milstein Sellers & Toll, PLLC; Hagens Berman Sobol Shapiro LLP; and Susman Godfrey L.L.P. as Settlement Class Counsel; and

4) Approving the manner and form of notice and proposed Plan of Allocation to class members.

This motion is based on this Notice of Motion and Motion for Preliminary Approval of Settlement with Blue Sky Studios, Inc., the following memorandum of points and authorities, the Settlement Agreement filed herewith, the pleadings and the papers on file in this action and such other matters as the Court may consider.

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I. INTRODUCTION

Pursuant to Federal Rule of Civil Procedure 23, plaintiffs Robert Nitsch, David Wentworth, and Georgia Cano respectfully seek preliminary approval of a Settlement Agreement with defendant Blue Sky Studios, Inc. ("Blue Sky"). The Court should preliminarily approve the proposed settlement as fair, reasonable and adequate because it provides for the class a cash payment of $5,950,000 and cooperation from Blue Sky. That amount is approximately 25 percent of plaintiffs' expert's calculation of the damages attributable to Blue Sky employees in the class. On a percentage basis, the amount is far higher than the 14 percent of single damages represented by the total of all of the settlements with all defendants in the *High Tech* litigation. By any measure, but especially for the first settlement in the case with the smallest defendant, it is an excellent result for the class.

The settlement here was reached after arm's length negotiations, drawing on the expertise of informed, experienced counsel who have been deeply involved in this litigation since its inception, and it reflects the risks associated with both parties continuing to litigate this case. In particular, counsel have been informed and guided by the rulings and settlement valuations deemed fair and reasonable in the *High-Tech* litigation.

At this stage in the litigation, plaintiffs are quite familiar with the strengths of this case, and the challenges plaintiffs face as this case proceeds to trial. Counsel for plaintiffs have analyzed and catalogued approximately 300,000 documents produced from defendants' custodians, deposed nine witnesses, including two third-party witnesses, defended the deposition of each of the named plaintiffs, defended the deposition of Plaintiffs' expert Dr. Orley Ashenfelter, and filed their class certification motion supported by Dr. Ashenfelter's expert report, one of the world's leading labor economists.[1] The settlement reached with Blue Sky is fair and appropriate based on the risks and rewards of litigating this case.

The proposed settlement requires certification by this Court of a Settlement Class that is the same as that proposed by plaintiffs in their motion for class certification.[2] The settlement provides

[1] *See* Declaration of Jeff D. Friedman in Support of Motion for Preliminary Approval of Settlement with Blue Sky Studios, Inc. ("Friedman Decl."), ¶ 3, filed concurrently herewith.

[2] *See* Part III.A, *infra*.

$10,000 for each named plaintiff in service awards ($30,000 total). Plaintiffs propose a comprehensive notice program designed to effectively provide direct and actual notice of the settlement to all class members.

Plaintiffs respectfully request an order providing: (1) preliminary approval of the proposed Settlement Agreement with Blue Sky; (2) certification of the proposed Settlement Class; (3) appointment of Cohen Milstein Sellers & Toll, PLLC; Hagens Berman Sobol Shapiro LLP; and Susman Godfrey L.L.P. as Settlement Class Counsel; and (4) approval of the manner and form of notice and proposed Plan of Allocation[3] to class members.

II. PROCEDURAL HISTORY

Named plaintiffs are former animation and visual effects employees of defendants. Each named plaintiff worked for at least one of the defendants during the period when plaintiffs allege defendants were engaged in an illegal agreement to suppress compensation paid to class members.

Plaintiffs allege that the defendants' agreement worked to restrain competition in several respects. Defendants entered into a "gentlemen's agreement" not to actively solicit each other's employees.[4] Among the manner and means of the alleged anti-solicitation conspiracy were (a) defendants would not "cold–call" each other's employees; (b) they would notify the other company when making an offer to an employee of the other company, if that employee had applied for a job; and (c) the company making such an offer would not increase the compensation offered to the prospective employee in its offer if the company currently employing the employee made a counteroffer.[5] In addition, plaintiffs allege that defendants' employees who were responsible for monitoring and enforcing the recruiting restraints engaged in direct collusive discussions to coordinate compensation across defendant firms.[6]

On December 2, 2014, plaintiffs filed their Consolidated Amended Class Action Complaint (CAC) against DreamWorks Animation, ImageMovers Digital, Lucasfilm, Pixar, Sony Pictures

[3] *See* Friedman Decl., Ex. A.

[4] *See* Second Consolidated Amended Class Action Complaint (SAC) ¶ 43, ECF No. 117.

[5] *See Id.*, ¶ 2.

[6] *See id.*, ¶¶ 13-15.

Animation, Sony Pictures Imageworks, The Walt Disney Company, and Blue Sky.[7] On January 9, 2015, defendants filed a motion to dismiss.[8] On April 17, 2015, this Court granted defendants' motion without prejudice.[9] The Court held that plaintiffs had not sufficiently alleged acts of fraudulent concealment by defendants such that the four-year statute of limitations should be tolled. On May 15, 2015, plaintiffs filed the SAC, alleging additional and more detailed acts of fraudulent concealment by defendants.[10] The Court denied defendants' second motion to dismiss on August 20, 2015.[11]

Since that time, plaintiffs have engaged in extensive discovery: drafting and responding to requests for production and 30(b)(6) notices, reviewing thousands of plaintiffs' documents for responsiveness and privilege, reviewing defendants' voluminous document productions, preparing for and taking depositions, obtaining relevant employment data and working with plaintiffs' expert to evaluate that data and calculate damages on a class-wide basis – all in anticipation of their motion for class certification and trial.

Most recently, plaintiffs filed their Notice of Motion and Motion for Class Certification on February 2, 2015.[12] Plaintiffs defended Dr. Ashenfelter at deposition on March 15, 2016. Defendants' opposition to class certification was filed on March 24, 2016.

III. SUMMARY OF SETTLEMENT TERMS

A. The Proposed Settlement Class

The proposed Settlement Class is the same as the class defined in Plaintiffs' Motion for Class Certification[13] (the "Class Cert Motion"):

> All animation and visual effects employees employed by defendants in the United States who held any of the jobs listed in Ashenfelter Report

[7] ECF No. 63.

[8] Motion to Dismiss the CAC, ECF No. 75.

[9] Order Granting Motion to Dismiss, ECF No. 105.

[10] ECF No. 121.

[11] Order Denying Motion to Dismiss, ECF No. 147.

[12] ECF No. 203.

[13] *Id.*

> [ECF No. 210] Appendix C[14] during the following time periods: Pixar (2001-2010), Lucasfilm Ltd., LLC (2001-2010), DreamWorks Animation SKG, Inc. (2003-2010), The Walt Disney Company (2004-2010), Sony Pictures Animation, Inc. and Sony Pictures Imageworks, Inc. (2004-2010), Blue Sky Studios, Inc. (2005-2010) and Two Pic MC LLC f/k/a ImageMovers Digital LLC (2007-2010). Excluded from the Class are senior executives, members of the board of directors, and persons employed to perform office operation or administrative tasks.[15]

B. The Settlement Consideration

1. Monetary Settlement Fund

Blue Sky has agreed to a lump-sum payment of $5,950,000 to the settlement fund. This payment is the full amount owed under the Settlement Agreement, and is inclusive of any attorneys' fees, expenses, and service awards that might be ordered by this Court.[16]

2. Additional Consideration

As additional consideration, Blue Sky has agreed to (a) timely prepare a declaration on issues regarding authentication for documents produced by Blue Sky in the litigation that appear on plaintiffs' trial exhibit list; (b) use best efforts to answer all reasonable questions posed by plaintiffs' counsel concerning the content or circumstances of the documents produced by Blue Sky in this litigation; and (c) provide no voluntary cooperation to the other defendants in this litigation, including submitting declarations in opposition to class certification.[17]

C. Release of Claims

Once the Settlement Agreement is final and effective, the named plaintiffs, and the Settlement Class members, shall release, as to Blue Sky, its parent Fox Entertainment Group LLC, and any of its related entities as defined by the Settlement Agreement, any and all state and federal claims, either known or unknown, arising from or relating to the factual allegations in plaintiffs' SAC, or any purported restriction on competition for employment or compensation of named plaintiffs or Class Members, up to the date of the Settlement. The Settlement Agreement does not

[14] *See* Friedman Decl., Ex. B.

[15] *See* Friedman Decl., Ex. C, § I(A), ¶ 27.

[16] *See id.*, § III(A), ¶ 1.

[17] *Id.*, § III(B), ¶ 1.

release any other claims not covered by the Settlement Agreement. Blue Sky agrees not to solicit or encourage any plaintiffs to exclude themselves from the Settlement Agreement.[18]

D. Notice and Implementation of the Settlement

The Settlement Agreement provides for actual notice to the Settlement Class members, as described below. Blue Sky has agreed as part of the Settlement Agreement to provide such contact information as it has available in its human resources databases for all potential class members, and the proposed order filed hereto asks the Court to order the other Defendants to provide the same. Notice will be sent out within 41 days of preliminary approval of the Settlement Agreement.[19]

E. Plan of Distribution

Within ten days of final approval of the Settlement Agreement, Blue Sky will wire (or cause to be wired) $5,850,000 to an account established by an escrow agent.[20] The funds will be held in an interest-bearing account that will be construed to be a "Qualified Settlement Fund" pursuant to applicable IRS regulations.[21] The Claims Administrator will be responsible for determining the monetary award that shall be awarded to plaintiffs from the Settlement Fund based on their pro-rata share, which is calculated based on their total compensation compared to the total compensation of all class members throughout the class period, as described in the Plan of Allocation. The Claims Administrator's decision shall be final and unreviewable.[22] Class Counsels' attorneys' fees and cost payments are subject to court approval.[23]

IV. ARGUMENT

A. The Settlement Agreement Satisfies Rule 23(e)

Federal Rule of Civil Procedure 23(e) provides that a proposed settlement in a class action case must be approved by the Court. The Court is to determine whether the proposed settlement is

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[18] *Id.*, § V(A).

[19] *Id.*, § II(B), ¶¶ 4, 5.

[20] If the Court preliminarily approves the Settlement Agreement, Blue Sky will already have provided $100,000 to the settlement fund within 10 days of the Court's Order.

[21] *Id.*, § III(A), ¶ 3.

[22] *Id.*, § IV(B), ¶¶ 4, 5.

[23] *See id.*, § VI(A), ¶ 1.

"fair, reasonable, and adequate."[24] As a first step, plaintiffs must seek preliminary approval of the proposed settlement, which is an "initial evaluation" of the fairness of a proposed settlement.[25] In determining whether the proposed settlement is "fundamentally fair, adequate, and reasonable" the court makes a preliminary determination of whether to give notice of the proposed settlement to the class members and an opportunity to voice approval or disapproval of the settlement.[26] Preliminary approval is not a dispositive assessment of the fairness of the proposed settlement, but rather determines whether it falls within the "range of reasonableness."[27] Preliminary approval establishes an "initial presumption" of fairness,[28] such that notice may be given to the class and the class may have a "full and fair opportunity to consider the proposed [settlement] and develop a response."[29]

Preliminary approval of a settlement and notice to the proposed class is appropriate: "[i]f [1] the proposed settlements appears to be the product of serious, informed, non-collusive negotiations, [2] has no obvious deficiencies, [3] does not improperly grant preferential treatment to class representatives or segments of the class, and [4] falls with the range of possible approval."[30] It is within the "sound discretion of the trial judge" to approve or reject the settlement.[31] In instances where a settlement results from arm's length negotiations with involvement of experienced class action counsel and relevant discovery has been provided, there is a "presumption that the agreement is fair." [32]

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[24] Fed. R. Civ. P. 23(e)(2).

[25] Manual for Complex Litigation (Fourth) § 21.632 (2015).

[26] *Staton v. Boeing Co.*, 327 F.3d 938, 952 (9th Cir. 2003) (quoting *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998)); *see* Manual for Complex Litigation (Fourth) § 21.631 (2015).

[27] *In re High-Tech Emp. Litig.*, No. 11-cv-2509, 2013 WL 6328811, at *1 (N.D. Cal. Oct. 30, 2013) ("*High-Tech I*") (citation omitted); *see also Collins v. Cargill Meat Solutions Corp.*, 274 F.R.D. 294, 301-302 (E.D. Cal. 2011).

[28] *In re Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078, 1079 (N.D. Cal. 2007).

[29] *Williams v. Vukovich*, 720 F.2d 909, 921 (6th Cir. 1983).

[30] *In re Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078, 1079 (N.D. Cal. 2007).

[31] *Zepeda v. Paypal, Inc.*, No. C 10-2500, 2015 WL 6746913, at *4 (N.D. Cal. Nov. 5, 2015).

[32] *Linney v. Cellular Alaska P'ship*, No. C-96-3008, 1997 WL 450064, at *5 (N.D. Cal. July 18, 1997).

1. The Settlement Is the Product of Informed, Arm's Length Negotiations

The settlement was reached after informed, arm's length negotiations between the parties. The parties reached this settlement after plaintiffs conducted extensive discovery to prepare and file their class certification papers. In anticipation of filing their class certification papers, plaintiffs served detailed discovery requests, resulting in production of hundreds of thousands of documents, and took seven depositions of current and former employees of the defendants, including the President of DreamWorks, the Senior Vice President of Production and Talent for Disney, the former "compensation manager" for Pixar, the former Director of Compensation at Sony Pictures, the former Director of Compensation at DreamWorks, and two Senior Recruiters who worked for the defendants.[33] Plaintiffs also presented a damages model, which helped inform both parties of the potential damages at stake for Blue Sky. Plaintiffs' counsel was personally involved in working with the economists who created the damages model. The settlement was only reached after weeks of negotiations between the parties.[34]

The settlement also reflects non-collusive negotiations. To the extent a settlement is reached prior to class certification, courts must be "particularly vigilant not only [to look] 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."[35] There are three factors courts weigh when considering collusion: (1) a disproportionate distribution of the settlement fund to counsel; (2) negotiations of a "clear sailing provision," which allows for the payment of attorney's fees independent of payments to the class; and (3) an arrangement for funds not awarded to revert to defendants rather than to be added to the settlement fund.[36] None of these factors is present here.

First, the settlement requires payment of attorneys' fees solely out of the Settlement Fund. Payment to the named plaintiffs and class members is distributed based on the distribution plan

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[33] *See* Friedman Decl., ¶ 3.

[34] *See id.* ¶ 4.

[35] *In re Bluetooth Headset Prods. Liability Litig.*, 654 F.3d 935, 947 (9th Cir. 2011) (citation omitted).

[36] *Id.*

specified in the Settlement Agreement, and class counsels' fees must be approved by this Court.[37] *Second*, there is no clear sailing provision. To the contrary, the settlement stipulates that Blue Sky and Blue Sky's counsel will take no position on any applications for Attorney's Fees and Expenses by Class Counsel.[38] *Third*, the settlement allows a pro rata reduction of the Settlement Fund if four percent or more of Class Members opt out, but other than that provision, it does not allow any reversion of settlement funds to the defendants. This provision is common and is no way reflective of any collusion; its threshold is unlikely to be met. After the distribution, to the extent that any monies remain in the settlement fund, plaintiffs will move the Court to order distribution of such funds either for additional distribution to eligible claimants or to escheat to the federal government.[39]

2. The Proposed Settlement Has No Obvious Deficiencies

The Proposed Settlement Agreement was the product of a thorough assessment of the strengths and weaknesses of plaintiffs' case. It reflects nearly a year and half of discovery, uncovering the intricacies of a multi-faceted conspiracy. This settlement also comes on the eve of plaintiffs receiving defendants' opposition to class certification, and allows Blue Sky to settle and obtain a release of all claims against them before the plaintiffs' reply brief is filed in this matter.

The Settlement also provides meaningful and certain monetary recovery. In making this assessment, plaintiffs are guided by this Court's decisions in *High-Tech*. Initially, *High-Tech* plaintiffs sought approval of a $20 million settlement with Intuit, Lucasfilm, and Pixar. The Court approved this amount, based on (1) an "initial presumption of fairness" that adheres to arm's length negotiations involving experienced counsel; (2) the amount of consideration – $20 million – was "substantial," based on the number of injured plaintiffs and total compensation paid by defendants; (3) the non-settling defendants remained jointly and severally liable for all damages caused by the conspiracy, including the damage caused by the defendants who settled; and (4) the defendants' agreement to cooperate with authenticating documents and locating witnesses.[40]

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[37] *See* Friedman Decl., Ex. B, § VI(A).

[38] *See id.*, § VI(A), ¶ 3.

[39] *See id.*, § III(B), ¶ 2.

[40] *See High-Tech I*, 2013 WL 6328811, at *1.

As detailed above, the proposed settlement here was the result of arm's length negotiations with experienced counsel. By law, the remaining defendants remain jointly and severally liable for all damages caused by the conspiracy, including any damages found to be caused by Blue Sky.[41] And Blue Sky has agreed to cooperate with plaintiffs in authenticating documents, and not assisting the remaining defendants with the litigation.

The remaining issue, then, is the fairness of the consideration paid by Blue Sky. Instructive in this regard was this Court's reasoning in rejecting a proposed *High-Tech* settlement of $324.5 million with Adobe, Apple, Google, and Intel.[42] The Court first noted that the plaintiffs' expert calculated single damages at $3.05 billion, but the total proposed settlement of $344.5 million was only 11.29 percent of the expert's calculation.[43] The Court accordingly concluded the proposed settlement was insufficient. In response to a second motion for settlement approval, the Court ultimately approved a $415 million settlement with the same four defendants, or a total of $435 million for the whole case.[44] This figure represents 14.26 percent of the total single damages calculated by plaintiffs' expert.

In this case, the settlement provides for a $5.95 million payment to the settlement fund. This is substantial given the extent of Blue Sky's alleged involvement in the conspiracy and its relatively small share of total compensation and damages.[45] In particular, the Settlement Fund represents

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[41] *See Ward v. Apple Inc.*, 791 F.3d 1041, 1048 (9th Cir. 2015) (citations omitted).

[42] *See In re High-Tech Emp. Litig.*, 2014 WL 3917126, at *5 (N.D. Cal. Aug. 8, 2014) ("*High-Tech II*").

[43] *See id.* The total settlement figure included the previously approved $20 million settlement with Intuit, Lucasfilm, and Pixar.

[44] *See In re High-Tech Litig.*, Case No. 11-cv-02509 LKH, Order Granting Plaintiffs' Motion for Preliminary Approval of Class Action Settlement, at 4, ECF No. 1054.

[45] The class compensation of Blue Sky employees is approximately 4.32 percent of the total compensation of the Settlement Class, and the number of Blue Sky years of employment during the class period is 4.36 percent of the Settlement Class. (Given that many of the class members worked at multiple defendants and therefore cannot be neatly divided as employees of one defendant or the other, these are the most accurate metrics.) In approving the $20 million settlement in *High-Tech I*, the Court found it "substantial, particularly in light of the fact that the Settling Defendants collectively account for less than 8% of Class members, and together account for approximately 5% of total Class compensation." *High-Tech I*, 2013 WL 6328811, at *1.

approximately 25 percent of the $23.1 million[46] in alleged damages for Settlement Class members (as calculated by Plaintiffs' expert) who were employees of Blue Sky during the relevant time period. This percentage is clearly far higher than that approved by the Court in *High-Tech II*.

The Settlement also reflects the risks plaintiffs must consider in preparing for trial. Although plaintiffs believe the class members have meritorious claims, juries can be difficult to predict. And defendants would almost certainly appeal any adverse finding from the jury. In particular, as this Court is aware, the statute of limitations has been a hotly contested issue in this case; the Court initially dismissed plaintiffs' first Complaint based on insufficient allegations of fraudulent concealment. Although the Court ruled that plaintiffs have now sufficiently pled fraudulent concealment, and plaintiffs continue to obtain evidence to support their fraudulent concealment allegations, that issue undoubtedly injects uncertainly into the ultimate outcome in this case. Indeed, defendants have pursued discovery on this issue vigorously with the named Plaintiffs and third parties, including document requests and deposition testimony.

Plaintiffs also face defendants' claim that their conduct should not be treated as a *per se* antitrust violation, but instead should be judged under the rule of reason framework – an issue plaintiffs faced in *High- Tech I*. This issue also raises uncertainty for Plaintiffs in obtaining a favorable verdict in this case.

Cooperation with plaintiffs is "an appropriate factor for a court to consider in approving settlement."[47] The Settlement provides the additional consideration that Blue Sky will cooperate with plaintiffs to prepare a declaration for all documents produced by Blue Sky in this case that appear on plaintiffs' trial exhibit list and provide no voluntary cooperation to the other defendants. This cooperation is useful in preparing plaintiffs' class certification reply papers – and preparing for trial.

This settlement, therefore, reflects the careful balance struck between each parties' position at this stage in the litigation.

[46] This damages estimate associated with Blue Sky employees was made by Plaintiffs' expert. Plaintiffs can provide more specific information at the Court's request.

[47] *In re Mid-Atlantic Toyota Antitrust Litig.*, 564 F. Supp. 1379, 1386 (D. Md.1983).

3. The Settlement Does Not Improperly Grant Preferential Treatment to Class Representatives or Segments of the Class

The third factor the court must consider in granting preliminary approval is whether the settlement improperly grants preferential treatment to class representatives or segments of the class.[48] The Proposed Settlement Agreement does not. It provides a reasonable and fair manner to compensate named plaintiffs and class members based on their salary and injury. The named plaintiffs, each of whom has been deposed and reviewed and produced thousands of pages of documents, and had their personnel work files produced, would currently receive $10,000 service award, which is half the service awards approved in *High-Tech*.[49]

4. The Settlement Falls Well Within the Range of Possible Approval

The court must also determine whether a settlement "falls within the range of possible approval." To make a determination, the court must focus on "substantive fairness and adequacy."[50]

This settlement certainly falls within the range of possible approval. As detailed above, the $5.95 million settlement represents about 25 percent of the damages that Dr. Ashenfelter estimated Blue Sky caused its employees. This is in excess of the 14.26 percent approved by the Court in *High-Tech II*.

B. The Proposed Settlement Class Satisfied Rule 23

Rule 23(a) provides four requirements to certify a class: "(1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a). Each of these requirements is addressed below.

[48] *Zepeda*, 2015 WL 6746913, at *4.

[49] *See In re High-Tech Emp. Litig.*, Case No. 11-cv-02509 LKH, Order Granting Plaintiffs' Motion for Attorneys' Fees, Reimbursement of Expenses, and Service Awards (ECF No. 916), at 3.

[50] *In re Tableware Antitrust Litig.*, 484 F. Supp. 2d at 1080.

1. Numerosity

The class is comprised of several thousand animation and visual effects employees who worked for the defendants during the defined class periods. This number of class members easily satisfies the numerosity requirement.[51]

The class is also ascertainable. As this Court recognized, "a class is ascertainable if the class is defined with 'objective criteria' and if it is 'administratively feasible to determine whether a particular individual is a member of the class.'"[52] In this case, Class members are defined by specific job titles, from defendants' own employment databases, which also identify each individual class member corresponding to those job titles. This Court found ascertainability satisfied through the use of similar methodologies in *High-Tech*.[53]

2. The Case Involves Questions of Law or Fact Common to the Class

The proposed class also satisfies Rule 23(a)(2)'s commonality requirement. Each class member alleges the same injury—suppressed compensation—from the same alleged unlawful conduct: Defendants' conspiracy to restrain competitive labor market forces to suppress compensation through non-solicitation agreements and collusive coordination on compensation. "Where an antitrust conspiracy has been alleged, courts have consistently held that 'the very nature of a conspiracy antitrust action compels a finding that common questions of law and fact exist.'"[54] To satisfy the commonality requirement, "[e]ven a single [common] question will do,"[55] and "[a]ntitrust liability alone constitutes a common question that 'will resolve an issue that is central to the validity' of each class member's claim 'in one stroke.'"[56] The existence *vel non* of defendants' compensation-suppression conspiracy is a common question for every class member, thus satisfying the commonality requirement.

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[51] *See, e.g.*, *In re Beer Distrib. Antitrust Litig.*, 188 F.R.D. 557, 562 (N.D. Cal. 1999) (25 class members met the numerosity requirement).

[52] *In re Yahoo Mail Litig.*, 308 F.R.D. 577, 596 (N.D. Cal. 2015) (Koh, J.) (quotation omitted).

[53] 985 F. Supp. 2d 1167, 1182 (N.D. Cal. 2013).

[54] *Id.* at 1180 (quoting *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 267 F.R.D. 583, 593 (N.D. Cal. 2010)).

[55] *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2556 (2011) (quotation omitted).

[56] *High-Tech*, 985 F. Supp. 2d at 1180 (*quoting Dukes*, 131 S. Ct. at 2551).

3. Plaintiffs' Claims Are Typical of the Claims of the Class

As this Court has recognized, "[i]n antitrust cases, typicality usually will be established by plaintiffs and all class members alleging the same antitrust violations by defendants."[57] In this case, plaintiffs have alleged the same antitrust violation as to every class member, making their claims typical of the class as a whole.

4. Plaintiffs Will Fairly and Adequately Represent the Interests of the Class

The test for adequacy turns on two questions: "(1) whether named plaintiffs and their counsel have 'any conflicts of interest with other class members,' and (2) whether named plaintiffs and their counsel will 'prosecute the action vigorously on behalf of the class.'"[58] The named plaintiffs do not have conflicts of interest with other class members. Plaintiffs and their counsel have also demonstrated they will prosecute this action vigorously, and will continue to do so.

C. The Settlement Class Satisfies Rule 23(b)(3)

1. Common Questions of Fact or Law Predominate

"In order to meet the predominance requirement of Rule 23(b)(3), a plaintiff must establish that the issues in the class action that are subject to generalized proof, and thus applicable to the class as a whole . . . predominate over those issues that are subject only to individualized proof."[59] There is no requirement that common evidence predominate for each element of the claim.[60] In antitrust conspiracy cases, "courts repeatedly have held that the existence of the conspiracy is the predominant issue and warrants certification even where significant individual issues are present."[61]

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[57] *Id.* at 1181 (quotation omitted).

[58] *Id.* (*quoting Hanlon*, 150 F.3d at 1020).

[59] *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 136 (2nd Cir. 2001) (citations omitted).

[60] *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1196 (2013) ("Rule 23(b)(3), however, does *not* require a plaintiff seeking class certification to prove that each elemen[t] of [her] claim [is] susceptible to classwide proof." (emphasis and brackets in original) (quotation omitted)).

[61] *In re Cathode Ray Tube* ("*CRT*") *Antitrust Litig.*, 308 F.R.D. 606, 620 (N.D. Cal. 2015) (quotation omitted); *see also In re Rubber Chem. Antitrust Litig.*, 232 F.R.D. 346, 352 (N.D. Cal. 2005) ("[T]he Court notes that the 'great weight of authority suggests that the dominant issues in cases like this are whether the charged conspiracy existed and whether price-fixing occurred.'") (citation omitted).

The existence of common evidence to prove defendants' conspiracy cannot seriously be disputed. Plaintiffs allege that defendants conspired to suppress compensation by agreeing not to solicit each other's employees, to take special procedures when contacted by each other's employees, and to coordinate compensation policies through direct, collusive communications. This illegal conspiracy had a single purpose: to avoid "mess[ing] up the pay structure," and keep defendants out of "a normal industrial competitive situation."[62] The United States Department of Justice ("DOJ") determined that this conspiracy was a *per se* violation of the antitrust laws. Proving this *per se* violation will be the main issue at trial and will be established through common evidence.

Common proof of the violation's impact will also predominate over any individual questions in the case. To show classwide impact, plaintiffs must set forth "a reasonable method for determining, on a classwide basis, the alleged antitrust activity's impact on class members."[63] The types of common evidence that plaintiffs will rely on to demonstrate impact to all or nearly all class members are similar to those employed in *High-Tech*.[64] First, plaintiffs will use defendants' documents and testimony to show that the conspiracy suppressed class member compensation – which was the defendants' express purpose in forming the conspiracy. Second, plaintiffs will use defendants' documents to demonstrate that their formal pay structures and adherence to the principle of "internal equity" caused the conspiratorial downward pressure on wages to spread across the entire class. Plaintiffs will demonstrate that defendants benchmarked their salaries and benefits to each other and engaged in custom cuts of salary surveys and direct exchanges of sensitive compensation information, and will use defendants' documents to show that depressed compensation at even one defendant studio would have depressed compensation at all defendant studios.

In addition to this extensive documentary evidence, plaintiffs have also confirmed the class-wide impact of defendants' scheme through the expert report of renowned Princeton economist Dr. Orley Ashenfelter. Dr. Ashenfelter's report utilizes economic theory, the documentary evidence, and

[62] *See* Plaintiffs' Notice of Motion and Motion for Class Certification and Memorandum of Law in Support, at 6, submitted under seal Feb. 1, 2016, and evidence cited therein.

[63] *CRT*, 308 F.R.D. at 625.

[64] *See High-Tech*, 985 F. Supp. 2d at 1191-1206.

standard statistical modeling and econometric analysis to confirm both that defendants' compensation was generally suppressed, and that this suppression impacted all or nearly all of the class, not just those who would have been directly recruited. The combination of this statistical evidence and defendants' documents favors certification.

2. Class Proceedings Are Superior in this Case.

Given the common proof of conspiracy, antitrust injury, and damages described herein, continuing this case as a class action is superior to other procedural methods.[65] In light of the abundance of common proof at issue, requiring class members to proceed individually "would merely multiply the number of trials with the same issues and evidence."[66]

D. The Court Should Reaffirm the Appointment of Class Counsel

Rule 23(c)(1)(B) provides that an order certifying a class action "must appoint class counsel under Rule 23(g)." The court must consider "(i) the work counsel has done in identifying or investigating potential claims in the action; (ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action; (iii) counsel's knowledge of the applicable law; and (iv) the resources counsel will commit to representing the class."[67]

The Court has already appointed the three undersigned law firms as Interim Co-Lead Class Counsel.[68] Since entry of that Order, the three law firms continue to vigorously represent their clients and the interest of the proposed Class, including substantial document review, motions practice, depositions, and moving this Court to certify the proposed Class. In addition, the Settlement Class Counsel have spent substantial time and resources on understanding the economic issues in the case, including the appropriate measure of damages. This knowledge will be crucial for properly calculating damages in this case, both for this Proposed Settlement and any future settlements. In

[65] *See TFT-LCD*, 267 F.R.D. at 314 ("[I]f common questions are found to predominate in an antitrust action, . . . courts generally have ruled that the superiority prerequisite of Rule 23(b)(3) is satisfied." (ellipses in original)).

[66] *High-Tech*, 985 F. Supp. 2d at 1228.

[67] Fed. R. Civ. P. 23(g)(1)(A).

[68] *See* Order Appointing Interim Co-Lead Plaintiffs' Counsel, ECF No. 54.

sum, undersigned counsel are well-qualified to serve as Settlement Class Counsel in this case, and respectfully request the Court to appoint them accordingly.

E. The Proposed Notice and Plan of Dissemination Meets the Strictures of Rule 23

Rule 23(c)(2)(B) provides that class members must receive the "best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable efforts." Moreover, Rule 23(e)(1) requires a court to "direct notice in a reasonable manner to all class members who would be bound by the propos[ed] [settlement]."

A class action settlement notice "is satisfactory if it 'generally describes the terms of the settlement in sufficient detail to alert those with adverse viewpoints to investigate and to come forward and be heard.'"[69] Rule 23(c)(2)(B) contains specific requirements for the notice, namely, that the notice state in clear, concise, plain, and easily understood language:

> (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).

"Notice by mail is sufficient to provide due process to known affected parties, so long as the notice is 'reasonably calculated ... to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'"[70] As in *High-Tech*,[71] to discourage potentially frivolous objections, an objector must sign his or her objection under penalty of perjury, and must list any other objections by the Objector, or the Objector's attorney, to any class action settlements submitted to any court in the United States in the previous five years.

The Proposed Notice[72] here meets those requirements, and is modelled on the notice approved by the Court in the *High Tech* litigation. The parties' intent is to have the Claims

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[69] *Rodriguez v. W. Pub. Corp.*, 563 F.3d 948, 962 (9th Cir.2009) (*quoting Churchill Vill., LLC v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir. 2004)).

[70] *Monterrubio v. Best Buy Stores, L.P.*, 291 F.R.D. 443, 452 (E.D. Cal. 2013) (*quoting Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)).

[71] *See High-Tech I*, 2013 WL 6328811, at *6.

[72] *See* Friedman Decl., Ex. D; *see also id.* Ex. E (postcard notice).

Administrator provide actual notice where possible to each Class Member. Pursuant to the agreement between the parties, Blue Sky is obligated to provide plaintiffs with the name, social security number, all known email addresses, last known physical address, dates and location of employment, and all known compensation information by date, job title and type of compensation at Blue Sky during the defined class period (to the extent that information exists in Blue Sky's human resources databases). If Blue Sky is unable to determine an employee's job title during the class period, they nevertheless will provide the other information listed above, to the extent such information is available to Blue Sky. Plaintiffs have served a similar request on the other defendants in this litigation. Plaintiffs ask for production of this information from the other defendants on a similar timeline to ensure that all class members receive adequate notice.

The Claims Administrator, Kurtzman Carson Consultants ("KCC"),[73] will be responsible for providing notice to potential class members consistent with Rule 23(c)(2)(B). The Claims Administrator will email notice to settlement class members where possible, and send postcard notice if email notification is not possible. In addition, the Claims Administrator will undertake an Internet notice campaign, including the use of banner advertisements. Finally, the detailed long-form notice will be available on the website www.animationlawsuit.com, in addition to relevant case documents such as the complaint and settlement agreement itself. With this motion, plaintiffs provide proposed forms for email notice, postcard notice, and a proposed plan of distribution.[74]

F. Proposed Schedule for Final Approval and Dissemination of Notice

Below is a proposed schedule for providing notice, filing objections, and holding a fairness hearing:

[73] KCC acquired Gilardi LLC in August 2015. Gilardi previously served as Claims Administrator in the *High-Tech* litigation.

[74] *See* Declaration of Kenneth Jue in Support of Motion for Preliminary Approval of Settlement with Blue Sky Studios, Inc., ¶ 5, filed concurrently herewith.

Event	Due Date
Administrator receives Blue Sky and defendant data on potential class members	20 days from Order preliminarily approving Settlement.
Notice mailed and posted on internet	21 days after Administrator receives the data.
Deadline for motion for attorneys' fees, costs, and service awards	31 days after Notice mailed.
Objections deadline	45 days after Notice mailed.
Exclusions deadline/end of opt-out period	45 days after Notice mailed.
Administrator files Affidavit of Compliance with Court regarding notice requirements	14 days after opt-out deadline.
Final Fairness Hearing	90 days after Notice mailed, or at the Court's convenience.

V. CONCLUSION

Based on the foregoing, plaintiffs respectfully request that this Court certify the proposed Settlement Class; preliminarily approve the proposed Settlement Agreement; appoint the undersigned Interim Co-Lead Class Counsel as Settlement Class Counsel; and approve the Notices to be issued to the Proposed Settlement Class and notice plan.

DATED: March 31, 2016

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