IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Kevin Moitoso, Tim Lewis, Mary Lee Torline, and Sheryl Arndt, individually and as representatives of a class of similarly situated persons, and on behalf of the Fidelity Retirement Savings Plan, Plaintiffs, v. FMR LLC, the FMR LLC Funded Benefits Investment Committee, the FMR LLC Retirement Committee, Fidelity Management & Research Company, FMR Co., Inc., and Fidelity Investments Institutional Operations Company, Inc., Defendants.	Case No. 1:18-cv-12122-WGY **MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT**

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INTRODUCTION

Plaintiffs Kevin Moitoso, Tim Lewis, Mary Lee Torline, and Sheryl Arndt ("Plaintiffs") submit this Memorandum in support of their Motion for Preliminary Approval of Class Action Settlement. A copy of the Class Action Settlement Agreement ("Settlement" or "Settlement Agreement") is attached as **Exhibit A** to the accompanying Declaration of Kai Richter ("*Richter Decl.*").[1] This Settlement resolves Plaintiffs' class action claims against Defendants FMR LLC, the FMR LLC Funded Benefits Investment Committee ("FBIC"), the FMR LLC Retirement Committee ("Retirement Committee"), Fidelity Management & Research Company, FMR Co., Inc., and Fidelity Investments Institutional Operations Company, Inc. (collectively "Fidelity" or "Defendants") under the Employee Retirement Income Security Act ("ERISA"), concerning Defendants' administration and management of the Fidelity Retirement Savings Plan ("Plan").

Under the terms of the proposed Settlement, Fidelity will cause its insurers to pay a gross settlement amount of $28,500,000 into a common fund for the benefit of the Class. This is a significant monetary recovery for the Class that falls well within the range of court-approved settlements in similar ERISA cases, and provides the Class with essentially a full recovery of the alleged damages for failure to monitor recordkeeping fees (which partially overlapped with alleged damages associated with the failure to monitor certain Fidelity funds). Moreover, the Settlement also provides for prospective relief. Specifically, one or more Plan fiduciaries will (1) undertake to monitor Plan recordkeeping fees; and (2) undertake to monitor the Plan's investment options, other than any investments available through the Plan's self-directed brokerage account. These changes directly address the Court's finding in its Case Stated Order that Fidelity "fail[ed] to monitor proprietary funds other than the two DIAs, and … fail[ed] to monitor recordkeeping

[1] Capitalized terms have the meaning assigned to them in Article 1 of the Settlement Agreement, unless otherwise specified herein.

expenses." *ECF No. 224 at 66*.

For the reasons set forth below, the Settlement is fair, reasonable, and adequate, and merits preliminary approval so that the proposed Notices can be sent to the Class. Among other things supporting preliminary approval:

- The Settlement was negotiated at arm's length by experienced and capable counsel, after extensive litigation;
- The Class for purposes of settlement is consistent with the class previously certified by the Court (*see* ECF No. 83);
- The Settlement provides for significant monetary relief that is in line with settlements in other cases, and is reasonably allocated among Class Members;
- The prospective relief will ensure that the Plan's recordkeeping expenses and investment options are monitored on a going-forward basis;
- The Released Claims are tailored to the claims that were asserted or could have been asserted in the action;
- The proposed Notices provide fulsome information to Class Members about the Settlement, and will be distributed via first-class mail; and
- The Settlement Agreement provides Class Members the opportunity to raise any objections they may have to the Settlement.

Accordingly, Plaintiffs respectfully request that the Court enter an order: (1) preliminarily approving the Settlement; (2) approving the proposed Notices and authorizing distribution of the Notices; (3) scheduling a final approval hearing; and (4) granting such other relief as set forth in the proposed Preliminary Approval Order submitted herewith. This motion is not opposed by Defendants as parties to the Settlement Agreement.

BACKGROUND

I. PROCEDURAL HISTORY

A. Pleadings

Plaintiffs Kevin Moitoso, Tim Lewis, and Mary Lee Torline filed their Class Action Complaint on October 10, 2018, alleging that FMR LLC and related entities breached their

fiduciary duties of prudence and loyalty under ERISA with respect to the Plan's investment lineup and by failing to secure revenue sharing rebates for Plan participants. *See ECF No. 1*.[2] Defendants filed an Answer on October 19, 2018. *ECF No. 14.*

On November 9, 2018, Plaintiffs filed an Amended Complaint ("AC") that added a prohibited transaction claim under 29 U.S.C. § 1106(b)(3) and certain supporting allegations. *ECF No. 31*. Defendants filed an Answer to the AC on November 21, 2018. *ECF No. 33*.

On January 10, 2019, Plaintiffs filed a Second Amended Complaint ("SAC") that included several material revisions. *See ECF No. 37.* First, the SAC included a new allegation that "the Plan Fiduciaries failed to prudently monitor and control the Plan's recordkeeping expenses." *Id. ¶ 12*. Second, the SAC alleged that the "Revenue Credits" that Fidelity makes available to participants under the Plan (which approximate the amount of fees paid to Fidelity in each Plan year) are not made available to former employees who remain in the Plan. *Id. ¶ 15*. Third, the SAC revised the class definition to include only former employees who participated in the Plan. *Id. ¶ 137*. Fourth, the SAC added a claim for breach of the duty of impartiality (Count II), as well claims regarding the disclosures provided to participants (Count III) and regarding the management of the Portfolio Advisory Service at Work ("PAS-W") managed account program (Count IV). *ECF No. 37.* Fifth, the SAC added the FBIC as a defendant, and also added Strategic Advisors, Inc. (the managed account provider of the PAS-W program) as a defendant. Defendants filed an Answer to the SAC on January 24, 2019. *ECF No. 48*.

On March 25, 2019, Plaintiffs filed a Third Amended Complaint ("TAC"), which added Sheryl Arndt as a class representative. *ECF No. 56.* Defendants filed an Answer to the TAC on April 8, 2019. *ECF No. 71*.

[2] Plaintiffs also asserted a claim against FMR LLC for allegedly failing to monitor Plan fiduciaries, and an equitable claim under 29 U.S.C. § 1132(a)(3).

Finally, on May 2, 2019, Plaintiffs filed a Fourth Amended Complaint ("FAC") that removed the disclosure claim, dropped the claim related to the management of the PAS-W program, and removed Strategic Advisers, Inc. as a defendant. *ECF No. 77.* The FAC remains the operative complaint, and Defendants filed an Answer to the FAC on May 16, 2019. *ECF No. 88*.

B. Court Proceedings

On May 2, 2019, the Parties filed a Stipulation and Proposed Order for class certification, *ECF No. 78*, which the Court adopted on May 7, 2019. *ECF No. 83*. The Parties then filed cross-motions for summary judgment on September 6, 2019. *See ECF Nos. 135, 139.* On November 5, 2019, the Parties sent a joint letter to the Court requesting that, if summary judgment was not dispositive of the pending issues presented on summary judgment, those issues could be resolved on a "case-stated" basis. On November 7, 2019, the Court held a summary judgment hearing in which it agreed to the parties' proposed case-stated procedure. *ECF No. 216*.

On November 20, 2019, by agreement of the Parties, the Court held a case stated hearing. *ECF No. 222*. The Court then issued its Case Stated Order on March 27, 2020. *ECF No. 224.* In summary, the Court ruled that Fidelity breached its duty of prudence by failing to monitor recordkeeping expenses and failing to monitor certain mutual funds available in the Plan, but Fidelity did not breach its duty of prudence by failing to investigate alternatives to mutual funds, did not breach its duty of loyalty to the Plan and plan participants, and did not engage in prohibited transactions. *ECF No. 224* at 4.[3] The Court further held that FMC LLC was liable for breach of its duty to monitor other Plan fiduciaries. *Id.* However, the Court's Case Stated Order addressed only the question of breach, not causation or loss, and did not address Fidelity's statute of limitations defense. *Id.* at 66.

[3] The Court also noted that Plaintiffs withdrew their impartiality claim in their briefing. *Id. at 3.*

On April 17, 2020, the Parties filed a Joint Stipulation in which Defendants voluntarily withdrew and dismissed with prejudice their statute of limitations defense with respect to all remaining claims, and Plaintiffs waived their right to appeal the Court's Case Stated Order as to their prohibited transaction claim. *ECF No. 226.* For the remaining issues of causation and loss on the monitoring claims, the Court set a trial date of July 6, 2020. *ECF No. 232*. Approximately one month before trial, on June 5, 2020, the Parties agreed to submit the loss and causation issues associated with failure to monitor recordkeeping expenses on a case stated basis. *ECF No. 237*; *see also ECF No. 238* (adopting parties' case stated proposal). However, the issues of loss and loss causation with respect to the failure to monitor certain funds remained to be tried. *Id.*

C. Discovery

The record that was developed during discovery was substantial. Defendants produced over 151,000 pages of documents and voluminous data, and Plaintiffs produced over 32,000 pages of documents. *Richter Decl. ¶ 12.* Class Counsel also took the depositions of nine fact witnesses and all three of Defendants' expert witnesses, and Defendants took the depositions of all four Named Plaintiffs and all four of Plaintiffs' experts. *Id. ¶¶ 13-14.* In addition, the Parties' exchanged multiple rounds of expert reports.

As part of the discovery process, and for purposes of this litigation only, Fidelity also stipulated to certain facts in order to resolve certain discovery disputes concerning certain portions of Plaintiffs' discovery requests. *See ECF No. 87-1, 87-2.* Among other things, Fidelity provided stipulations regarding recordkeeping offsets and revenue credits that Fidelity makes available to third party plans. Additionally, in order to avoid having to produce confidential information about what Fidelity charges other recordkeeping clients, Fidelity also agreed to stipulate, for purposes of this litigation only, to the value of the recordkeeping services that Fidelity provided to the Plan during the Class Period. *ECF No. 87-1 at Stipulation Nos. 1 and 2*. In its Case Stated Order, the

Court concluded that the issue of loss with respect to Defendants' failure to monitor recordkeeping expenses "may or may not be trivial given the parties' stipulations." *ECF No. 224 at 60.*

II. OVERVIEW OF SETTLEMENT TERMS

Following the Court's Case Stated Order, the Parties engaged in direct negotiations and reached a settlement-in-principle in June 2020. *See ECF No. 240.* The terms of the Settlement are memorialized in the Settlement Agreement that is the subject of this motion.

A. The Class

The Settlement Agreement applies to the following Class, which tracks the class certified by the Court in its prior Class Certification Order (*ECF No. 83*):

> [A]ll participants and beneficiaries of the FMR LLC Profit Sharing Plan or the Fidelity Retirement Savings Plan who, during the Class Period, (1) remained Plan participants or beneficiaries for any length of time, (2) ceased to be employed by a participating employer before or during the period of time that they remained in the Plan, and (3) did not receive any portion of the mandatory revenue credit contributed to the FMR LLC Retirement Savings Plan pursuant to § 5.1(e) of the 2014 Restatement of the Plan (as amended) and §1.12(b)(3) of the 2017 Adoption Agreement for use with the Fidelity Basic Plan Document No. 17 for the Plan (as amended) issued by FMR LLC in any Plan year or portion of a Plan year in which they maintained a Plan account balance and were no longer employed by a participating employer. Excluded from the class are Individual Board Members and Individual Committee Members.

Settlement Agreement ¶ 1.11. Based on information provided by Fidelity's counsel, there are approximately 41,000 class members. *Richter Decl. ¶ 3.*

B. Monetary Relief

Under the Settlement, Fidelity will cause its insurers to contribute a Gross Settlement Amount of $28.5 million to a common settlement fund (the "Settlement Fund"). *Settlement Agreement ¶¶ 1.31, 4.1, 4.2.* After accounting for any Attorneys' Fees and Costs, Administrative Expenses, and class representative Service Awards approved by the Court, the Net Settlement Amount will then be distributed to eligible Class Members. *Id. ¶¶ 5.2-5.3.*

The Net Settlement Amount will be allocated among eligible Class Members in proportion to their average quarterly account balances in the Plan. *Id.* ¶ *5.1 (b), (c).* The Plan accounts of Participant Class Members who are currently enrolled in the Plan will be automatically credited with their share of the Settlement Fund. *Id.* ¶ *5.2.* Former Participant Class Members who no longer have a Plan account will be required to submit a claim form, which allows them to elect to have their distribution rolled over into an individual retirement account or other eligible employer plan, or to receive a check. *Id.* ¶¶ *1.5, 5.3.*[4] Under no circumstances will any monies revert to Fidelity. Any checks that are uncashed will revert to the Qualified Settlement Fund and will be paid to a cy pres to be mutually agreed upon by the parties. *Id.* ¶ *5.6(b).*

C. Prospective Relief

The Settlement also provides that the following procedures shall apply to the management of the Plan on a prospective basis beginning no later than 30 days after the Settlement Effective Date:

(a) One or more Plan fiduciaries will undertake to monitor Plan recordkeeping fees; and

(b) One or more Plan fiduciaries will undertake to monitor the Plan's investment options, other than any investments available through the Plan's self-directed brokerage account.

Settlement Agreement ¶ *6.1.*

D. Release of Claims

In exchange for this relief, the Class will release Defendants and affiliated persons and entities (the "Released Parties" as defined in ¶ 1.50 of Settlement) from all claims:

[4] The Claim Form also allows the Settlement Administrator to verify the addresses of Class Members who are sent checks. This is an important consideration here because all of the Class Members are former employees, and because the Former Participant Class Members are no longer affiliated with the Plan.

> **1.42(a)** That in any way arise out of, relate to, are based on, or have any connection with any of the allegations, acts, omissions, purported conflicts, representations, misrepresentations, facts, events, matters, transactions or occurrences that were asserted or could have been asserted in the Action . . . .;[5]
>
> **1.42(b)** that would be barred by res judicata based on the Court's entry of the Final Approval Order;
>
> **1.42(c)** that arise from the direction to calculate, the calculation of, and/or the method or manner of the allocation of the Net Settlement Fund pursuant to the Plan Of Allocation; or
>
> **1.42(d)** that arise from the approval by the Independent Fiduciary of the Settlement Agreement.

Id. ¶ *1.42.* The release carves out claims "to enforce the Settlement Agreement" and for "individual claims for denial of benefits from the Plan." *Id.* ¶ *1.42.*

E. Independent Fiduciary Review

As required under ERISA, Fidelity will retain an independent fiduciary to review the Settlement and authorize the release (if approved) on behalf of the Plan. *Settlement Agreement,* ¶ *2.2; see also* Prohibited Transaction Exemption 2003-39, 68 Fed. Reg. 75632, *as amended,* 75 Fed. Reg. 33830 ("PTE 2003-39"). The independent fiduciary will issue its report prior to the final approval hearing, so the Court may consider it. *Id.* ¶ *2.2(b).*

F. Class Notices and Settlement Administration

Class Members will be sent a direct notice of the settlement ("Notice") via U.S. Mail. *Id.* ¶ *3.2 & Exs. 1 & 2.* The Notice sent to Former Participant Class Members will also include a Former Participant Class Member Claim Form enabling them to make the election described above. *Id.* ¶ *3.2 & Ex. 3.* These Notices provide information to the Class regarding, among other things: (1) the nature of the claims; (2) the scope of the Class; (3) the terms of the Settlement; (4)

[5] The release language has been truncated due to space limitations. The full release language, incorporated by reference, is in the Settlement Agreement, ¶ 1.42.

the process for submitting Former Participant Class Member Claim Forms; (5) Class Members' right to object to the Settlement and the deadline for doing so; (6) the class release; (7) the identity of Class Counsel and the amount of Attorneys' Fees they will seek in connection with the Settlement; (8) the amount of any requested class representatives' Service Award; (9) the date, time, and location of the final approval hearing; and (10) Class Members' right to appear at the final approval hearing. *Id. Exs. 1 & 2.*

To the extent that Class Members would like more information about the Settlement, the Settlement Administrator will establish a Settlement Website on which it will post the Notices, Former Participant Class Member Claim Form, and relevant case documents, including a copy of the operative Fourth Amended Complaint and all documents filed with the Court in connection with the Settlement. *Id.* ¶ *3.3.* Further, the Settlement Website will also include a toll-free telephone number through which Class Members may contact the Settlement Administrator, and receive answers to questions. *Id.* ¶ *3.3(c).*

G. Attorneys' Fees and Administrative Expenses

The Settlement Agreement requires that Class Counsel file their Motion for Attorneys' Fees and Costs at least 14 days before the deadline for objections to the proposed Settlement. *Id.* ¶ *7.1.* Under the Settlement, these fees must be reasonable and are subject to Court approval. *Id.*[6] ¶ *7.1.* The Settlement also provides for Service Awards up to $10,000 per Named Plaintiff, subject to Court approval. *Id.* ¶ *7.2.*

ARGUMENT

I. STANDARD OF REVIEW

Federal Rule of Civil Procedure 23(e) requires judicial approval of any settlement

[6] The Settlement also allows Class Counsel to file an application with the Court for payment of reasonable litigation Costs and Administrative Expenses in connection with the Settlement. *Id.*

agreement that will bind absent class members. "Approval is to be given if a settlement is untainted by collusion and is fair, adequate, and reasonable." *In re Lupron Mktg. & Sales Practices Litig.*, 228 F.R.D. 75, 93 (D. Mass. 2005). The First Circuit has expressed a "strong public policy in favor of settlements, particularly in very complex and technical regulatory contexts" such as this. *Puerto Rico Dairy Farmers Ass'n v. Pagan*, 748 F.3d 13, 20 (1st Cir. 2014) (quotation omitted); *see also In re Pharm.*, 588 F.3d 24, 36 (1st Cir. 2009) (discussing policy favoring settlements in "hard-fought, complex class action[s]").

Settlement approval involves two stages: "First, the judge reviews the proposal preliminarily to determine whether it is sufficient to warrant public notice and a hearing. If so, the final decision on approval is made after the hearing." *Hochstadt v. Boston Scientific Corp.*, 708 F. Supp. 2d 95, 106-07 (D. Mass. 2010) (quoting MANUAL FOR COMPLEX LITIGATION (Fourth) § 13.14 (2004)). At the preliminary approval stage, courts "examine the proposed settlement for obvious deficiencies before determining whether it is in the range of fair, reasonable, and adequate." *In re M3 Power Razor Sys. Mktg. & Sales Practice Litig.*, 270 F.R.D. 45, 62 (D. Mass. 2010). The ultimate fairness determination is left for final approval, after class members receive notice of the settlement and have an opportunity to be heard.

In 2018, Rule 23(e) was amended to specify uniform standards for settlement approval. *See* Fed. R. Civ. P. 23(e) advisory committee note (2018). The amended rule states that, at the preliminary approval stage, the court must determine whether it "will likely be able to: (i) approve the proposal under Rule 23(e)(2); and (ii) [where a class has not already been certified] certify the class for purposes of judgment on the proposal." Fed. R. Civ. P. 23(e)(1)(B). Rule 23(e)(2), in turn, specifies the following factors the court must ultimately consider at the final approval stage in determining whether a settlement is "fair, reasonable, and adequate":

> (A) the class representatives and class counsel have adequately represented the class;
>
> (B) the proposal was negotiated at arm's length;
>
> (C) the relief provided for the class is adequate, taking into account:
>
> > (i) the costs, risks, and delay of trial and appeal;
> >
> > (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
> >
> > (iii) the terms of any proposed award of attorney's fees, including timing of payment; and
> >
> > (iv) any agreement required to be identified under Rule 23(e)(3); and
>
> (D) the proposal treats class members equitably relative to each other.

Fed. R. Civ. P. 23(e)(2).[7] "The goal of this amendment is not to displace any [existing] factor, but rather to focus the court … on the core concerns of procedure and substance that should guide the decision whether to approve the proposal." Fed. R. Civ. P. 23(e) advisory committee note (2018).

II. THE SETTLEMENT SATISFIES THE STANDARD FOR PRELIMINARY APPROVAL

As discussed below: (1) the settlement was negotiated at arm's length by experienced counsel after extensive litigation, (2) the Class was adequately represented by the Named Plaintiffs, and (3) the relief provided is adequate and equitable to all Class Members in light of the risks and costs of further litigation. Accordingly, this Court should grant preliminary approval of the Settlement and authorize notice to the Class.

[7] Courts considering motions for preliminary approval after 2018 have taken different views as to whether these amendments altered or merely codified existing case law. *Compare Swinton v. SquareTrade, Inc.*, 2019 WL 617791, at *4-5 & n.9 (S.D. Iowa Feb. 14, 2019) (concluding that the amendments "are mostly form over substance" and "largely codify existing case law") *with In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 330 F.R.D. 11, 28 (E.D.N.Y. 2019) (stating that the "will likely be able to" standard "appears to be more exacting than the prior requirement"). Courts within the First Circuit have generally continued to apply the same "within the range of" standard to preliminary approval even after the 2018 amendments. *See Simerlein v. Toyota Motor Corp.*, 2019 WL 1435055, at *10 (D. Conn. Jan. 14, 2019); *Del Sesto v. Prospect Chartercare, LLC*, 2019 WL 2162083, at *1 (D.R.I. May 17, 2019).

A. The Settlement Is the Product of Arm's-Length Negotiations Between Experienced Counsel After Extensive Litigation and Adequate Class Representation

A proposed class action settlement enjoys a "presumption in favor of the settlement" if "sufficient discovery has been provided and the parties have bargained at arms-length." *City P'ship Co. v. Atl. Acquisition Ltd. P'ship*, 100 F.3d 1041, 1043 (1st Cir. 1996). That is precisely the situation presented here.[8] Indeed, the parties not only bargained at arms-length and conducted sufficient discovery, but also submitted the breach issues to the Court on a case-stated basis. In light of the full record that was developed, and the guidance that the Parties received from the Court regarding breach, the Parties were clearly able "to make an intelligent judgment about settlement." *Bezdek v. Vibram USA Inc.*, 79 F. Supp. 3d 324, 348 (D. Mass. 2015) (quotation omitted), *aff'd*, 809 F.3d 78 (1st Cir. 2015); *see also Hill v. State Street Corp.*, 2015 WL 127728 (D. Mass. Jan. 8, 2015) (finding extensive document production and depositions over more than two years to be sufficient discovery); *Bussie v. Allmerica Fin. Corp.*, 50 F. Supp. 2d 59, 77 (D. Mass. 1999) (retention of expert before settlement was probative of the settlement's fairness). This Court is well aware that this case was both hard-fought and complex.

Further, "[w]hen the parties' attorneys are experienced and knowledgeable about the facts and claims, their representations to the court that the settlement provides class relief which is fair, reasonable and adequate should be given significant weight." *Rolland v. Cellucci*, 191 F.R.D. 3, 10 (D. Mass. 2000). Once again, that is the situation presented here. Class Counsel are knowledgeable and experienced in ERISA class actions, *see Richter Decl.* ¶¶ *24-26*, and have concluded that the relief provided by the Settlement is fair and reasonable, *id.* ¶ *9*.

[8] The Settlement occurred only after Class Counsel conducted a thorough investigation; prepared a detailed complaint (and amended complaints); brought a motion for summary judgment; responded to a motion for summary judgment; obtained more than 151,000 pages of documents from Defendants; deposed nine fact witnesses and Defendants' four experts; and retained and consulted multiple experts. *See supra* at 5.

Finally, the Class Members have been adequately represented by the class representatives. The class representatives have fulfilled their duties to the class by (among other things) reviewing the complaints, producing documents, reviewing and signing their interrogatory responses, communicating regularly with Class Counsel, testifying at their depositions, and reviewing the proposed Settlement. *See Moitoso Decl. ¶ 2*; *Lewis Decl. ¶ 2; Torline Decl. ¶ 2; Arndt Decl. ¶ 2.*

B. The Settlement Provides Significant Relief to the Class and Does So Through an Effective Distribution Method that Treats Class Members Equitably

The product of these serious and informed negotiations was a Settlement that provides significant relief to the Class. The $28,500,000 settlement amount is substantial in relation to other ERISA 401(k) plan settlements, and well above the average for such cases. *See Richter Decl. ¶ 6.* By comparison, the ERISA settlements that this Court approved in *Putnam* and *Eaton Vance* were $12.5 million and $3.45 million, respectively. *See Brotherston v. Putnam Invs., LLC*, No. 1:15-cv-13825, ECF No. 220 (Apr. 29, 2020); *Price v. Eaton Vance Corp.*, No. 18-12098, ECF No. 45 (May 22, 2019). As another basis for comparison, Judge Zobel recently approved a $6.875 million ERISA settlement involving Massachusetts Financial Services (MFS). *See Velazquez v. Mass. Fin. Services Co.*, No. 17-cv-11249, ECF No. 108 (D. Mass. Dec. 5, 2019).

The recovery also measures favorably based on other metrics. For example, the monetary relief ($28.5 million) represents approximately 1.11% of Class Members' assets in the Plan's "Open Architecture Window" exclusive of PAS-W ($2.567 billion), which were the assets upon which Plaintiffs' remaining claims were focused as of the point when the Settlement was negotiated.[9] *See Richter Decl. ¶ 6* (citing *ECF No. 125-2 (Strombom Expert Report) at 70*). Even

[9] Plaintiffs had already withdrawn their claims relating to the management of the PAS-W program at the time of the Settlement and stipulated that they would "not seek to recover losses or other monetary relief for assets of the [] Plan invested through the [] PAS-W managed account option." *ECF No. 229.* Assets held in the Plan's target-date funds (the Fidelity Freedom Funds) are also excluded from this calculation because Plaintiffs did not assert claims with respect to those funds

if PAS-W assets are included, the settlement amount still represents 0.76% of assets, *id.*, which also falls within the range of other settlements. *Id.* By comparison, the recoveries in *Eaton Vance* and *MFS* represented 0.66% and 0.80% of plan assets, respectively, while the percentage in *Putnam* was higher (1.9% of Plan assets). *Id.*

The settlement amount also represents a significant portion of the Class's alleged damages. The $28.5 million recovery constitutes approximately 84% of the alleged losses due to failure to monitor recordkeeping expenses ($33.9 million), and a full recovery based on the raw amount of the damages for that claim ($27.97 million) before any present value adjustment. *Supplemental Expert Report of Steve Pomerantz (June 3, 2020) ("Pomerantz Supplemental Report"), Richter Decl.* **Exhibit B** at ¶ 13. Although Plaintiffs also alleged damages in connection with the failure to monitor certain mutual funds, Dr. Pomerantz acknowledged in his report that there was a partial "overlap" between the damages associated with a failure to monitor recordkeeping fees and the damages related to the failure to monitor certain Fidelity mutual funds. *See Expert Report of Steve Pomerantz, ECF No. 131-01, ¶ 141* ("Any losses associated with excess Recordkeeping Offsets/Revenue Credits would overlap with the combined losses measured within the Benchmark Index and Sector Models."). Even disregarding this overlap, the $28.5 million recovery represents approximately 29.2% of the total estimated losses (both damages associated with a failure to monitor recordkeeping fees and damages related to the failure to monitor certain Fidelity mutual funds), and an even higher percentage if the overlap is considered.[10] This also compares favorably

at any point in this litigation. *See Pls' ECF No. 154 at 14* ("Plaintiffs make no claim relating to the Freedom Funds").

[10] Of Dr. Pomerantz's various models, his highest measure of damages related to the failure to monitor certain Fidelity mutual funds was his Benchmark Index Model, which estimated $53.4 million in such damages exclusive of sector funds. *Pomerantz Supplemental Report, ¶ 8.* Dr. Pomerantz separately calculated an additional $10.4 million in damages attributable to sector funds, *id. ¶ 9*, for a total of $63.8 million in alleged damages related to the failure to monitor certain Fidelity mutual funds.

with other settlements: by comparison, the recovery in *Eaton Vance* was 23% of estimated damages, and the recovery percentage in *Putnam* was 28%. *See Eaton Vance*, No. 18-12098, ECF No. 32, at 12 (May 6, 2019); *Putnam*, No. 1:15-cv-13825, ECF No. 214 at 12; *see also Urakhchin v. Allianz Asset Mgmt. of Am., L.P.*, No. 8:15-cv-01614, ECF No. 185 (C.D. Cal. July 30, 2018) (approving $12 million ERISA 401(k) settlement that represented approximately one-quarter of estimated total plan-wide losses of $47 million); *Johnson v. Fujitsu Tech. & Business of America, Inc.*, 2018 WL 2183253, at *6-7 (N.D. Cal. May 11, 2018) (approving $14 million ERISA 401(k) settlement that represented "just under 10% of the Plaintiffs' most aggressive 'all in' measure of damages"); *Hochstadt*, 708 F. Supp. 2d at 109 (D. Mass. 2010) (recovery of approximately 27% of conservatively estimated damages was "plainly reasonable").

Moreover, in addition to the foregoing monetary compensation, the Settlement provides for prospective relief. *Richter Decl. ¶ 8.* Beginning no later than 30 days after the Settlement Effective Date, one or more Plan fiduciaries will undertake to monitor Plan recordkeeping fees and the Plan's investment options (other than any investments available through the Plan's self-directed brokerage account). *Settlement Agreement ¶ 6.1.* This prospective relief addresses the core issues raised in this lawsuit: Fidelity's "fail[ure] to monitor proprietary funds other than the two DIAs, and … fail[ure] to monitor recordkeeping expenses." *ECF No. 224* at 66. This prospective relief further supports settlement approval. *See Bezdek*, 79 F. Supp. 3d at 346-47 (noting that prospective relief is "a valuable contribution" to a settlement agreement); *Nilsen v. York Cty.*, 400 F. Supp. 2d 266, 284 (D. Me. 2005) (prospective relief benefitting class members supports settlement); *Marcoux v. Szwed*, 2017 WL 679150, at *3 (D. Me. Feb. 21, 2017) (same).

The Settlement also treats Class Members equitably and will be delivered through an effective method of distribution. The Net Settlement Amount will be allocated among all eligible

Class Members on a *pro rata* basis in proportion to their average quarterly account balances in the Plan during the Class Period. *Settlement Agreement ¶ 5.1(b), (c).* Notably, the recordkeeping fees that Plaintiffs challenged in the case were assessed as a percentage of assets.

Current participants in the Plan will have their accounts automatically credited with their share of the Settlement Fund. *Id. ¶ 5.2.* Although Former Participant Class Members are required to submit a claim form for administrative reasons—to specify a cash payment or rollover election and to verify their current address—they are entitled to the same proportional share of the Settlement. *Id. ¶ 5.3.* This method of distribution has been approved in similar ERISA class action settlements, including the *MFS* case in this District. *See, e.g.*, *MFS*, No. 17-cv-11249, ECF No. 91-1 at ¶¶ 2.6, 6.1, 6.6; *Sims v. BB&T Corp.*, No. 1:15-cv-732, ECF No. 437 at 3-4 (M.D.N.C. Nov. 30, 2018).

Finally, any attorneys' fees that will be deducted from the Gross Settlement Amount are subject to Court approval and must be "reasonable". *Settlement Agreement ¶ 7.1.* The Settlement does not purport to establish a presumptive fee award. The fees that Class Counsel intend to seek (one-third of the Gross Settlement Amount) are consistent with applicable law,[11] and are fully disclosed in the Notices that will be sent to the Class. *See Settlement Agreement, Exs. 1 & 2 at p.6*. Moreover, Class Counsel will file their motion for an award of Attorney's Fees and Costs at least 14 days before the deadline for objections. *Settlement Agreement* ¶ 7.1. This further favors preliminary approval of the Settlement.

[11] *See, e.g.*, *See Eaton Vance*, No. 18-12098, ECF Nos. 62, 63 (approving one-third fee); *In re Relafen Antitrust Litig*., 231 F.R.D. 52, 85−89 (D. Mass. 2005) (same); *Gordan v. Mass. Mutual Life Ins. Co.*, No. 3:13-cv-30184, ECF No. 144 (D. Mass. Nov. 3, 2016) (same); *see also Kruger v. Novant Health, Inc.*, 2016 WL 6769066, at *2 (M.D.N.C. Sept. 29, 2016) ("[C]ourts have found that '[a] one-third fee is consistent with the market rate' in a complex ERISA 401(k) fee case such as this matter"); *Krueger v. Ameriprise Fin., Inc.*, 2015 WL 4246879, at *2 (D. Minn. July 13, 2015) ("In such cases, courts have consistently awarded one-third contingent fees.").

C. Plaintiffs Would Have Faced Potential Litigation Risks and Substantial Delay in the Absence of the Settlement

In the absence of a Settlement, Plaintiffs would have faced significant litigation risk. *See Hill*, 2015 WL 127728, at *10 (noting that the risk of continued litigation includes the risk that there could be no recovery at all); *In re Lupron*, 228 F.R.D. at 97 ("[A] significant element of risk adheres to any litigation taken to binary adjudication."). These risks are objectively illustrated by the procedural history of this case. As noted above, Plaintiffs lost their claims that Fidelity breached its duty of prudence by failing to investigate alternatives to mutual funds, breached its duty of loyalty, and engaged in prohibited transactions on the case stated record. *See supra* at 4. And even on the issues that the Court found in Plaintiffs' favor, it expressly noted that its decision "addresse[d] only the question of liability, not causation or loss." *ECF No. 224* at 66. Thus, it is uncertain whether Plaintiffs ultimately would have prevailed. In two other recent trials involving defined contribution plans, the defendants were the prevailing party. *See Wildman v. Am. Century Servs., LLC*, 362 F. Supp. 3d 685, 711 (W.D. Mo. 2019); *Sacerdote v. New York Univ.*, 328 F. Supp. 3d 273 (S.D.N.Y. 2018). Moreover, in the *Putnam* case that this Court recently tried, the defendants also were initially the prevailing party before the case was remanded on appeal.

With respect to losses attributable to the failure to monitor investments, the First Circuit noted in *Putnam* that "questions of fact" remained regarding whether plaintiffs' expert (the same expert retained in this case) had "picked suitable benchmarks, or calculated the returns correctly, or focused on the correct time period." *Brotherston v. Putnam Invs., LLC*, 907 F.3d 17, 34 (1st Cir. 2018). These questions loomed large in this case, as Fidelity filed both a *Daubert* motion with respect to Dr. Pomerantz and a separate motion to exclude certain of his models.[12] *See ECF Nos.*

[12] At the time the parties reached a settlement-in-principal, these motions remained pending. The Court did not rule on the motions until the morning that the Parties filed their Notice of Settlement.

114, 129. The *American Century* case further illustrates the risks associated with proving losses associated with the failure to monitor investments, as the trial court concluded that the plaintiffs failed to prove loss based on the damages models of the same expert. *See Wildman*, 362 F. Supp. 3d at 710 (W.D. Mo. 2019) (finding "Dr. Pomerantz's models did not use suitable benchmarks and relied on unfounded assumptions"). Similarly, in *Sacerdote*, the court found that "while there were deficiencies in the Committee's processes—including that several members displayed a concerning lack of knowledge relevant to the Committee's mandate—plaintiffs have not proven that … the Plans suffered losses as a result." 328 F. Supp. 3d at 280.

Although Plaintiffs believe that Dr. Pomerantz's loss models in this case were sound, these decisions illustrate the risks that Plaintiffs faced on the issue of loss. *See* Restatement (Third) of Trusts, § 100 cmt. b(1) (2012) (noting that determination of losses attributable to the failure to monitor investments in breach of fiduciary duty cases is "difficult"). Adding to this risk, Defendants put forward two very substantial expert reports in support of their arguments concerning loss and loss causation related to the failure to monitor certain Fidelity investments. By contrast, the Defendants offered no expert in support of their defenses on the failure to monitor recordkeeping expenses. This further supports settlement approval. *See Hill*, 2015 WL 127728, at *9; *Kemp-DeLisser v. Saint Francis Hospital and Medical Center*, 2016 WL 6542707, at *9 (D. Conn. Nov. 3, 2016) (finding complex damages analysis weighed in favor of ERISA class settlement). Given the risks, it was reasonable for Plaintiffs to reach a settlement that approximated the amount of the alleged excess recordkeeping fees (*see supra* at 14), as Dr. Pomerantz's estimates of damages associated with a failure to monitor recordkeeping fees were less vigorously challenged than his estimates of damages attributable to the failure to monitor certain Fidelity

See ECF Nos. 239, 240. In any event, the motions were denied "without prejudice" to their renewal at trial. *ECF No. 239.*

funds, and those alleged damages overlapped in part with damages associated with a failure to monitor recordkeeping fees in any event.

Aside from these risks, continuing the litigation would have resulted in additional complex and costly proceedings, which would have further delayed relief to Class Members, even if Plaintiffs had ultimately prevailed. It is well-recognized that ERISA 401(k) cases such as this "often lead[] to lengthy litigation." *Krueger v. Ameriprise*, 2015 WL 4246879, at *1 (D. Minn. July 13, 2015). Indeed, these cases can extend for a decade or longer before final resolution, sometimes going through multiple appellate proceedings. *See Tussey v. ABB, Inc.*, 850 F.3d 951 (8th Cir. 2017) (recounting lengthy procedural history of case that was initially filed in 2006, and remanding for district court to address the issue of loss a second time); *Tibble v. Edison Int'l*, 2017 WL 3523737, at *15 (C.D. Cal. Aug. 16, 2017) (outlining remaining issues ten years after suit was filed on August 16, 2007); *Abbott v. Lockheed Martin Corp.*, 2015 WL 4398475, at *4 (S.D. Ill. July 17, 2015) (noting that the case had originally been filed on September 11, 2006). This case has already been pending for nearly two years, and although trial was set to begin in July 2020, it is impossible to predict how long any appellate proceedings or subsequent proceedings would have taken. As the *Putnam* litigation demonstrates, ERISA 401(k) cases can take many different twists and turns. Given the risks, cost, and delay of further litigation, it was in the best interest of the Class to reach a settlement on the terms that were negotiated. *See Kruger v. Novant Health, Inc.*, 2016 WL 6769066, at *5 (M.D.N.C. Sept. 29, 2016) ("[S]ettlement of a 401([k]) excessive fee case benefits the employees and retirees in multiple ways.").

III. THE CLASS NOTICE PLAN IS REASONABLE AND SHOULD BE APPROVED

In addition to reviewing the substance of the Parties' Settlement Agreement, the Court must ensure that notice is sent in a reasonable manner to all class members who would be bound by the settlement. Fed. R. Civ. P. 23(e)(1). The "best notice" practicable under the circumstances includes

individual notice to all class members who can be identified through reasonable effort. Fed. R. Civ. P. 23(c)(2)(B). That is precisely the type of notice proposed here. The Settlement Administrator will provide direct notice of the Settlement to the Class via U.S. Mail. *Settlement Agreement ¶ 3.2.* This type of notice is presumptively reasonable. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985).

The content of the Notices is also reasonable. The Notices include all relevant information, *see supra* at 8-9, and "fairly apprise the prospective members of the class of the terms of the proposed settlement and of the options that are open to them." *Hill*, 2015 WL 127728, at *15 (quoting *Greenspun v. Bogan*, 492 F.2d 375, 382 (1st Cir. 1974)); *see also Eaton Vance*, No. 18-12098, ECF No. 45 ¶ 8 (May 22, 2019) (approving similar notice). Moreover, the Notices will be supplemented through the Settlement Website and toll-free telephone support line. *See supra* at 9.

IV. THE PROPOSED CLASS DEFINITION IS CONSISTENT WITH THE CLASS PREVIOUSLY CERTIFIED BY THE COURT.

Finally, the class definition in the Settlement is consistent with the class previously certified by the Court. The only differences are that the current class definition includes an end date for the Class Period, and explicitly identifies the persons with responsibility for the Plan's investment and administrative functions who are excluded from the Settlement. *Compare Settlement Agreement, ¶ 1.11* with *ECF No. 83* (order certifying litigation class). The fact that the class for settlement purposes is consistent with the class that the Court has already approved for litigation purposes further supports approval of the Settlement.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court (1) preliminarily approve the Settlement; (2) approve the proposed Notices and authorize distribution of the Notices; (3) schedule a final approval hearing; and (4) enter the accompanying Preliminary Approval Order.

Respectfully Submitted,

Dated: July 2, 2020

NICHOLS KASTER, PLLP

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CERTIFICATE OF SERVICE

I hereby certify that on July 2, 2020, a true and correct copy of the foregoing was served by CM/ECF to the parties registered to the Court's CM/ECF system.

Dated: July 2, 2020

s/Kai Richter
Kai Richter