Mark P. Kindall, Cal. Bar No. 138703
mkindall@ikrlaw.com
Robert A. Izard, *pro hac vice*
rizard@ikrlaw.com
IZARD KINDALL & RAABE LLP
29 South Main Street, Suite 305
West Hartford, CT 06107
Telephone: (860) 493-6292

Gregory Y. Porter, *pro hac vice*
gporter@baileyglasser.com
Mark G. Boyko, *pro hac vice*
mboyko@baileyglasser.com
Bailey & Glasser LLP
1055 Thomas Jefferson Street, NW Suite 540
Washington, DC 20007
Telephone: (202) 463-2101

Joseph A. Creitz, Cal. Bar. No. 169552
joe@creitzserebin.com
CREITZ & SEREBIN LLP
100 Pine Street, Suite 1250
San Francisco, CA 94111
Telephone: (415) 466-3090

Attorneys for the Plaintiffs

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

MARLON H. CRYER, individually and as representative of a class of similarly situated persons,	)	Case No. 4:16-cv-4265-CW **(lead case consolidated with)** Case No. 3:17-cv-6409-CW
Plaintiffs,	)	**PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT**
v.	)	
FRANKLIN RESOURCES, INC., et al.,	)	Hearing Date: Time: Judge: Hon. Claudia Wilkens Courtroom: 2, 4th Floor
Defendants.	)	

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

Other Authorities

Plaintiffs Marlon Cryer and Nelly Fernandez (collectively, "Plaintiffs") submit this Memorandum of Law in support of their Motion for Preliminary Approval of the Settlement Agreement dated February 12, 2019, memorializing the settlement in principle the parties reached on December 3, 2018. Plaintiffs seek an Order: (1) preliminarily approving the Settlement under FED. R. CIV. P. 23(e); (2) approving the manner for notifying the Class of the Settlement; and (3) setting a date for the Final Approval Hearing, as well as other deadlines.[1]

I. INTRODUCTION

Plaintiffs brought their consolidated cases under ERISA to challenge the decisions that Defendants made concerning the 401(k) plan (the "Plan") offered to qualified employees of Franklin Resources, Inc. ("Franklin") and its subsidiaries (together with Franklin, the "Company"). Plaintiffs alleged that Defendants maintained underperforming proprietary investments in the Plan because they generated fees for Franklin, and that in doing so they violated their fiduciary duties of prudence and loyalty pursuant to 29 U.S.C. § 1104(a). In addition, Ms. Fernandez asserted claims that these arrangements violated 29 U.C.S. § 1106. While these allegations concerned each of the proprietary funds offered in the Plan, Plaintiffs' claims focused on the decision to maintain the Franklin Money Market Fund as the Plan's capital preservation option, decision to add Franklin's target date funds as the sole asset allocation funds offered in the Plan, and decision to keep Franklin's Large Cap Value Fund in the Plan for a time despite a history of underperformance.

After more than two years of litigation, multiple dispositive and discovery motions, a contested class certification motion, complete document, deposition, and expert discovery, and a month before trial, Plaintiffs and Defendants have agreed to settle the combined claims in the *Cryer* and *Fernandez* consolidated action. The parties have resolved the matter for

[1] All capitalized terms not defined herein have the meanings ascribed to them in Part I of the Settlement Agreement.

$13.85 million, plus an additional Plan benefit consisting of an increase in Franklin's existing matching contributions from 75% to 85% for a period of three years (referred to as the "Increased Match"). The Increased Match is anticipated to add $4.3 million annually to the Plan through higher payments by Franklin, based on 2017 Plan data).[2] The Class will also benefit from the addition of a nonproprietary target date fund to the Plan, alongside the Plan's existing target date fund (which serves as the Plan's qualified default investment alternative).

Even before this litigation commenced, Defendants had already removed the Large Cap Value Fund from the Plan. Since the commencement of this litigation, Defendants removed the Franklin Money Market Fund and replaced it with a non-proprietary capital preservation fund. Thus, in addition to compensation directed to current and former plan participants, Plaintiffs' primary concerns regarding the Plan have been addressed.

The Settlement is a fair, reasonable, and adequate resolution of the Class's claims and should be preliminarily approved under Rule 23(e). In particular, we estimate that the settlement represents nearly one-third of the Class's potential damages and eliminates the numerous, substantial risks, expenses, and potential delays that would lay ahead if they continued prosecuting this case. The Settlement, negotiated at arm's length by experienced counsel on both sides and with the help of an experienced mediator, is an excellent result and in the Class Members' best interests.

Lastly, Plaintiffs ask the Court to approve the proposed Notice to the members of the Class and schedule a Final Approval Hearing, as well as other deadlines.

[2] While the actual value of the Increased Match over the agreed three-year period will vary depending on future Plan participant numbers and deferral rates, for purposes of allocating the Increased Match benefit, the Increased Match will be calculated as $4.3 million annually, ($12.9 million total over the full Increased Match Period) based on historical data from the Plan's most recent Form 5500. In 2017, Franklin contributed $32.1 million to the Plan in matching contributions, an obligation which would have been $4.3 million higher had it matched at a rate of 85% instead of 75%. If Plan participants contribute a greater or lesser amount than they have done historically, the aggregate value of the Increased Match could be higher or lower.

II. LITIGATION HISTORY

The history of this case is well known to the Court. See, e.g., *Fernandez* Dkt. 116 at 2–4. Plaintiff Cryer filed his original complaint on July 28, 2016. Dkt. 1. Defendants responded by filing a motion to dismiss and a motion for summary adjudication, Dkts. 19 and 21, asserting, among other things, that Mr. Cryer's action violated a severance agreement he had with Franklin. After extensive briefing, the Court denied those dispositive motions on January 17, 2017. Dkt. 44. After the start of discovery, Mr. Cryer filed a motion for class certification (Dkt. 53), which the Court granted (Dkt. 67), and a motion to amend the complaint (Dkt. 56), which the Court denied. Dkt. 66. Defendants moved for reconsideration of the order certifying the class (Dkt. 73), which the Court agreed to hear and then denied. Dkt. 83.

Shortly thereafter, Plaintiff Fernandez filed a separate action, making allegations substantively identical to those Mr. Cryer had raised in his proposed First Amended Complaint. *Fernandez* Dkt. 1. Defendants filed a motion to dismiss and motion for summary adjudication asserting, among other things, that Ms. Fernandez's action violated her severance agreement with Franklin. The Court denied Defendants' motions. *Fernandez* Dkt. 52. At the same time, the Court consolidated the two cases. *Id.*

Subsequent to the Court's consolidation of the *Cryer* and *Fernandez* actions for trial and the close of fact and expert discovery, the parties briefed and argued cross motions for Summary Judgment. On November 16, 2018, those motions were largely denied, and the case was set for a one-week trial to commence on January 14, 2019. Dkt. 149. In the weeks leading up to trial (and independent of any settlement discussions), Plaintiffs agreed to dismiss, with prejudice, the Franklin Resources, Inc. Board of Directors, the individual current and former Franklin Board members named in the suit (Gregory E. Johnson, Rupert H. Johnson, Jr., Charles B. Johnson, Charles E. Johnson, Peter K. Barker, Mariann Byerwalter, Mark C. Pigott, Chutta Ratnathicam, Laura Stein, Seth Waugh, Geoffrey Y. Yang, Samuel Armacost, Joseph Hardiman, and Anne Tatlock), and Plaintiff Fernandez's monitoring claim. Later, as trial preparations continued, the parties reached an agreement in principle to settle the case, informed the Court of this agreement on December 3, 2018, and filed a Notice of Settlement on December 6, 2018. Cryer Dkt. 150.

III. THE SETTLEMENT AGREEMENT

A. The Settlement Benefits.

The Settlement resolves all claims of the certified Class — current and former participants in the Plan since July 28, 2010.

Class Members will receive compensation in three different ways:

(1) Former Participants — Class Members who are no longer employed by the Company and do not have any account with a positive balance in the Plan — will receive a check for their pro rata share of the Allocation Amount (defined as the distributable portion of the $13.85 million payment plus the estimated value of the Increased Match), which will be mailed to them shortly after the Settlement becomes effective.

(2) Inactive Participants — Class Members who are no longer eligible to make contributions in their Plan accounts but who have a Plan account with a positive balance — will receive their pro rata share of the Allocation Amount directly into their Plan account shortly after the Settlement becomes effective. This method of distribution will provide eligible Class Members with the added benefit that a direct deposit in a qualified retirement plan is tax deferred.

(3) Active Participants — Class Members who are currently making contributions to their Plan accounts — will receive their compensation through Franklin's agreement to provide an additional Plan benefit consisting of an increase in Franklin's existing matching contributions from 75% to 85% for a period of three years .[3]

[3] The Settlement provides that the three-year Increased Match Period will begin with the first full quarter of participant deferrals following the Effective Date of the Settlement. However, Franklin may elect to accelerate the Increased Match contributions on deferrals made by eligible participants during the calendar year in which the Increased Match is first implemented, by making retroactive "true-up" Increased Match contributions (i.e., at a rate of 10%) to the Plan accounts of those Participants who received a 75% match contribution during that calendar year. Should the Company elect to do so, the three-year Increased

Active Participants whose Increased Match during the Increased Match Period fails to equal or exceed what their recovery would have been had they been entitled to participate in the initial settlement distribution will receive a one-time payment after the end of the Increased Match Period from money in the Settlement Fund not distributed initially, but set aside to ensure that Class Members are no worse off by being classified as Active Participants. These distributions will be made directly into the Plan accounts of such Active Participants with a Plan balance at the end of the Increased Match Period, and by check to those who have since closed their accounts.

To allocate the Settlement benefit, the $13.85 million payment, after the deduction of taxes, costs, expenses, and fees, will be combined with the estimated $12.9 million Increased Match (based on the full Increased Match Period). The resulting figure will be allocated to the Class Members in proportion to their account balances during the Class Period, which shall serve as a proxy for their alleged losses, as fully described in the Plan of Allocation attached to the Settlement Agreement. Settlement at Exhibit C. Class members will not need to make a claim to receive their share of the Settlement Fund. Any Class Member whose payment due is less than ten dollars ($10.00) in the initial distribution will receive a payment of ten dollars ($10.00).

After a three-year period, amounts remaining in the Settlement Fund will first be paid to Active Participants who did not receive at least their entitlement amount through the Increased Match. Any remainder will be distributed to Class Members who continue to have an account in the Plan at that time, and paid electronically into their Plan accounts, unless the amount available for distribution is under $50,000. Any remainder under $50,000 (and any assets remaining after that distribution) will be transferred to the Plan's forfeiture account and used for payment of Plan administrative expenses. No portion of the Settlement Fund will revert back to Franklin or the Defendants.

Match Period shall be deemed to have commenced on the first day of the first quarter in which the Increased Match was applied, even if that first date is prior to the Effective Date.

B. Released Claims.

Under the Settlement Agreement, the "Released Claims" are any and all claims for monetary, injunctive, and all other relief against the Defendant Released Parties through the date the Court enters the Final Approval Order and Judgment (including, without limitation, any Unknown Claims) arising out of or in any way related to: (a) the conduct alleged in the *Cryer* and *Fernandez* operative Complaints, whether or not included as counts in the Complaints; (b) the selection, retention and monitoring of the Plan's investment options and service providers; (c) the performance, fees and other characteristics of the Plan's investment options; (d) the Plan's fees and expenses, including without limitation, its recordkeeping fees; (e) the nomination, appointment, retention, monitoring and removal of the Plan's fiduciaries; and (f) the approval by the Independent Fiduciary of the Settlement. The Released Claims include certain exceptions, including claims to enforce the covenants or obligations set forth in the Parties' Settlement Agreement, and individual claims to vested benefits that are otherwise due under the terms of the Plan.

C. Notice to Class Members.

All Class Members are current or former Plan participants and many are current employees of the Company. Under the Settlement, Franklin's current and former third-party recordkeepers will provide the Settlement Administrator with the names and last known addresses of Class Members to allow the Settlement Administrator to provide them with notice of the Settlement. Notice by First Class Mail or e-mail, where possible, will be sent to all Class Members using addresses submitted by the Class Members for communications involving their Plan accounts. For undelivered or returned mail to Class Members, the Settlement Administrator will engage in standardized processes to identify and locate Class Members.

The proposed Class Notice, attached as Exhibit B to the Settlement, informs Class Members about the Actions, the class definition, the class claims, issues and defenses, that a class member may enter an appearance through an attorney if the member so desires, the terms of the Settlement, including the release and the binding effect of the Settlement, and the procedures for objecting to the Settlement. In addition, the Settlement Administrator will establish a website containing the operative *Cryer* and *Fernandez* complaints, the Notice, the Settlement Agreement, and other key documents in the case. Class Members will also be provided with a toll-free number staffed by live operators as well as a telephone number and email address to reach Class Counsel.

IV. THE COURT SHOULD PRELIMINARILY APPROVE THE SETTLEMENT.

As a matter of public policy, federal courts strongly favor and encourage settlements, particularly in class actions and other complex matters, where the inherent costs, delays, and risks of continued litigation might otherwise overwhelm any potential benefit the class could hope to obtain. *See Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992) (noting the "strong judicial policy that favors settlements, particularly where complex class action litigation is concerned"). Indeed, "there is an overriding public interest in settling and quieting litigation," and this is "particularly true in class action suits." *Van Bronkhorst v. Safeco Corp.*, 529 F.2d 943, 950 (9th Cir. 1976); *see also In re Howrey LLP*, No. 14-cv-03062-JD, 2014 WL 3427304, at *5 (N.D. Cal. July 14, 2014). As the Ninth Circuit noted, "there is a strong judicial policy that favors settlements particularly where complex class action litigation is concerned. . . .This policy is also evident in the Federal Rules of Civil Procedure. . . which encourage facilitating the settlement of cases." *In re Synocor ERISA Litig.*, 516 F.3d 1095, 1101 (9th Cir. 2008).

Effective December 1, 2018, for a court to preliminarily approve a settlement, the settling parties must provide the court with sufficient information to enable it to determine that it will likely be able to approve the settlement at the final approval stage. FED. R. CIV. P. 23(e)(1)(B). In other words, the court should review whether the settlement "is fair, reasonable, and adequate." FED. R. CIV. P. 23(e)(2). The revised Federal Rule directs courts, in making that evaluation, to consider "whether: (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 . . . and (D) the proposal treats class members equitably relative to each other." FED. R. CIV. P. 23(e)(2). The adequacy of the proposed relief must be considered in light of "(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)." *Id*.

A. Plaintiffs and Class Counsel have adequately represented the Class.

Class Counsel and Plaintiffs have pursued this litigation for over two years, all through fact and expert discovery, class certification, dispositive motions, and within a month of trial. Class Counsel have specialized expertise in proprietary fund 401(k) litigation. The Class representatives and Class Counsel have already been found adequate by this Court at the class certification stage. Dkt. 67, at 14–15.

The Settlement also does not unduly favor the Plaintiffs. Plaintiffs' shares of the Settlement will be based on the Plan of Allocation, a formula based on the claimed losses to their Plan accounts. While Plaintiffs also intend to request incentive awards, the Settlement is not contingent on Plaintiffs receiving an award in a specified amount. "Incentive awards that are intended to compensate class representatives for work undertaken on behalf of a class 'are fairly typical in class action cases.'" *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 943 (9th Cir. 2015) (quoting *Rodriguez*, 563 F.3d at 958). Incentive awards are generally approved so long as the awards are reasonable and do not undermine the adequacy of the class representatives. *See Radcliffe v. Experian Info. Solutions*, 715 F.3d 1157, 1164 (9th Cir. 2013) (finding incentive award must not "corrupt the settlement by undermining the adequacy of the class representatives and class counsel"). Here, Plaintiffs have represented the Class through years of litigation, and have taken the risks associated with having their names associated with high-profile class litigation. Moreover, the amounts that Plaintiffs intend to request — $25,000 for Plaintiff Cryer, and $15,000 for Plaintiff Fernandez — are consistent with awards in other cases. *See*, *e.g.*, *Kruger*, 2016 WL 6769066, at *6 (awarding class representatives $25,000 each for their contributions); *In re Northrop Grumman ERISA Litig*., No. 06-cv-6213, Dkt. 803 at 16 (C.D. Cal. Oct. 24, 2017) (awarding class representatives $25,000 each from $16.75 million settlement concerning allegedly improper 401(k) fees and investments).

Likewise, the Settlement does not excessively compensate Class Counsel. The amount of fees that Class Counsel intend to request, $7,490,000, is reasonable and significantly less than awards in other ERISA cases. *Spano v. The Boeing Co*., 2016 WL 3791123, at *2 (S.D. Ill. March 31, 2016) (collecting cases and awarding one-third of $57 million ERISA settlement); *Denard v. Transamerica Corporation*, No. 15-cv-30, 2016 WL 3554978, at *2 (N.D. Iowa June 24, 2016) (preliminarily approving settlement in ERISA class action where class counsel could seek fees of up to one third of the settlement fund); *Kruger*, 2016 WL 6769066 at *2 (approving attorney fees of one-third of a $27 million settlement in ERISA 401(k) fiduciary breach class action concerning proprietary funds); *In re Northrop Grumman ERISA Litig*., No. 06-cv-6213, Dkt. 803 at 16 (awarding Class Counsel one-third of $16.75 million ERISA class action settlement reached in the Central District of California); *Kanawi v. Bechtel Corp*., No. 06-cv-5566, 2011 WL 782244 at *1 (N.D. Cal. Mar. 1, 2011) (finding upward adjustment from presumptive 25% to 30% appropriate in $18.5 million ERISA class action alleging excessive fees and self-dealing).

B. The Settlement was negotiated at arm's length.

At different times in the history of the *Cryer* and *Fernandez* actions, the parties have engaged in settlement discussions. Counsel for Plaintiffs and Defendants had in person mediations on April 14, 2017, and July 10, 2018, with the assistance of a neutral mediator, Robert A. Meyer, following the exchange of detailed mediation statements and exhibits. Discussions continued, with and without the assistance of Mr. Meyer, at different times. Porter Decl. ¶ 5. The Court ordered the parties to participate in further mediation efforts upon issuance of its ruling on the parties' cross-motions for summary judgment. On December 3, 2018, the parties reached a settlement-in-principle, and so notified the Court on December 3, resulting in a joint Notice of Settlement, including a request for a stay of all scheduled dates, filed with the Court on December 6, 2018. Dkt. 150.

Class Counsel was fully aware of the case strengths and weaknesses when negotiating the Settlement, which supports the Settlement's preliminary approval. Class Counsel also has in-depth knowledge of the legal framework applicable to this case. Class Counsel have decades of experience prosecuting, settling, and trying ERISA cases on behalf of retirement plan participants, which they used to evaluate and negotiate the Settlement. Porter Decl. at ¶ 4. As the Ninth Circuit observed, "[t]his circuit has long deferred to the private consensual decision of the parties" and their counsel in settling an action. *Rodriguez*, 563 F.3d at 965; *see also Omnivision*, 559 F. Supp. 2d at 1043 ("The recommendations of plaintiffs' counsel should be given a presumption of reasonableness."). It is Class Counsel's opinion that the proposed Settlement is fair and reasonable, a factor which supports the Settlement's approval.

Because the Settlement was negotiated by experienced counsel with the aid of a mediator, there is a presumption that it was the product of arm's length negotiations. *Satchell v. Fed. Express Corp*., 2007 WL 1114010, at *4 (N.D. Cal. Apr. 13, 2007) ("The assistance of an experienced mediator in the settlement process confirms that the settlement is non-collusive."). The Settlement was also reached after multiple rounds of negotiation, and after all fact discovery and dispositive motions were decided. Plaintiffs were thus fully informed of the merits and position of their case. *See, e.g., Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1027 (9th Cir. 1998) (no basis to disturb settlement in the absence of any evidence suggesting "that the settlement was negotiated in haste or in the absence of information.").

C. The relief provided for the Class is adequate.

The parties have resolved the matter for $13.85 million, plus an additional Plan benefit consisting of an increase in Franklin's existing matching contributions from 75% to 85% for a period of three years. As noted above, the Increased Match is anticipated to add $4.3 million annually to the Plan through higher payments by Franklin, based on 2017 Plan data. The combination of these benefits is just under one-third of the Class's potential damages. Porter Decl. at ¶ 7. This percentage, in and of itself, is reasonable and warrants preliminary approval. *See, e.g.*, *Newbridge Networks Sec. Litig.*, No. 94-1678, 1998 WL 765724, at *2 (D.D.C. Oct. 23, 1998) ("an agreement that secures roughly six to twelve percent of a potential recovery . . . seems to be within the targeted range of reasonableness"). *Urakchin v. Allianz Asset Mgmt. of Amer., L.P.*, No. 15-cv-1614, 2018 WL 3000490, at *4 (C.D. Cal. Feb. 6, 2018) (granting preliminary approval to settlement of proprietary fund 401k ERISA case that represented between 25.5% of plaintiffs' losses) and Docket Entries 185 and 186 (final approval order and judgment of that settlement). In addition, the Plan is already benefitting from a non-proprietary stable value fund for a low-risk capital preservation option, and will benefit from a non-proprietary target date fund alternative.

D. The costs, risks, and delay of trial and appeal.

The adequacy of the Settlement is even more evident when the cost, risk and delay associated with continued litigation are considered. Despite Plaintiffs' confidence in their case, they face significant hurdles in proving their claims. While "[a] pure heart and an empty head are not enough" for defendants to avoid liability (*Donovan v. Cunningham*, 716 F.2d 1455, 1467 (5th Cir. 1983), *cert denied*, 467 U.S. 1251 (1984)), breach of fiduciary duty claims under ERISA depend heavily on the process by which decisions were made rather than the results of those decisions. *See White v. Chevron Corp.*, No. 16-793, 2017 WL 2352137, at *4 (N.D. Cal. May 31, 2017), *aff'd*, No. 17-16208, 2018 WL 5919670 (9th Cir. Nov. 13, 2018) (finding the "prudence analysis focuses a fiduciary's 'conduct in arriving at an investment decision, not on its results, and ask[s] whether a fiduciary employed the appropriate methods to investigate and determine the merits of a particular investment.'"); *see also Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 595 (8th Cir. 2009).

Here, the Plan's investment decisions were made by the Investment Committee. The minutes from the Investment Committee's meetings indicate that the Investment Committee evaluated the Plan's options regularly and, at certain times, removed Franklin funds, including the Large Cap Value Fund, from the Plan's lineup. Porter Decl. at ¶ 6. The Investment Committee used an independent investment consultant, who produced data on each fund for each quarterly Investment Committee meeting and was in contact with Investment Committee members and staff between meetings to raise issues concerning particular investment products. The consultant also assessed each fund compared to guidelines established by the Investment Committee and codified in an Investment Policy Statement, which itself was reviewed and revised during the Class Period. Whenever possible, the Investment Committee utilized the lowest cost share class of each Franklin fund.

If Plaintiffs established that Defendants breached their fiduciary duty, proving damages would not be a given. Some funds in the Plan performed well during the proposed Class Period, outperforming their benchmarks and peer group, and the majority of the funds Plaintiffs alleged were imprudent had particular years where they performed well, often during the period at the beginning of the Class Period. While Plaintiffs' expert opined that damages were $92 million, that amount was a "best case" scenario, based on the immediate removal of all proprietary funds on the first day of the Class Period, a damage number that Defendants would try to minimize if not eliminate at trial by asserting particular funds were prudently selected and maintained until after performance had deteriorated.

Albeit a decision on the pleading standard on a Rule 12(b)(6) motion, the Eighth Circuit's recent decision in *Meiners v. Wells Fargo & Co.*, 898 F.3d 820 (8th Cir. 2018) may also impact the benchmarks that Plaintiffs could use for their damages calculation. In *Meiners*, the Eighth Circuit rejected a comparison of the performance and fees of Wells Fargo's actively managed target date funds with a passively managed alternative. *Meiners*, 898 F.3d at 823–24. The same alternative was used by Plaintiffs' expert here to calculate damages and the same methodology was used to compare Franklin funds to passive alternatives.

While this settlement comes at the time of trial, it nevertheless provides significant savings to the Class. Not only are the costs of trial and appeal saved, but the Class receives its recovery now instead of after protracted appeals.

Courts have repeatedly recognized that ERISA 401(k) cases "often lead [] to lengthy litigation." *Krueger v. Ameriprise*, No. 11-cv-2781, 2015 WL 4246879, at *1 (D. Minn. July 13, 2015). It is not unusual for ERISA fee cases to last for a decade or longer. *See, e.g.*, *Tussey v. ABB, Inc.*, No. 06-cv-4305, 2017 WL 6343803, at *3 (W.D. Mo. Dec. 12, 2017) (requesting proposed findings on amount of damages more than 10 years after the suit was filed); *Tibble v. Edison Int'l*, No. 07-cv-5359, 2017 WL 3523737, at *15 (C.D. Cal. Aug. 16, 2017) (outlining issues for trial in a case filed in 2007). The potential for protracted litigation supports the Settlement's approval.

Even if Plaintiffs prevailed at trial and established damages that began at the start of the Class Period and reflected Plaintiffs' experts' methodology, they faced not only the ordinary risks of appeal and delay, but also the particularized risk that a Supreme Court ruling in *Munro v. USC* would lead to a reversal of this Court's determination that the covenants not to sue and class action waivers signed by Mr. Cryer and Ms. Fernandez (as well as most Franklin employees) barred these actions and the Plan's recovery. Dkt. 119 (order denying motion to stay).

E. The effectiveness of distribution to the Class.

No Class Member will be required to do anything to receive a monetary payment from the Settlement. The Plan's Recordkeepers maintain detailed records of its current and former participants, which will enable the Settlement Administrator to deliver notices and distributions with reasonable confidence that the distributions are being sent to the correct people and the correct addresses.

Additionally, distributions will be done in a way that minimizes or defers tax consequences, thus adding additional value to the Class. Class Members who are still contributing to the Plan will receive their benefit primarily through the Increased Match, which both allows for the potential of additional monetary benefit if they elect to increase their eligible salary deferrals into the Plan — and therefore their ability to take advantage of the Increased Match — and provides the additional benefit of dollar-cost averaging because the deferrals are made during regular pay periods. Meanwhile, these participants do not need to increase, or even maintain, their contributions in the Plan to receive their full benefit, as the Plan of Allocation provides a secondary distribution to Plan participants for whom the Increased Match fails to equal or exceed the benefit they would have received if they were no longer in the Plan.

F. The terms of the proposed attorney's fee award

Class Counsel intend to file a motion for an award of attorneys' fees of $7,490,000 (28% of the $13.85 million payment plus the estimated value of the Increased Match, without accounting for the value of the new Target Date Funds) and reimbursement of expenses at a later date. A percentage of the common fund is the typical method by which high-stakes ERISA class litigation is funded. While the base-line fee in the Northern District of California is one-quarter of the settlement, that amount can be adjusted based on a number of factors present here. *Vizcaino v. Microsoft Corp*., 290 F.3d 1043, 1048 (9th Cir. 2002).

Judge Breyer applied the enhancement factors enumerated in *Vizcaino* and approved a 30% award in *Kanawi v. Bechtel Corp.,* an $18.5 million settlement of a similar case alleging plan fiduciaries violated ERISA §§ 404 and 406 by selecting and maintaining plan investment options in order to benefit the plan sponsor and the Bechtel family. As this Court noted in approving the 30 percent fee award, the fee request here "is only modestly more than the Ninth Circuit's 25% 'benchmark'" and is "within the usual range of percentages awarded in similar cases." *Kanawi v. Bechtel Corp*., No. 06-cv-5566, 2011 WL 782244 at *1

(N.D. Cal. Mar. 1, 2011) (awarding 30% fee and $1,571,102.56 in costs); *Vedachalam v. Tata Consultancy Services, Ltd.*, No. C 06-0963-CW, 2013 WL 3941319, at *2 (N.D. Cal. July 18, 2013) (awarding 30% fee in $29.75 million settlement).[4]

Plaintiffs anticipate filing a fee petition based on approximately 5,800 hours spent litigating this case, with a lodestar in excess of $2.9 million. Thus, the lodestar multiplier of Class Counsel's $7.49 million request will be approximately 2.6. *Vizcaino v. Microsoft Corp*., 290 F.3d 1043 at *1047 (9th Cir. 2002) (upholding approval of 28% fee where lodestar cross-check resulted in a multiplier of 3.65). Class Counsel's ordinary hourly rates are provided for in the attached Declarations of Messrs. Porter and Izard. The lodestar multiplier will be even lower by the end of this litigation in light of Class Counsel's additional communications with Class Members, oversight of the settlement administrator, cooperation with the Independent Fiduciary, attendance at the final approval hearing, and oversight of Franklin's compliance with the Settlement Agreement.

Class Counsel have been extraordinarily efficient. In *Kanawi v. Bechtel Corp*., the plaintiffs incurred over $1.5 million in expenses and class counsel spent over 21,000 attorney hours. *Kanawi v. Bechtel Corp*., No. 06-cv-5566, 2011 WL 782244 at *2 (N.D. Cal. Mar. 1, 2011). In *In re Northrop Grumman ERISA Litig*., class counsel spent over 23,000 hours. *In re Northrop Grumman ERISA Litig*., No. 06-cv-6213, Dkt. 803 at 5 (C.D. Cal. Oct. 24, 2017) (awarding 33% fee, $1,159,114 in costs, and incentive awards to named plaintiffs of $25,000).

In addition, Class Counsel have incurred costs and expenses of approximately $430,000 to date. All of these expenses were actually incurred and were necessary to the successful prosecution of the actions. Approximately two-thirds of the expenses were fees paid to Plaintiffs' testifying experts.

---

[4] Most other courts recognize a one-third fee as the market rate in proprietary fund settlements like this one. *Krueger v. American Financial, Inc*., 2015 WL 4246879 at *2 (D. Min. July 13, 2015) (In "ERISA class actions asserting breaches of fiduciary duties…courts have consistently awarded one-third contingent fees"); *Spano v. Boeing Company*, 2016 WL 3791123 at *2 (S.D. Ill. March 31, 2016) ("Comprising 33 1/3 % of the monetary recovery…Class Counsel's fee application is reasonable").

Defendants have reserved all rights to object to the motion in full.

G. Agreements made in connection with the Settlement.

The Settlement Agreement represents the entire agreement between Plaintiffs and Defendants.

H. The proposal treats Class Members equitably relative to each other.

As described above, the settlement treats each Class Member equitably. Damage calculations are based on each individual Class Member's Plan account balance during the Class Period. Because nearly all investments in the Plan as directed by Class Members were in the proprietary funds, Plan account balances are a reasonable proxy for the alleged harm.

Meanwhile, participants are treated equitably regardless of their current status within the Plan. All Plan participants will benefit to on a pro rata basis— whether through a lump-sum payment or through the Increased Match, and the Plan of Allocation is designed to ensure that Class Members who will benefit from the Increased Match obtain that full benefit even if their participant status changes before the Increased Match Period ends. The Settlement also provides for distribution of unclaimed Settlement Fund assets to Class Members who have a Plan account with a positive balance at that time, with any remainder to go to the Plan's forfeiture account to pay for Plan administrative expenses.

V. THE COURT SHOULD APPROVE THE PROPOSED NOTICE.

Notice of a class action settlement must be provided in a "reasonable manner". Fed.R.Civ.P. 23(e)(1)(B). This means that it is "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank Tr. Co.*, 339 U.S. 306, 314 (1950) (citation omitted). Here, the proposed form and method of Notice satisfy all due process considerations and Rule 23(e)(1). The proposed Class Notice describes the lawsuit in plain English, including the terms of the proposed Settlement, the considerations that caused Plaintiffs and Class Counsel to conclude that the Settlement is fair and adequate, the attorneys' fees and expenses, plus costs and incentive awards, that are being sought; the procedure for objecting to the Settlement, and the date and place of the Fairness Hearing. *See* the SA at Exhibit B.

The method for distributing the Notice is also designed to reach all Class Members. *See Mullane*, 339 U.S. at 314 (holding that a "fundamental requirement of due process [is]… to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections") (citation omitted). With the Court's approval, the Class Notice will be sent to the (last known) address or e-mail address Class Members provided to the Plan's recordkeeper for Plan-related communications. The Notice also requires the Settlement Administrator to send follow-up mailings to any Class Members whose notice letters are returned because they no longer reside at such address. In addition, the Settlement Agreement, Class Notice, the Complaint, and various other documents from the case will be published on the Settlement Website. Thus, the proposed plan for delivering notice of the Settlement will fairly apprise Class Members of the Settlement Agreement and their options with respect thereto, and therefore fully satisfy due process requirements. *See Newberg on Class Actions*, Vol. 3, §§ 8:12, 8:15, 8:28, 8:33, 8:34 (5th ed. 2014).

VI. SETTLEMENT ADMINISTRATION

On January 9, 2019, Class Counsel submitted Requests for Proposals to four settlement administrators. Class Counsel received proposals from Rust, KCC, Angeion, and JND and, following a review based on the overall merits of each proposal, as well as cost, selected Angeion. Based on certain assumptions with respect to the Class as a whole and the Class's utilization of particular services (usage of toll-free number, requests for notices to be re-mailed, etc.) the administrator anticipates administration expenses of $50,000, which will be paid from the Settlement Fund. Porter Decl. ¶ 8. Over the past two years, neither Bailey Glasser nor Izard, Kindall & Raabe, LLP has used this administrator.

In addition, ERISA requires that the Settlement be approved by an independent fiduciary, whose fees will be paid from the Settlement Fund.

VII. PAST DISTRIBUTIONS

Mr. Porter and Mr. Boyko of Bailey Glasser recently settled a comparable case brought on behalf of 27,058 participants in the retirement plan offered to TIAA-CREF employees. *Richards-Donald v. TIAA*, No. 15-cv-8040 (S.D.N.Y.). As here, that plan included a number of proprietary funds, which Plaintiffs alleged were imprudently and disloyally selected and maintained in the plan. The settlement created a $5 million settlement fund. The cost to administer that settlement was $77,501 and the administrator for that settlement, KCC, also submitted a proposal to administer this settlement. Porter Decl. ¶ 13. The court, noting that the settlement was reached early in the litigation, awarded a 25% attorneys' fee. *Richards-Donald v. TIAA*, No. 15-cv-8040 at Dkt. 56 (S.D.N.Y. Oct. 20, 2017). Of the $5 million settlement, $3,562,082.24 was distributed to the Class. Similar to the plan for effecting notice of the Settlement in this case, current and former plan participants in the TIAA-CREF case received their notices by first class mail — in addition to a website — and were not required to submit a claim form. Porter Decl. ¶ 13. However, under the terms of that settlement, participants entitled to receive less than $10 did not receive a distribution. Porter Decl. ¶ 13. 18,604 class members received a distribution, with the average distribution being $191.47.

Last year, Mr. Porter and Mr. Boyko also settled a case against Citigroup concerning proprietary funds included in the Citigroup employees' 401(k) plan between 2001 and 2005. That case settled for $6.9 million and the class consists of 367,382 current and former Citigroup employees. Epiq is the settlement administrator for that settlement, and Epiq also submitted a proposal to administer this settlement. Porter Decl. ¶ 13. The court awarded attorneys' fees of one-third of the settlement, or $2.3 million, as well as reimbursement of $374,101.12 in costs and expenses and $15,000 each to two named plaintiffs. While administration is ongoing, the expected administrative cost is $375,550. As a result, the total amount distributed is expected to be $3.82 million and the average recovery is expected to be approximately $11.

Mr. Porter also settled a third case, this time against Fidelity, concerning the use of proprietary funds in the employee 401(k) plan. *Bilewicz v. FMR LLC*, No. 13-cv-10636 (D. Mass.). That settlement involved 92,498 class members, who were mailed notices. The case settled for $12 million and Class Counsel were awarded attorneys' fees of $4 million (one-third of the settlement).

VIII. PROPOSED SCHEDULE

The following schedule that the parties propose for final approval of the Settlement is based on the need to provide the Class with fair notice and the opportunity to be heard, as well as to provide notice to appropriate federal and state officials as required by the Class Action Fairness Act of 2005 ("CAFA"), 28 U.S.C. §§ 1332(d), 1453, and 1711–1715.

The Settlement requires that notice be given to Class Members after the Court enters a Preliminary Approval Order. Class Members should have at least 45 calendar days following notice to decide whether or not to object to the Settlement, and should have the ability to review Plaintiffs' motion for final approval and supporting papers prior to that date. Accordingly, the parties propose that the Final Approval Hearing be scheduled at least 110 calendar days after the issuance of the Preliminary Approval Order, with Plaintiffs' motions for final approval and for the award of attorneys' fees and expenses due 30 calendar days prior to the Final Approval Hearing, objections due 14 calendar days before the Final Approval Hearing and responses to objections due five business days before the Final Approval Hearing. The parties propose that the Final Approval Hearing occur as soon after the 110th calendar day from entry of the Preliminary Approval Order as the Court can accommodate. Below is the proposed schedule in chart form.

Plaintiffs and Defendants agree to the following schedule of events subject to the Court's approval:

Event	Timing
Preliminary Approval Hearing	To be set by the Court if required
Plan Recordkeepers to provide Settlement Administrator with Class Members' names and contact information	Thirty calendar days after entry of Preliminary Approval Order
Settlement Administrator to create Settlement Website and set up Toll-Free Settlement Information Line	Thirty calendar days after entry of Preliminary Approval Order
Settlement Administrator to mail/email Settlement Notice	Forty-five calendar days after entry of Preliminary Approval Order
Settlement Administrator to provide Parties with declaration on notice	Seven business days after deadline to mail/email Notice
Plaintiffs' motion for final approval of the Settlement, an award of Attorneys' Fees and Expenses and Case Contribution Awards to be filed	At least thirty calendar days before the Final Approval Hearing
Objections to the Settlement by any federal or state authorities to be filed	Thirty calendar days before the Final Approval Hearing
Objections to the Settlement by any Class Members and notice of the intention to appear at Final Approval Hearing to be filed or postmarked	Fifteen calendar days before the Final Approval Hearing
Independent Fiduciary report to be filed	Thirty calendar days before Final Approval Hearing
Settlement Administrator's declaration on CAFA notices to be filed	Thirty calendar days before Final Approval Hearing
Response to objections to be filed	Five business days before Final Approval Hearing
Final Approval Hearing	At least 110 calendar days after entry of Preliminary Approval Order

IX. CONCLUSION

For the reasons set forth above, the Settlement meets the standard for preliminary approval under Rule 23. Accordingly, Plaintiffs seek an Order: (1) preliminary approving to the Settlement under FED. R. CIV. P. 23(e); (2) approving the manner of notifying the Class of the Settlement; and (3) setting a date for a Final Approval Hearing.

Dated: February 15, 2019

Respectfully submitted,

/s/*Mark G. Boyko*
Gregory Y. Porter, *pro hac vice*
Mark G. Boyko, *pro hac vice*
Bailey & Glasser LLP
1055 Thomas Jefferson Street, NW Suite 540
Washington, DC 20007
Telephone: (202) 463-2101
Facsimile: (202) 463-2103
gporter@baileyglasser.com
mboyko@baileyglasser.com

/s/*Mark P. Kindall*
Mark P. Kindall, Cal. Bar No. 138703
Robert A. Izard, *pro hac vice*
IZARD KINDALL & RAABE LLP
29 South Main Street, Suite 305
West Hartford, CT 06107
Telephone: (860) 493-6292
Facsimile: (860) 493-6290
rizard@ikrlaw.com
mkindall@ikrlaw.com

/s/ *Joseph A. Creitz*
Joseph A. Creitz, Cal. Bar No. 169552
Lisa S. Serebin, Cal Bar No. 146312
CREITZ & SEREBIN LLP
100 Pine Street, Suite 1250
San Francisco, CA 94111
Telephone: (415) 466-3090
Facsimile: (415) 513-4475
joe@creitzserebin.com
lisa@creitzserebin.com

Attorneys for Plaintiffs

ATTESTATION

Pursuant to Civil Local Rule 5-1(i)(3), I attest that concurrence in the filing of this document has been obtained from each of the other signatories.

Dated: February 15, 2019

/s/ *Mark G. Boyko*
Mark G. Boyko

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 15th day of February, 2019, a true and correct copy of the foregoing was filed with the Court using the CM/ECF system and service upon all participants in this case who are CM/ECF users will be accomplished by operation of that system.

/s/ Mark G. Boyko