UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -	x	
TERRE BEACH, *et al.*, individually and on behalf of themselves and all others similarly situated,	:	
Plaintiffs,	:	Civil Action 17-CV-00563-JMF
v.	:	
JPMORGAN CHASE BANK, NATIONAL ASSOCIATION, JPMORGAN CHASE & COMPANY, *et al.*,	:	
	:	
Defendants.	:	
- -	x	

MEMORANDUM IN SUPPORT OF PLAINTIFFS' UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT

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INTRODUCTION

Plaintiffs Sean Daly, Antoinette Fondren, Ferdinand Orellana, and William Stirsman, on behalf of themselves and the Certified Class[1], 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 1 to the accompanying Declaration of Joseph H. Meltzer ("Meltzer Decl."). This Settlement resolves Plaintiffs' class action claims against Defendants JPMorgan Chase Bank, National Association, JPMorgan Chase & Company, Compensation & Management Development Committee of the Board of Directors for JPMorgan Chase & Company (the "CMDC"), Selection Committee, Employee Plans Investment Committee (the "EPIC"), J.P. Morgan Investment Management Inc., Head of Human Resources for JPMorgan Chase & Company, Chief Financial Officer for JPMorgan Chase & Company, Benefits Director of JPMorgan Chase & Company, Terry Belton, Bernadette Branosky, Corinne Burger, Sally Durdan, Thelma Ferguson, Tom Horne, Bei Ling, Pablo Sanchez, Erik Umlauf, David Watson, Michael Weinbach, Stephen B. Burke, Lee R. Raymond, William C. Weldon, John C. Donnelly, and Marianne Lake under the Employee Retirement Income Security Act ("ERISA"), concerning Defendants' administration and management of the JPMorgan Chase 401(k) Savings Plan ("Plan").

Under the terms of the proposed Settlement, Defendants will pay a gross settlement amount of $9,000,000.00 into a common fund for the benefit of the Certified Class. This is a significant monetary recovery for the Class and falls well within the range of court-approved settlements in similar ERISA cases. This is also a fair and reasonable recovery in comparison to the amount of

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

the allegedly excessive fees associated with the Disputed Investments, and the attendant risks of litigation. Moreover, the issues giving rise to this suit have now been resolved, as the Disputed Investments have been removed from the Plan and replaced with less-costly alternative funds or, in the case of the Target Date Funds, have been subject to significant reduction in fees.

For the reasons set forth below, the Settlement is fair, reasonable, and adequate, and merits preliminary approval so that the proposed Notice[2] 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 and a mediation session with a national mediator with experience in mediating ERISA cases;
- The Class has been adequately represented by the Class Representatives and the terms of the Settlement treat Class Members fairly and equitably;
- The Settlement provides for significant monetary relief that is in line with settlements in other similar cases;
- The Settlement conveniently provides for automatic distribution of the Settlement funds to Current Participants in the Plan, while Former Participants have the option of submitting a Rollover Form, or will otherwise receive their distribution via check;
- The Released Claims are tailored to the claims that were asserted in the action;
- The proposed Notice provides 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 in writing or at the Fairness Hearing.

Accordingly, Plaintiffs respectfully request that the Court enter an order: (1) preliminarily approving the Settlement; (2) approving the proposed Notice and authorizing distribution of the Notice; (3) scheduling a Fairness Hearing; and (4) granting such other relief as set forth in the

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[2] The proposed form of Notice is attached as Exhibit A to the Settlement Agreement. Exhibit B to the Settlement Agreement is the Former Participant Rollover Form to be included with the Notice sent to Class Members who are no longer participants in the Plan. *See* Sections II, D. and III, *infra.*

proposed Preliminary Approval Order submitted herewith. This motion is not opposed by Defendants.

BACKGROUND

I. PROCEDURAL HISTORY

On January 25, 2017, Plaintiff Terre Beach, a participant in the Plan, filed a complaint on behalf of the Plan and similarly-situated Plan participants, alleging a series of claims against Defendants under ERISA. ECF No. 1. Following the entry of Orders (ECF Nos. 27 and 34) consolidating that action with three other actions similarly seeking relief on behalf of the Plan and Plan participants pursuant to ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2), Plaintiffs in this consolidated action filed an initial amended consolidated complaint in May 2017. ECF No. 38. They subsequently filed a Second Amended Complaint (ECF No. 55) (the "Complaint" or "¶") in July 2017.

In their Complaint, Plaintiffs alleged that Defendants – fiduciaries of the Plan – breached fiduciary duties of prudence and loyalty they owed to the Plan, Plaintiffs, and other Plan participants under ERISA by, *inter alia,* failing to prudently evaluate the Plan's investment portfolio with respect to expenses of six specified funds, *i.e.* the Disputed Investments. Plaintiffs further alleged that these asserted fiduciary breaches resulted in Plan participants paying unnecessarily high fees, which diminished their retirement savings. More specifically, Plaintiffs alleged: (1) in Count I, that Defendants failed to prudently and loyally manage the Plan's assets in violation of ERISA §§ 404 and 405 because, during the Class Period, Defendants knew or should have known that the Disputed Investments were not suitable and appropriate investments for the Plan given their unduly excessive fees and/or including due to conflicts of interest; (2) in Count II, that the CMDC and Selection Committee Defendants failed to adequately monitor other fiduciaries in violation of ERISA § 404; (3) in Count III, that the Plan administrator Defendants

and/or the Bank failed to provide disclosures to Plan participants regarding designated investment alternatives in violation of ERISA § 404; (4) in Counts IV and V, that Defendants (other than the individual defendants) engaged in prohibited transactions, in violation of ERISA §§ 406 (a)(1) and (b)(1) and(2); (5) in Count VI, that all Defendants (other than JPMIM) were liable for knowing participation in fiduciary breaches in violation of ERISA § 405; and (6) in Count VII, brought in the alternative, that Defendants JPMorgan Chase, the Bank, and JPMIM through their actual or constructive knowledge of the breaches of fiduciary duties in Counts I, III, and IV, are liable as non-fiduciaries to disgorge ill-gotten gains and/or provide other equitable relief pursuant to ERISA § 502(a)(3). To remedy this alleged unlawful conduct, Plaintiffs sought relief pursuant to ERISA § 502(a)(2) and (3).

Defendants moved to dismiss the Complaint on July 27, 2017. ECF No. 58. On March 29, 2018, the Court denied JPMorgan's motion in large part, and allowed all of Plaintiffs' claims other than the non-disclosure claims to proceed. ECF No. 73. With regard to Plaintiffs' breach of fiduciary duty claims, the Court noted that they were "substantially similar to those that other courts have held to be sufficient [to] survive motions to dismiss." ECF No. 80 (Apr. 24, 2018 Status Conf. Tr. at 4, lines 2-11 (citations omitted)).

Plaintiffs moved for class certification on October 1, 2018. ECF No. 95. On June 11, 2019, the Court granted Plaintiffs' motion, certifying a class of participants in the Plan from January 25, 2011 to the present. ECF 132. The Court adopted a refined class definition that excluded those who had invested in the Disputed Investments "only at times when the funds had no fees or reasonable fees." ECF 132 at 16 and 22. As such, the Court certified the following Class:

> All persons, except Defendants and any other persons with responsibility for the Plan's investment menu, who were participants in or beneficiaries of the Plan, at

> any time between January 25, 2011 and the present (the "Class Period"), and whose individual accounts were invested in one or more of the following funds: the Growth and Income Fund; the Mid Cap Value Fund; the Mid Cap Growth Fund; the Small Cap Core Fund, but only if the investment occurred before December 19, 2015; the Core Bond Fund, but only if the investment occurred before March 12, 2016; and any of the Target Date Funds, but only if the investment occurred before April 1, 2016.[3]

The Parties conducted discovery both while the class certification motion was pending and following the class decision. They completed discovery, including expert discovery, in the fall of 2019 in accordance with the case management orders entered in this case. In October and November of 2019, Defendants filed, and Plaintiffs responded to, motions to exclude the opinions and testimony of Plaintiffs' experts, Cynthia L. Jones and Marcia S. Wagner. ECF Nos. 166, 169, 184 and 187. The parties each also filed separate motions for summary judgment (ECF Nos. 177 and 189), which were fully briefed as of January 24, 2020.

While those motions were pending, the Parties agreed to engage Hunter R. Hughes, III, as mediator in this matter. Mr. Hughes is an experienced and well-respected mediator, who has successfully resolved numerous ERISA cases and other actions. Meltzer Decl. ¶ 3. The Parties engaged in a full-day video conference mediation with Mr. Hughes on April 3, 2020.[4] Through mediation with Mr. Hughes, the Parties reached an arms-length, class-wide resolution of this matter, subject to the Court's approval. Thereafter, the Parties negotiated the comprehensive Settlement Agreement that is the subject of the present motion. *Id*. at ¶ 6. The terms of the Settlement are memorialized in the Settlement Agreement.

[3] The settlement class is consistent with the class certified for litigation purposes.

[4] A prior mediation session scheduled to be held in person in New York City on March 31, 2020 was re-scheduled for April 3, 2020 via video conference due to the impact of the coronavirus pandemic.

II. OVERVIEW OF THE SETTLEMENT TERMS

A. Monetary Relief

Under the Settlement, Defendants will contribute a Gross Settlement Amount of $9 million to a common settlement fund (the "Settlement Fund"). Settlement Agreement ¶ 1.30. After accounting for any Attorneys' Fees and Expenses, Administrative Expenses, and Incentive Awards approved by the Court, the Net Settlement Amount will be distributed to eligible Class Members in accordance with a Plan of Allocation. *Id.* ¶ 1.41.

The Plan of Allocation is detailed in the Settlement Agreement and provides that the Net Settlement Amount will be allocated among eligible Class Members in proportion to their Settlement Allocation Score, per the methodology set forth therein and below. After determining each Class Member's Settlement Allocation Score, the Settlement Administrator will determine the total settlement payment available to each Class Member by calculating each such Class Member's pro rata share of the Net Settlement Fund; this is accomplished by comparing each Settlement Allocation Score to the sum of the Settlement Allocation Scores for all Class Members.

Current Participants' accounts will be automatically credited with their share of the Settlement Fund. *Id.* ¶ 5.2. Former Participants will have the opportunity to submit a Rollover Form allowing them to have any distribution rolled over into an individual retirement account or other eligible employer plan. *Id.* ¶ 5.3. Former Participants who do not timely submit a Rollover Form will be sent a check. *Id.* ¶ 5.3. Under no circumstances will any monies revert to JPMorgan. Any checks that are uncashed will revert to the Qualified Settlement Fund and will be paid to the Plan for the purpose of defraying administrative fees and expenses. *Id.* ¶ 5.6.

B. Review by Independent Fiduciary

Defendants will retain an Independent Fiduciary to review and authorize the settlement on behalf of the Plan. *Id.* ¶ 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's fees and expenses shall be paid from the Settlement Fund. Settlement Agreement, ¶ 2.2.

C. Release of Claims

In exchange for the relief provided by the Settlement, the Class will release the Released Defendant Parties from any claims: (i) that were asserted in the Action, could have been asserted in the Action, or that arise out of, relate to, or are based on any of the conduct alleged in the Action; (ii) that would be barred by *res judicata* based on the Court's entry of the Final Approval Order; (iii) that arise from or relate to 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 (iv) that arise from or relate to the approval by the Independent Fiduciary of the Settlement Agreement, unless brought against the Independent Fiduciary alone. *Id.* ¶¶ 7.1, 7.2.

D. Class Notice and Settlement Administration

Class Members will be sent a direct notice of the settlement ("Notice") via U.S. Mail. *Id.* ¶ 3.2. The Notice sent to Former Participants will also include a Former Participant Rollover Form enabling them to make the election described above. *Id.* The Notice will provide information to the Class regarding, among other things: (1) the nature of the claims; (2) the definition of the Class; (3) the terms of the Settlement; (4) the process for submitting Rollover Forms (Former Participants only); (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' compensation; (9) the date, time, and location of the Fairness Hearing; and (10) Class Members' right to appear at the Fairness Hearing. *Id.* ¶ 1.36.

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 Notice,

Former Participant Rollover Form, and relevant case documents, including but not limited to a copy of all documents filed with the Court in connection with the Settlement. *Id.* ¶ 3.3.

E. Attorneys' Fees and Expenses and Incentive Awards

The Settlement Agreement requires that Class Counsel file their Motion for Attorneys' Fees and Expenses at least fourteen (14) days before the deadline for objections to the proposed Settlement are due. *Id.* ¶ 6.1. Under the Settlement, these fees must be reasonable and are subject to Court approval. *Id.* The Settlement also provides for Incentive Awards up to $10,000 per Plaintiff. *Id.* ¶ 6.2. Class Counsel must file an application with the Court for payment of such Incentive Awards no later than fourteen (14) days prior to the deadline for Class Members to object to the Settlement Agreement. *Id.*

ARGUMENT

I. STANDARD OF REVIEW

Rule 23(e) of the Federal Rules of Civil Procedure requires judicial approval of any settlement agreement that will bind absent class members. This involves two stages:

> (1) preliminary approval, where "prior to notice to the class a court makes a preliminary evaluation of fairness," and (2) final approval, where "notice of a hearing is given to the class members, [and] class members and settling parties are provided the opportunity to be heard on the question of final court approval."

In re Gse Bonds Antitrust Litig., 2019 U.S. Dist. LEXIS 218621, at *10 (S.D.N.Y. Dec. 16, 2019) (quoting *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litig*., 330 F.R.D. 11, 28 (E.D.N.Y. 2019)). Under Rule 23(e)(2), *as amended* (effective as of December 2018), in the first instance, the court should determine whether it "will likely be able to: (i) approve the proposal under Rule 23(e)(2); and (ii) certify the class for purposes of judgment on the proposal." *In re Payment Card.*, 330 F.R.D. at 28. As such, in considering preliminary approval, the court should assess the factors set forth in Rule 23(e)(2) to determine whether those factors weigh in

favor of final approval. *Id.* In so doing, however, courts remain mindful "of the 'strong judicial policy in favor of settlements, particularly in the class action context'." *In re Payment Card*, 330 F.R.D. at 27 (citing *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 116 (2d Cir. 2005)). *See also In re PaineWebber Ltd. P'ships Litig.*, 147 F.3d 132, 138 (2d Cir. 1998); 4 NEWBERG ON CLASS ACTIONS ("NEWBERG") § 11:41 (4th ed. 2002).

Rule 23(e)(2) identifies four factors for courts to consider in determining whether a settlement warrants approval as "fair, reasonable and adequate", (1) adequacy of representation, (2) existence of arm's-length negotiations, (3) adequacy of relief, and (4) equitableness of treatment of class members. FED. R. CIV. P. 23(e)(2). Courts in this circuit additionally continue to consider the nine factors set out in *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974)[5] when assessing whether a settlement is "fair, reasonable, and adequate." *See In re Gse Bonds*, 2019 U.S. Dist. LEXIS 218621, at *11 (observing that "the Advisory Committee Notes to the 2018 amendments indicate that the four new Rule 23 factors were intended to supplement rather than displace these '*Grinnell*' factors."). In considering the nine *Grinnell* factors, courts look at them individually and as weighed against one another to determine if, on balance, they favor approval of the settlement. *See Pantelyat v. Bank of Am., N.A.*, 2019 WL 402854, at *6 (S.D.N.Y. Jan. 31, 2019) (quoting *In re Top Tankers, Inc. Sec. Litig.*, 2008 WL 2944620, at *4

[5] The *Grinnell* factors include: (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; [and] (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation. *Wal-Mart Stores, Inc.*, 396 F.3d at 117 (citing *Grinnell*, 495 F.2d at 463).

(S.D.N.Y. July 31, 2008) in observing that "[a]ll nine factors need not be satisfied; rather, a court should look at the totality of these factors in light of the particular circumstances").

II. THE SETTLEMENT SATISFIES THE STANDARD FOR PRELIMINARY APPROVAL

Here, when examined under the relevant criteria, both the terms of the Settlement, and the manner in which it was negotiated, demonstrate that it is likely to be approved as fair, reasonable and adequate, and therefore that the Settlement now warrants preliminary approval so that Notice may be sent to the Class.

A. Class Counsel and the Class Representatives Have Adequately Represented the Class Satisfying Rule 23(e)(2)(A)

In certifying the Class, this Court found the Class Representatives and Class Counsel are adequate to represent the Class. ECF No. 132 at 16-17 and 19-20. In the eleven months since that decision, Class Counsel have continued to aggressively litigate the claims to advance the interests of the Class, as reflected in the procedural history above. Moreover, Class Counsel was informed by the knowledge gained through their extensive litigation of this case, including the completion of both fact and expert discovery, in negotiating the Settlement achieved on behalf of the Class. As such, they have adequately represented the Class. Likewise, the Class Representatives have fulfilled their duties to the Class by (among other things) reviewing and contributing information for the complaints and motions filed in this Action, producing relevant documents, reviewing and contributing information for written discovery responses, testifying at their respective depositions, communicating regularly with Class Counsel, and reviewing the proposed Settlement. *See* Plaintiff Declarations in Support of Plaintiffs' Motion for Class Certification by Ferdinand Orellana (ECF. No. 97-24), William Stirsman (ECF No. 97-25); Sean Daly (ECF No. 97-26), and James Monaghan (ECF No. 97-27); Meltzer Decl. ¶ 7. These facts, in conjunction with the arms-

length negotiation process that led to the Settlement (discussed below), demonstrate that Rule 23(e)(2)(A)'s adequacy requirement is satisfied.

B. The Settlement is the Product of Arm's-Length Negotiations between Experienced Counsel after Extensive Litigation Satisfying Rule 23(e)(2)(B)

Rule 23(e)(2)(B) requires procedural fairness as demonstrated by the fact that the Settlement "was negotiated at arm's length." A proposed class action settlement "will enjoy a presumption of fairness" where the settlement "is the product of arm's-length negotiations conducted by experienced counsel knowledgeable in complex class litigation." *In re Gse Bonds*, 2019 U.S. Dist. LEXIS 218621, at *12. *See also In re Excess Value Ins. Coverage Litig.*, 2004 WL 1724980, at *10 (S.D.N.Y. July 30, 2004); *Wal-Mart*, 396 F.3d at 116; MANUAL FOR COMPLEX LITIGATION § 30.42 ("[A] presumption of fairness, adequacy and reasonableness may attach to a class settlement reached in arm's-length negotiations between experienced, capable counsel."). That is precisely the situation presented here.

Counsel for Plaintiffs and Defendants are knowledgeable and experienced in complex class actions, particularly actions involving allegations of breaches of fiduciary duties under ERISA. *See* Opinion and Order Granting Motion for Class Certification, ECF No. 132 at 19-20 (appointing KTMC Class Counsel and recognizing the firm's extensive experience litigating ERISA class actions and knowledge of ERISA).

Furthermore, the Settlement of this matter occurred after Plaintiffs' counsel conducted a thorough investigation, analyzed over 271,700 pages of documents and other data produced by Defendants, took and defended 20 depositions (including of members of the EPIC and RPIG), participated in briefing on Defendants' motion to dismiss, class certification, and summary judgment, and engaged an expert to assist with calculating damages, as well as a separate expert to opine on, *inter alia*, Defendants' procedural imprudence. Meltzer Decl. ¶¶ 3-5. The advanced

nature of the litigation not only weighs in favor of the Settlement in connection with the Rule 23(e)(2)(B) factor but also in connection with the third *Grinnell* factor. That factor requires courts to consider the stage of the proceedings and amount of discovery completed. The relevant inquiry "is whether the plaintiffs have obtained a sufficient understanding of the case to gauge the strengths and weaknesses of their claims and the adequacy of the settlement." *In re AOL Time Warner, Inc. SEC and ERISA Litig.*, 2006 WL 903236, at *10 (S.D.N.Y. Apr. 6, 2006). Here, given that the case was poised for resolution on summary judgment motions and/or trial, the Parties were certainly well advised of the strengths and weaknesses of their respective case when they negotiated the Settlement.

Moreover, the Settlement was negotiated with the assistance of an experienced and well-regarded national mediator with ERISA experience. This further demonstrates the fairness of the negotiations and Settlement. *See In re Gse Bonds*, 2019 U.S. Dist. LEXIS 218621, at *12 (noting that "a mediator's involvement in settlement negations can help demonstrate their fairness," citing *In re Payment Card,* 330 F.R.D. at 35). All of these factors lend the Settlement a presumption of fairness and show that Rule 23(e)(2)(B) is satisfied.

C. The Settlement Provides and Equitably Distributes Significant Relief to Class Members Satisfying the Adequacy Factors of Rule 23(e)(2)(C) and *Grinnell*

1. The Adequacy Factors of Rule 23(e)(2)(C)

Rule 23(e)(2)(C) considers the adequacy of the relief provided by a Settlement 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, if required; (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).

As discussed below, these factors overlap with a number of those identified in *Grinnell* and weigh

in favor of approving the proposed Settlement.

(i) The Costs, Risk, Delay of Trial and Appeal[6]

In the absence of a Settlement, Plaintiffs would have faced potential litigation risks. *See In re PaineWebber Ltd. P'ships Litig.*, 171 F.R.D. 104, 126 (S.D.N.Y. 1997) ("Litigation inherently involves risks."). Prior to the Settlement, the Parties had each filed motions for summary judgment and Defendants filed motions to exclude Plaintiffs' liability and damages experts, which were pending at the time the Settlement was reached. Although Plaintiffs believe there is strong support for denying Defendants' motions, it is uncertain whether they would have prevailed.

Furthermore, even if Plaintiffs were successful in defeating Defendants' motions for summary judgment and motions to exclude, it is uncertain whether Plaintiffs ultimately would have prevailed at trial. In other recent trials involving defined contribution plans, the defendants were the prevailing party. *See Sacerdote v. New York Univ.*, 328 F. Supp. 3d 273 (S.D.N.Y. 2018); *Wildman v. Am. Century Servs., LLC*, 362 F. Supp. 3d 685, 711 (W.D. Mo. 2019); *Brotherston v. Putnam Invs., LLC*, 2017 WL 2634361 (D. Mass. June 19, 2017).

Among other things, Defendants pointed to evidence that the committee overseeing the Plan (EPIC) regularly reviewed and monitored each investment option included in the Plan and,

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[6] This inquiry overlaps with four of the *Grinnell* factors: (1) the "complexity, expense and likely duration of the litigation," (4) "the risks of establishing liability," (5) "the risks of establishing damages," and (6) "the risks of maintaining a class through the trial." *See Johnson v. Rausch, Sturm, Israel, Enerson & Hornik, LLP*, 333 F.R.D. 314, 321 (S.D.N.Y. 2019) (discussing the overlap of these *Grinnell* factors with the factors identified in Rule 23(e)(2)(C)(i)). In assessing these factors, courts "balance the benefits afforded the Class, including immediacy and certainty of recovery, against the continuing risks of litigation." *Id.* While there is little risk here that a class could not be maintained through trial, for the reasons discussed above in examining the costs, risks and delays attendant to continued litigation, these *Grinnell* factors favor approval of the Settlement.

with the help of purportedly dedicated investment professionals, conducted heightened monitoring of certain investment options. Defendants argued that this robust process properly led to the timely removal or conversion of the Disputed Investments, or in case of the Target Date Funds, the reduction in fees. In support of those arguments, Defendants relied on recent caselaw such as *Sacerdote v. New York Univ*., 2017 WL 4736740 (S.D.N.Y. Oct. 19, 2017), where the court found that the defendants' process was adequate, and JPMorgan would credibly argue that EPIC's conduct here far exceeded the conduct that was ultimately validated by the court in *Sacerdote*.

Moreover, just prior to the mediation session leading to the Settlement of this case, the District of Massachusetts granted partial summary judgment to defendants in *Moitoso, et al. v. FMR, LLC, et al*., 2020 WL 1495938 (D. Mass. Mar. 27, 2020), on alternative investment vehicle claims similar to those alleged here. Specifically, plaintiffs there alleged that Fidelity breached its fiduciary duties by failing to investigate non-mutual fund investment vehicles, such as collective trusts and separate accounts. Relying on significant prior caselaw,[7] the *Fidelity* court concluded, however, "that Fidelity did not incur liability because it had no inherent duty to investigate these particular types of funds," and further that "plans are under no duty to offer alternatives to mutual

[7] *See, e.g*., *Main v. Am. Airlines, Inc*., 248 F. Supp. 3d 786, 794 (N.D. Tex. 2017) (a fiduciary defendant had not breached its duty by failing either to offer or investigate alternatives to mutual funds); *Larson v. Allina Health Sys*., 350 F. Supp. 3d 780, 796 (D. Minn. 2018) (plaintiffs had failed to state a claim for breach of duty by failing to "explore collective trusts and separate accounts in lieu of mutual funds"); *Rosen v. Prudential Ret. Ins. & Annuity Co*., 2016 WL 7494320, at *15 (D. Conn. Dec. 30, 2016) (rejecting plaintiffs' argument that the defendants breached their fiduciary duties by offering sixteen investment options, fourteen of which were mutual funds); *Wildman v. Am. Century Servs*., LLC, 362 F. Supp. 3d 685, 704 (W.D. Mo. 2019) (since plans are under no duty to offer any particular type or mix of funds, "ERISA does not require a retirement plan to offer an index fund or a stable value fund, and the failure to include either in the Plan, standing alone, does not violate the duty of prudence"); *Terraza v. Safeway Inc*., 241 F. Supp. 3d 1057, 1076 (N.D. Cal. 2017) (defendants' failure to offer the investment option with the lowest expense ratio is not enough, on its own, to plausibly state a claim for breach of the duty of prudence).

funds, even when the plaintiffs argue they are markedly superior." *Id*. at **12-14 ("The fact that courts have repeatedly upheld fiduciaries' decisions not to offer these alternatives indicates that a prudent fiduciary is under no reasonable duty to offer them."). The Court reasoned that these "non-mutual fund vehicles differ so much from mutual funds … in terms of their regulatory and transparency features that other courts have found it impossible to make an 'apples-to-oranges' comparison of the two." *Id.* at *14 (citing *White v. Chevron Corp*., 2016 WL 4502808 (N.D. Cal. Aug. 29, 2016) and *Loomis v. Exelon Corp*., 658 F.3d 667, 671-72 (7th Cir. 2011)).

Accordingly, the *Fidelity* court rejected a nearly identical argument that Plaintiffs made here, i.e., that Defendants breached their fiduciary duties by failing to timely investigate alternatives and consequently replace the Small Cap Core Fund and Core Bond Fund with less costly, yet nearly identical, alternative separate account and commingled fund formats, on the bases of the same arguments and defenses that the Defendants raised in this case. While from a different circuit, this opinion, and the caselaw on which it relied, represented a significant risk to a finding of liability on the alternative vehicle allegations in the present case.

Defendants have also hotly contested Plaintiffs' calculation of damages, arguing primarily that Plaintiffs' damages model inappropriately compared the performance of each of the Disputed Investments with the fees of a "hypothetical" alternative fund and thus excessively overstated damages. In fact, in attempting to exclude Plaintiffs' damages expert, Defendants argued that had the damages calculations for the Mid Cap Growth Fund accounted for both the performance and the fees of the S&P MidCap 400 Index Fund (the fund with which it was replaced), the "damages" for that one fund alone would have been *negative* $32.9 million through February 2016, and *negative* $50.8 million through July 2018, eliminating much or all of Plaintiffs' alleged damages.

Courts in other cases have sometimes accepted similar arguments on behalf of defendants.

For instance, in *Sacerdote*, the court found that "while there were deficiencies in the [c]ommittee's processes—including that several members displayed a concerning lack of knowledge relevant to the [c]ommittee's mandate—plaintiffs have not proven that … the Plans suffered losses as a result 328 F. Supp. 3d at 280. While Plaintiffs believe that Ms. Jones's loss models in this case were sound, this and other decisions illustrate that Plaintiffs faced risk with respect to damages as well as liability. *See* RESTATEMENT (THIRD) OF TRUSTS, § 100 cmt. b(1) (2012) (noting that determination of investment losses in breach of fiduciary duty cases is "difficult"). This further supports settlement approval in this case. *See Hill v. State Street Corp.*, 2015 WL 127728, at *9 (D. Mass. Jan. 8, 2015); *Kemp-DeLisser v. Saint Francis Hospital and Medical Cente*r, 2016 WL 6542707, at *9 (D. Conn. Nov. 3, 2016) (finding complex damages analysis weighed in favor of ERISA class settlement).

Aside from these risks, continuing the litigation would have resulted in complex, costly, and lengthy proceedings before this Court, and potentially the Second Circuit, which would have significantly delayed any relief to Class Members and might have resulted in no relief at all. It is well-recognized that ERISA 401(k) cases such as this "often lead to lengthy litigation." *See 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). Given the risks, expenses, and delays associated with further litigation, it was reasonable and appropriate for Plaintiffs to accept a Settlement that provided the Class with an immediate,

guaranteed recovery of a significant portion of their estimated damages due to allegedly excessive fees. *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").

In sum, the immediate and meaningful benefits of settling balanced against the risks, costs, delay and uncertainties attendant to continued litigation, favor approval of the Settlement.

(ii) Effectiveness of the Proposed Method of Distributing Relief

Rule 23(e)(2)(C)(ii) requires courts to examine "the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims." This factor also favors approval here. Class Members who are current Participants will have their accounts automatically credited with their share of the Settlement Fund. Settlement Agreement, ¶ 5.2. Class Members who are former Participants may submit a Rollover Form to roll over their potion of the settlement to a qualified individual retirement account or other eligible employee plan. *Id.* ¶ 5.3. Former Participants who do not provide such a Rollover Form will be sent a check. *Id.* This type of method of distribution also has been approved in similar ERISA class action settlements. *See Moreno v. Deutsche Bank Ams. Holding Corp.*, No. 15-cv-9936, ECF No. 322-1 at ¶¶ 6.5-6.6 (S.D.N.Y. Aug. 14, 2018); *Main v. Am. Airlines, Inc.*, No. 16-cv-00473, ECF No. 127-2 at ¶¶ 6.5-6.6 (N.D. Tex. July 7, 2017); *Mehling v. New York Life Ins. Co.*, 246 F.R.D. 467, 478-79 (E.D. Pa. 2007); *Price v. Eaton Vance Corp.*, No. 18-cv-12098, ECF No. 41-6 § 5.3 (D. Mass. May 17, 2019); *Velazquez v. Mass. Fin. Servs. Co.*, No. 17-cv-11249, ECF No. 91-1 §§ 6.5-6.6 (D. Mass. June 14, 2019); *Urakhchin v. Allianz Asset Mgmt. of Am., LP*, No. 15-cv-01614, ECF No. 174-1 at 6 (C.D. Cal. Dec. 26, 2017); *Sims v. BB&T Corp.*, No. 15-cv-732, ECF No. 437 at 3-4 (M.D.N.C. Nov. 30, 2018). Moreover, none the monies in the Settlement Fund will revert to Defendants.

(iii) The Terms of Any Proposed Award of Attorneys' Fees

Rule 23(e)(2)(C)(iii) requires courts to examine "the terms of any proposed award of attorneys' fees, including timing of payment." Here those terms are appropriately protective of the Class Members' interests. In particular, the Settlement provides that Class Members will be fully and timely apprised of the specifics of the fee requested, by requiring that "no later than fourteen (14) days prior to the deadline…to object to the Settlement Agreement, [Class Counsel] may file an application with the Court for payment of their reasonable Attorneys' Fees and Expenses, to be deducted from the Gross Settlement Amount." Settlement Agreement, ¶ 6.1. Section 10 of proposed form of Notice advises Class Members that such application will "not … exceed 33% of the $9,000,000.00 settlement amount plus their litigation expenses incurred in the prosecution of the case" and further, that "the Court will determine the proper amount of any such award." Meltzer Decl. ¶ 9, Ex. 1-A, at ¶ 10. Additionally, the proposed Notice advises Class Members of their rights to object to any part of the Settlement Agreement and how they may go about doing so. *Id*.

Attorney fee awards of 33%, as contemplated in the Notice, are within the range that courts in this circuit have approved. *See In re Parking Heaters, Antitrust Litig*., 2019 WL 8137325, at *7 (E.D.N.Y. August 15, 2019) (citing cases awarding 30-33% in attorney's fees). The requested fee award is also consistent with awards in similar ERISA class actions. *See, e.g.*, *Andrus v. New York Life Ins. Co.*, No. 1:16-cv-05698-KPF (ECF No. 83) (S.D.N.Y. June 15, 2017) (finding the requested amount of fees - which was one-third of the settlement fund - to be reasonable and appropriate). Courts in other districts have held the same. As the court stated in *Krueger v. Ameriprise Fin., Inc.*:

> [I]n comparing the requested fee with fee awards in similar cases, the relevant comparators are ERISA class actions asserting breaches of fiduciary duties in the selection and retention

> of plan investment options and the reasonableness of defined contribution plan fees. In such cases, courts have consistently awarded one-third contingent fees.

2015 WL 4246879, at *2 (D. Minn. July 13, 2015) (citing numerous cases); *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") (citing cases); *Clark v Oasis Outsourcing Holdings, Inc.*, No. 9:18-cv-81101, ECF No. 23 (S.D. Fla. Dec. 20, 2018); *High St. Rehab., LLC v. Am. Specialty Health Inc.,* 2019 WL 4140784, at *11 (E.D. Pa. Aug. 29, 2019) (awarding one-third in an ERISA class action); *Huffman v. Prudential Ins. Co. of Am.*, 2019 WL 1499475, at *7 (E.D. Pa. Apr. 5, 2019) (same).

Moreover, the Settlement provides that "the Court's failure to approve, in whole or in part, any application for Attorneys' Fees and Expenses sought by Class Counsel shall not prevent the Settlement Agreement from becoming effective, nor shall it be grounds for termination of the Settlement." Settlement Agreement, ¶ 6.1. Given these attorneys fee provisions, preliminary approval of the Settlement is warranted.

(iv) Any Agreement Required to be Identified Under Rule 23(e)(3)

Rule 23(e)(2)(C)(iv) requires the Courts to consider "any agreement required to be identified by Rule 23(e)(3)," that is "made in connection with the proposal." There are no such agreements, beyond the Settlement Agreement itself, here. Therefore, this factor does not have any weight in the preliminary approval assessment of the Settlement. *See Johnson*, 333 F.R.D. at 322 ("Given that no other Rule 23(e)(3) agreement exists, this factor has no bearing on the preliminary approval analysis.").

2. The *Grinnell* Adequacy Factors

There are three additional considerations among the nine *Grinnell* factors that may relate to the adequacy of a proposed settlement. Approval of the Settlement here remains appropriate

when these additional factors are examined:

- **Factor 7: the Defendant's Ability to Withstand a Greater Judgment**

Courts have observed that "it does not follow that a defendant's ability to withstand a greater judgment militates against approval of the settlement," nor, standing alone, does the defendant's ability to withstand a greater judgment detract from the fairness of the settlement. *Berni v. Barilla G. e R. Fratelli, S.p.A*., 332 F.R.D. 14, 31-32 (E.D.N.Y. 2019). *See also Christine Asia Co. v. Jack Yun Ma*, 2019 WL 5257534, at *14 (S.D.N.Y. Oct. 16, 2019) (noting that "where … the other *Grinnell* factors weigh in favor of approval, this factor alone does not suggest the settlement is unfair.") (internal citations omitted). Here, Defendants' ability to withstand a greater judgment was not a factor in the negotiations nor does that ability impact the assessment of the apparent fairness of the Settlement.

- **Factors 8 and 9: Range of Reasonableness of the Settlement Fund in Light of the Best Possible Recovery and Attendant Risks of Litigation**

Grinnell factor 8, "the range of reasonableness of the settlement in light of the best possible recovery," and *Grinnell* factor 9, "the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation," are often considered together, *see In re Payment Card*, 330 F.R.D. at 47-48, and weigh in favor of approval of the Settlement here. As discussed above, there are certainly costs and risks attendant to continuing to litigate. When a settlement in the amount agreed to is considered in light of those costs and risks and an analysis of the best possible recovery Plaintiffs could expect, the Settlement is plainly justified.

The $9,000,000.00 in monetary relief obtained is substantial not only in the aggregate, but also represents a significant portion of the damages that Plaintiffs calculated were caused by Defendants' alleged fiduciary breaches. Plaintiffs' damages expert, Cynthia L. Jones, calculated maximum damages to be $55.2 million, as set forth in the expert report submitted in this case.

ECF No. 168-5. To arrive at that amount, Ms. Jones calculated the fee differential between the Disputed Investments and the lower fee alternatives, *plus reinvestment* of that fee differential through February 2016. The $9 million recovery therefore represents approximately 16% of the maximum damages that Plaintiffs' expert calculated were associated with Defendants' alleged fiduciary breaches. *Id.* This recovery compares favorably to other class action settlements. *See, e.g.*, *Johnson v. Fujitsu Tech. & Business of Am., 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."); *In re Giant Interactive Grp., Inc. Sec. Litig*., 279 F.R.D. 151, 162 (S.D.N.Y. 2011) (recovery of 16.5% of maximum recoverable damages was within range of reasonableness); *In re IMAX Sec. Litig.*, 283 F.R.D. 178, 191 (S.D.N.Y. 2012) (approving recovery of approximately 13% of maximum provable damages); *In re Checking Account Overdraft Litig.,* 830 F. Supp. 2d 1330, 1346 (S.D. Fla. 2011) (recovery of 9% of damages was reasonable); *Newbridge Networks Sec. Litig.,* 1998 WL 765724, *2 (D.D.C. Oct. 23, 1998) ("[A]n agreement that secures roughly 6 to 12 percent of a potential recovery ... seems to be within the targeted range of reasonableness"); *In re Rite Aid Corp. Sec. Litig.,* 146 F. Supp. 2d 706, 715 (E.D. Pa. 2001) (noting that since 1995, class action settlements have typically "recovered between 5.5% and 6.2% of the class members' estimated losses").

Moreover, while the $55.2 million damages figure was a best case scenario, as set forth above, Defendants had put forth credible arguments that certain of the Disputed Investments were entitled to no recovery at all. First and foremost, had the Court agreed with Defendants' argument that Defendants were under no duty to offer alternatives to the two mutual fund offerings (i.e., the Small Cap Core Fund and Core Bond Fund), Plaintiffs' damages would have been reduced by over $12 million. Had the Court accepted Defendants' argument that the performance of the Mid-Cap

Growth Fund should have been taken into account such that investors in that fund suffered no damages, total damages would have been reduced by another $22.9 million.[8] And if the Court had not allowed for reinvestment damages the number would have been reduced even further. Thus, the Settlement is even more reasonable when viewed in this context of the very real risks in establishing damages. *See, e.g.*, *In re Gse Bonds,* 2019 U.S. Dist. LEXIS 218621, at **17-18 (granting preliminary approval to a settlement providing 10.9% to 21.3% of the best possible recovery, and noting that "courts in this district have approved similar percentages.").

Further, to ensure fairness, the terms of the Settlement will be subject to review and approval by an independent fiduciary under PTE 2003-39. Settlement Agreement, ¶ 3.1.1. The opinion of the independent fiduciary will be provided to the Court prior to the Fairness Hearing. Should the independent fiduciary approve the Settlement, that opinion would provide additional indicia of fairness.

D. The Settlement Treats Class Members Equitably Satisfying Rule 23(e)(2)(D)

Finally, Rule 23(e)(2)(D) requires the Court to consider whether "the proposal treats class members equitably relative to each other." Here, the Settlement treats all Class Members equitably and will be delivered through an effective method of distribution. Based on the loss calculations of Plaintiffs' damages expert, the Net Settlement Amount will be allocated among all eligible Class Members on a *pro rata* basis in proportion to their respective portion of damages based on their holdings in each of the Disputed Investments. Settlement Agreement ¶ 5.1 – 5.4.

Specifically, for each Class Member, a Settlement Allocation score will first be determined. That Settlement Allocation score will be equal to the sum of that Class Member's quarter-ending

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[8] In fact, as set forth above, Defendants had argued that taking performance into account, damages on that fund were actually negative, and should almost completely offset any other damages claimed by Plaintiffs on the remaining Disputed Investments.

(or partial quarter as applicable) account balances invested in each of the Disputed Investments weighted by the percentage of days in the quarter during which the account balance was invested in that fund and weighted by the percentage of days in the quarter for partial quarters at the beginning of the Class Period, measured in points such that: (i) each dollar invested in the the Growth and Income Fund equals four points, (ii) each dollar invested in the Mid Cap Value Fund equals four points, (iii) each dollar invested in the Core Bond Fund equals three points; (iv) each dollar invested in the Mid Cap Growth Fund equals three points; (v) each dollar invested in the Small Cap Core Fund equals four points; and (vi) each dollar invested in any of the Target Date Funds equals two points. *Id.* The points assigned to each dollar of a particular investment generally correspond to the relevant amount of damages suffered by each fund under Plaintiffs' damages model.[9]

After determining each Class Member's Settlement Allocation Score, the Settlement Administrator will then determine the total settlement payment available to each Class Member by calculating each such Class Member's pro rata share of the Net Settlement Fund; this is accomplished by comparing each Settlement Allocation Score to the sum of the Settlement Allocation Scores for all Class Members.

This weighted average approach is consistent with settlements in other ERISA cases that focused on particular funds within a 401(k) plan. *See, e.g.*, *Moreno*, ECF No. 322-1 at ¶ 6.4.1 (allocating settlement fund in ERISA case based on participants' weighted quarterly account balances during the class period, with proprietary funds weighted more heavily than non-

[9] Because the performance of the Mid-Cap Growth Fund exceeded the fee differential damages for that fund, five points were deducted from the points corresponding to the Mid-Cap Growth Fund and were distributed evenly across the other five Disputed Investments, each of which performed worse and were more expensive than the funds that replaced them.

proprietary funds) & ECF No. 347 (approving settlement); *Main v. Am. Airlines, Inc.*, No. 16-cv-00473, ECF No. 127-2 at ¶ 6.4.1 (N.D. Tex. July 7, 2017) (providing for similar weighted distribution) & ECF No. 137 (N.D. Tex. Feb. 21, 2018) (approving settlement).

E. Conclusion: The Relevant Factors Demonstrate that the Court Will Likely Grant Approval to the Settlement

The foregoing analysis of the factors identified by Rule 23(e)(2) and *Grinnell* establish that the Court will likely be able to grant final approval to the Settlement. Accordingly, the Settlement warrants preliminary approval and the Court should authorize dissemination of Notice of the proposed Settlement to the Class in the manner discussed below.

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

In addition to reviewing the substance of the Settlement Agreement, the Court should ensure that notice is sent in a reasonable manner to all class members who would be bound by the proposed 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 Agreement provides that the Settlement Administrator will provide direct notice of the Settlement to the Settlement 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 Notice is also reasonable. The Notice includes, among other things: (1) a summary of the lawsuit; (2) a clear definition of the Class; (3) a description of the material terms of the Settlement; (4) a disclosure of the release of claims; (5) instructions for submitting a Former Participant Rollover Form (if applicable); (6) instructions as to how to object to the Settlement and a date by which Class Members must object; (7) the date, time, and location of the Fairness

Hearing; (8) contact information for the Settlement Administrator; (9) information regarding Class Counsel and the amount that Class Counsel will seek in Attorneys' Fees; and (10) the proposed Incentive Awards be paid from the Gross Settlement Amount. Settlement Agreement Ex. A.

The proposed Notice is clearly reasonable as it "fairly apprise[s] the prospective members of the class of the terms of the proposed settlement and of the options that are open to them in connection with the proceedings." *See Lomeli v. Sec. & Inv. Co. Bahrain*, 546 Fed. App'x 37, 41 (2d Cir. 2013) (quoting *Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423, 438 (2d Cir. 2007)) (internal citations omitted); *In re Michael Milken & Assocs. Sec. Litig.*, 150 F.R.D. 57, 60 (S.D.N.Y. 1993) (settlement notice "need only describe the terms of the settlement generally").

CONCLUSION

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

Dated: May 22, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of May 2020, I electronically filed a copy of the foregoing with the Clerk of Court using the CM/ECF system which will send a notification to all counsel of record.

/s/ *Lisa M. Port*
Lisa M. Port