UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

BRIAN WALDNER, et al., Plaintiff, v. NATIXIS INVESTMENT MANAGERS, L.P., et al. Defendants.	Case No. 1:21-cv-10273-LTS Oral Argument Requested Pursuant to Local Rule 7.1(d)

DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR CLASS CERTIFICATION

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INTRODUCTION

Plaintiff's Motion for Class Certification ("Motion" or "Mot.") should be denied for a straight-forward reason. By 2017, Mr. Waldner, the named plaintiff seeking to represent the class, had actual knowledge of the essential facts alleged in the Complaint that the Court deemed sufficient to state a claim. His claims are therefore barred by ERISA's three-year statute of limitations, making his claims atypical and rendering him an inadequate class representative.

The statute of limitations applies for reasons specific to Mr. Waldner and based on his personal knowledge. Mr. Waldner was, and is, a sophisticated and experienced investment professional. Through his job responsibilities and his own research, Mr. Waldner had detailed knowledge of the Plan's[1] investment options, including every proprietary fund, every unaffiliated fund, and every fund in which he actually invested, including their fees and expenses and their investment performance. He similarly had actual knowledge about other retirement plans, the investment options they offered, and other funds in the marketplace. He knew Natixis earned revenue from including proprietary funds in the Plan and believed it to be self-serving for Natixis to do so. Armed with this knowledge, he nonetheless affirmatively chose to invest 30% of his Natixis retirement savings in Natixis funds, and 70% in an unaffiliated Vanguard fund. And he knew and did this all in 2017, more than three years before filing the Complaint.

The evidence demonstrating Mr. Waldner's actual knowledge of the core factual allegations pleaded in the Complaint is overwhelming. If the Court were to grant summary judgment on this basis, that will leave the litigation without a named plaintiff and a class—were one certified—without a representative. If, on the other hand, material factual disputes precluded summary judgment on statute of limitations grounds (and if summary judgment were not granted

[1] Unless otherwise defined herein, capitalized terms have the meanings ascribed in the Motion.

on other grounds), resolving those factual disputes—which are specific to Mr. Waldner rather than common to the class—would dominate a substantial part of trial.

For these and other reasons below, the Motion should be denied.

BACKGROUND

A. Mr. Waldner's Experience and Knowledge.

Mr. Waldner was, and is, a sophisticated financial professional with extensive knowledge and experience regarding retirement plans and mutual funds. Since before 2015, Mr. Waldner has held the professional designations of Chartered Financial Analyst ("CFA") charterholder and Certified Financial Planner ("CFP"); both require extensive study, years of experience, and passing challenging examinations. Tr. 34:5-38:1, 45:3-49:16.[2] Prior to joining Natixis in 2017, Mr. Waldner worked at five different asset management firms and was himself both a fund manager and the head of a prior employer's investment committee. Dacey Decl. Ex. 2; Tr. 161:12-15, 235:8-18. He had extensive experience with mutual funds, portfolio management, fund selection, and investment manager selection. Tr. 39:20-43:24, 110:14-111:6. He had extensive knowledge of retirement plans, plan selection by businesses, and retirement needs analysis. Tr. 51:23-57:8. He had advised plan sponsors about retirement plans and had drafted retirement plan investment policy statements. Tr. 53:24-54:18, 69:1-70:19. And he had specific "training and skills to advise an individual on how to invest their retirement savings in a retirement plan" and "on which [plan] investment options to choose." Tr. 57:12-23.

Mr. Waldner brought that experience and knowledge with him when, in 2017, he joined Natixis and began participating in the Plan. His job responsibilities at Natixis gave him daily

[2] "Tr." refers to Plaintiff's Deposition Transcript (Sept. 23, 2022), Ex. 1 to the Declaration of Katherine L. Dacey ("Dacey Decl."), filed concurrently with this memorandum.

hands-on experience and actual knowledge regarding the Plan's proprietary funds. With his team, Mr. Waldner regularly reviewed fund prospectuses for all of Natixis' domestic mutual funds, including the Plan's proprietary funds challenged here. Tr. 93:4-94:19. The fund prospectuses he reviewed included detailed information about fees and expenses; fund performance over 1, 5, and 10 years; and comparison of that performance to benchmarks, all of which Mr. Waldner was familiar with. Tr. 97:4-101:8. Among other purposes, he used this information to create fund "fact sheets," which are summary documents intended for investors and prospective investors that provide information similar to a fund prospectus but in a more summary form. Tr. 125:6-126:11. The fact sheets Mr. Waldner drafted and reviewed included information about fund fees and expenses, the fund's one-, three-, five-, and ten-year investment performance, how that performance compared to a benchmark comparator, as well as certain statistical information about the fund, among other things. Tr. 92:4-17, 128:9-129:15.

Mr. Waldner had not only advised clients regarding retirement plans prior to starting at Natixis in 2017, but also had already participated in at least three other 401(k) plans sponsored by previous employers. Tr. 245:10-249:23. Before investing in each of these earlier plans, he had obtained and reviewed information about the available funds—which were not Natixis-affiliated funds—including the types of information appearing in a fund prospectus or fund fact sheet. Tr. 245:10-247:5, 250:12-24.

Moreover, when Mr. Waldner began participating in the Plan in 2017, he received and read documentation about the Plan that included detailed information about the Plan's investment options, including fee and expense information and investment performance. Tr. 170:5-171:10, 176:19-178:24. Before making his decisions about how to invest in the Plan, he considered every available investment option, proprietary and non-proprietary, and reviewed the

fact sheets for each one. Tr. 180:1-17, 195:13-19. He had actual knowledge of which funds in the Plan were affiliated with Natixis—that is, the proprietary funds—and which were not. Tr. 128:3-8, 194:14-18. And, based on his extensive experience prior to joining Natixis, he was also well aware of the larger universe of funds available to investors and to other retirement plans. Tr. 201:16-19, 250:12-24.

Mr. Waldner also had actual knowledge in 2017 of potential conflicts of interest resulting from the inclusion of proprietary funds available in the Plan. He knew that Natixis earned revenue and profits from its funds, including those available in the Plan. Tr. 211:18-212:10. Indeed, he did not like the Plan because of its inclusion of proprietary funds, and he would have preferred to have had additional fund options in the Plan—options that he knew were available in other plans. Tr. 180:22-182:2. In fact, he had assets invested in other plans, and those assets were invested in non-Natixis funds unavailable in the Natixis Plan. Tr. 131:24-132:7, 250:12-24.

Based on his experience, his actual knowledge of the Plan and the retirement plan marketplace, and his research of all the Plan's investment options, Mr. Waldner chose, in 2017, to invest 70% of his Plan retirement contributions in a Vanguard fund unaffiliated with Natixis, and the remaining 30% divided among three Natixis affiliated funds: AEW Real Estate Fund, Oakmark International Fund, and Gateway Fund. Tr. 186:17-187:5.

Mr. Waldner left Natixis in 2018. At that time, he [REDACTED] Dacey Decl. Ex. 3 at ¶ 9.

B. The Plan.

The Plan offered (and still offers) many outstanding features that benefited participants. It included a wide variety of investment options, including more than 30 passively- and actively-managed funds from a variety of asset managers. Doc. 16-7 at pdf p. 39; *see* Docs. 16-10 to 16-16. They included, among others, U.S. and international equity funds; bond funds; a money

market fund; and target-date funds that change their allocation strategy as a participant gets closer to retirement. Doc. 16-7 at pdf p. 39; *see* Docs. 16-10 to 16-16. More than half of the investment options were managed by unaffiliated advisers such as Vanguard, State Street, SEI, Artisan, and Winslow; the remaining funds were managed by Natixis affiliates. Docs. 16-3 to 16-7. As the Motion acknowledges (at 4), [redacted] The Committee was also advised by Sullivan & Worcester, who served as ERISA counsel and attended Committee meetings. *See* Specht Decl. Ex. 9 ([redacted]).

Although the Plan offered Natixis-affiliated funds, participants were not steered into them. To the contrary, unless they chose otherwise, participants were automatically invested in an *unaffiliated* Vanguard fund. Doc. 16-8 at 12, pdf p. 16. The only participants who invested in Natixis-affiliated fund were those who, like Mr. Waldner, affirmatively chose to do so. *Id.*

Although participants in most plans must indirectly pay for a plan's recordkeeping expenses, Natixis has instead paid the Plan's recordkeeping expenses itself since 2017, rather than have participants bear that cost. Dacey Decl. Ex. 4 at 1. To further reduce expenses that participants would otherwise bear, the Plan obtains fund revenue credits from Schwab, the Plan's recordkeeper, which, since 2017, have been allocated back to participants' Plan accounts, substantially reducing the cost of investing in those funds. *Id.*; *see also* Doc. 16-1 at § 7.3(b); Doc. 16-7 at pdf p. 35; Doc. 16-8 at 12, pdf p. 16. And, in addition to participants' own Plan contributions, Natixis has contributed generously in matching contributions—over $52 million from 2015 and 2019. Doc 16-3 to 16-7 (each at pdf p. 27).

C. The Motion's Misunderstandings and Mischaracterizations of the Plan.

The majority of the Motion (at 2-12) is devoted to a "Background" section that has little

if anything to do with whether a class should be certified. Instead, the Motion mischaracterizes the record to imply that the Committee breached its fiduciary duties, while ignoring the Plan's many favorable characteristics that demonstrate that Plan participants were well-served.

Among other things, the Motion wrongly contends (at 4) that "underperforming proprietary funds were allowed to languish in the Plan for years without appropriate scrutiny" and in particular (at 8) that the [REDACTED]

[REDACTED]

Indeed, the Motion spends almost four pages (at 4-8) accusing the Committee of [REDACTED]

[REDACTED].

That criticism is entirely flawed. Putting aside the regular scrutiny the Delafield Fund (and all other Plan funds) received from the Committee, the Delafield Fund was not a Natixis fund. Despite the Motion's repeated references to the Delafield Fund as a proprietary fund (*e.g.*, at 2 n.3, at 3 n.4, 5, 8), the fund was unaffiliated with Natixis during the putative class period, as the Complaint itself concedes and public filings of both the Plan and the Delafield Fund itself confirm.[3] Natixis had no financial relationship with the Delafield Fund, did not earn any revenue or profits from the purchase or ownership of fund shares (whether in the Plan or otherwise), and did not lose revenue from the fund's removal from the Plan.[4] Neither the

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[3] *See* Doc. 19 ¶ 63; Doc. 16-2 at 38 (Delafield Fund was not a "party-in-interest" (i.e., a proprietary fund) of Natixis in 2014); *id.* at 41 (same); Doc. 16-3 at 41 (Delafield Fund was not a Natixis proprietary fund in 2015); Doc. 16-4 at 36 (Delafield Fund was not a Natixis proprietary fund in 2016); *id.* at 38 (same); Doc. 16-5 at 38 (Delafield Fund was not a Natixis proprietary fund in 2017); *id.* at 42 (same). The Motion apparently relies on a typo in the financial statements prepared by a third-party accounting firm attached to the Plan's 2015 DOL filing, which mistakenly put an asterisk next to "Delafield Fund," to characterize the Delafield Fund as a proprietary fund. Motion at 3 n.4 (citing to Doc. 16-3 at 38). But that same DOL filing elsewhere makes clear that the Delafield Fund was not a proprietary fund, Doc. 16-3 at 41.

[4] Delafield Fund's prior affiliation with Natixis ended in 2009, well before the putative class period. *See, e.g.,* Delafield Fund Semi-Annual Report (June 30, 2009), available at

Complaint nor Plaintiff's sworn interrogatory responses contend that Natixis breached its duties with respect to non-proprietary funds. *See, e.g.*, Doc. 19 ¶¶ 8-13 & 68; Dacey Decl., Ex. 5 at pp. 13-14 (Pl. Responses to Interrogs. 15 & 16). Any supposed [redacted] [redacted] is therefore irrelevant to the Complaint's claims.

Throughout, the Motion also wrongly suggests that the Committee should somehow have known from various funds' three- and five-year past performance history how each fund would perform in the future. That is simply Monday-morning quarterbacking. According to Mr. Waldner himself, a fund's prior three- and five-year performance tells you nothing about a fund's future performance. Tr. 109:20-110:3, 117:5-9. Rather, different investment strategies will out-perform the market during some market cycle phases and underperform during other phases, and past performance is not a predictor of future returns—something the Securities and Exchange Commission requires mutual funds to disclose to investors. Tr. 103:11-20; *see* SEC Form N-1A at 62, 63, *available at* https://www.sec.gov/files/formn-1a.pdf. Moreover, as Mr. Waldner himself acknowledges, it makes no sense to look at three- and five-year performance history, as both the Complaint and the Motion do, without also looking at one- and ten-year performance history, both of which the Complaint and Motion simply ignore. Tr. 108:3-14.

Picking funds that performed well in the past is easy, but predicting what funds will perform well in the future is much harder. A plan committee's failure to remove a fund that, in retrospect, underperformed over some cherry-picked period is not evidence of a fiduciary breach. Nonetheless, gifted with the benefit of 20-20 hindsight, the Motion (at 7, 11) cherry-picks two

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https://www.sec.gov/Archives/edgar/data/912896/000080662009000185/delncsr0609.txt (describing move to new adviser); Delafield Fund prospectus (Sept. 28, 2009), available at https://www.sec.gov/Archives/edgar/data/801444/000119312509199102/d485bpos.htm#tx23215_6 (disclosing new investment adviser unaffiliated with Natixis).

funds (neither of which Mr. Waldner invested in) that allegedly underperformed over certain periods, ignoring both those funds' strong performance during other periods and the strong performance of other Plan proprietary funds during the Motion's cherry-picked periods. Likewise, the Motion (at 7, 11) compares its cherry-picked funds to a few cherry-picked non-affiliated funds that, with the benefit of hindsight, performed better during those periods, while ignoring the many non-affiliated funds that performed worse. Mr. Waldner himself characterizes cherry-picking—which Mr. Waldner describes as selecting funds and performance periods that support one's desired outcome—as "unethical" and not something that a CFA charterholder or CFP like himself would ever do. Tr. 117:10-118:10.

The Motion grasps at other straws to wrongly suggest the Committee had a deficient process. For example:

- The Motion states (at 3) that the Committee [redacted].
- The Motion contends (at 3) that "[t]he Committee ... lacked clear performance criteria for adding an investment to a Watch List or removing an investment from the Plan." Having a retirement committee exercise discretion—with the aid of an external consultant and legal counsel—rather than follow inflexible rules does not breach any fiduciary duty and is not evidence of a deficient process, and the Motion provides no authority to the contrary.
- The Motion (at 5) criticizes the Committee [redacted]

because, as the Complaint acknowledges, active management differs in key respects from passive management. Doc. 19 ¶ 41.

- The Motion (at 12 & n.32) attacks the Committee for . But Mr. Waldner himself, a seasoned investment professional, carefully researched and then affirmatively chose to invest in the Gateway Fund in 2017 because he wanted to invest in an alternative investment, and he expected, moreover, that the Gateway Fund, as an alternative, hedged equity investment, would underperform equity investment options during bull markets. Tr. 119:14-123:19, 187:9-19, 189:18-192:1. And Mr. Waldner made an appropriate investment decision by investing in that fund. Had the Committee , as the Motion suggests it should have, Plan participants would have been deprived of an investment option that, just four years later, was ranked by Lipper, a leading source of mutual fund industry data, as the "Best Alternative Equity Market Neutral Fund" for the 5-year period ending November 30, 2020.[5]
- , the Motion (at 5) suggests that the Committee breached its duties by Specht Decl. Ex. 7.

The Motion includes other similarly flawed examples that do not indicate a deficient process.

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[5] *Natixis Investment Managers Affiliated Funds Earn 2021 US Refinitiv Lipper Fund Awards*, BUSINESSWIRE (Mar. 11, 2021), available at https://www.businesswire.com/news/home/20210311005755/en/.

ARGUMENT

I. Class Certification Should Be Denied Because Mr. Waldner's Claims Are Barred By the Statute of Limitations, Rendering Him Atypical.

Rule 23 requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). A proffered class representative who "is subject to unique defenses which threaten to become the focus of the litigation" will prevent a class from being certified. *In re Pharma. Indus. Average Wholesale Price Litig.*, 230 F.R.D. 61, 80 (D. Mass. 2005); *see also In re Schering Plough Corp. ERISA Litig.*, 589 F.3d 585 (3d Cir. 2009) (vacating certification of Rule 23(b)(1)(B) class in ERISA action where the named plaintiff was subject to unique defense). Because Mr. Waldner had actual knowledge of the Complaint's central facts more than three years before commencing this litigation, his claims are barred in whole or in part. 29 U.S.C. § 1113(2). Although many other class members may also have actual knowledge that bars their claims, the evidence of Mr. Waldner's knowledge is specific to him alone. Because Mr. Waldner is subject to a unique defense that threatens to become the focus of the litigation, class certification should be denied.

A. ERISA's Three-Year Statute of Limitations.

ERISA bars an action for breach of fiduciary duty commenced more than "three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation." 29 U.S.C. § 1113(2); *see also id.* § 1113(1) (six-year statute of repose). Actual knowledge requires that "a plaintiff knows the essential facts of the transaction or conduct constituting the violation." *Edes v. Verizon Commc'ns, Inc.*, 417 F.3d 133, 142 (1st Cir. 2005) (citation omitted). In *Edes*, where the plaintiffs alleged that defendants "had a fiduciary duty to classify [the plaintiffs] as eligible for plan participation, and to design their plans accordingly, based on their status as common-law employees, regardless of the plan's actual eligibility criteria," the First Circuit held

it sufficient to start the ERISA statute of limitations running when the plaintiffs had actual knowledge of the *effect* of the defendants' decision, namely that they were not classified as employees and were not receiving employment benefits. *Id.* "Plaintiffs need not have had actual knowledge of the plan's eligibility criteria to start the statute of limitations running." *Id.*

In short, the actual knowledge requirement under ERISA—and other areas of the law—is "actual knowledge of the facts giving rise to the cause of action."[6] In a recent decision in this District granting in part and denying in part a motion to dismiss and relying on *Edes*, the court addressed ERISA's three-year statute of limitations and what knowledge was required. *In re G.E. ERISA Litigation*, 2019 WL 5592864, at *2-3 (D. Mass. Oct. 30, 2019) (Talwani, J.). The court concluded that a claim concerning the composition of plan offerings was barred by the statute of limitations because the plaintiffs had "actual knowledge the day [p]laintiffs elected their Plan options." *Id.* at *3. On the other hand, a separate claim that the defendants "offered GE Funds as the sole actively managed investment options of the Plan despite high costs and poor performance in order to generate management fees and maintain GE Asset Management's performance" survived the motion to dismiss because, unlike the situation here, defendants did not yet have evidence "that [p]laintiffs had actual knowledge that their funds were performing poorer and their fees cost higher compared to other funds." *Id.*[7]

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[6] *Mass. Eye & Ear Infirmary v. QLT Phototherapeutics, Inc.*, 412 F.3d 215, 239 (1st Cir. 2005) (discussing fraudulent concealment statute of limitations); *see also Wilson v. Town of Fairhaven*, 2019 WL 1757780, at *12 (D. Mass. Mar. 4, 2019) (denying tolling where plaintiff knew essential facts for false arrest claim); *Slavin v. Morgan Stanley & Co.*, 791 F. Supp. 327, 332 (D. Mass. 1992) (actual knowledge is "knowledge of facts sufficient to support a claim" and limitations period begins "after discovery of the facts constituting the violation").

[7] *See also Bernoaola v. Checksmart Fin. LLC*, 322 F. Supp. 3d 830, 839 (S.D. Ohio 2018) (for ERISA's three-year statute of limitations period, a plaintiff "need not have actual knowledge of the process by which the … Plan selected … investment options, he need only have actual knowledge of the … Plan's investment options" because "knowledge of … the Plan's investment

The Supreme Court also recently addressed ERISA's three-year statute of limitations and explained how a defendant may prove that a plaintiff has the "actual knowledge" required under ERISA's three-year statute. *Intel Corp. Inv. Pol'y Comm. et al. v. Sulyma*, 140 S. Ct. 768 (2020). The Court explained that "[p]laintiffs who recall reading particular disclosures will of course be bound by oath to say so in their depositions"—as indeed Mr. Waldner did here. *Id.* at 779. But, "[o]n top of that, actual knowledge can be proved through 'inference from circumstantial evidence.'" *Id.* (citation omitted). "Evidence of disclosure would no doubt be relevant, as would electronic records showing that a plaintiff viewed the relevant disclosures and evidence suggesting that the plaintiff took action in response to the information contained in them." *Id.* The Supreme Court further made clear that, in the presence of this type of evidence, a plaintiff's self-serving affidavit denying knowledge would *not* necessarily defeat summary judgment. "If a plaintiff's denial of knowledge is 'blatantly contradicted by the record,' 'a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment.'" *Id.* (citation omitted). Finally, the Court explained that "actual knowledge" could also be proved via "evidence of willful blindness." *Id.* (citations and punctuation omitted).[8]

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options is 'knowledge of the facts or transaction that constituted the alleged violation.'") (citation omitted).

[8] Any argument by Plaintiff against application of the three-year statute of limitations premised on "a continuing duty to monitor investments and remove imprudent ones," *Tibble v. Edison Int'l*, 575 U.S. 523, 529 (2015), would fail for multiple reasons. First, that argument conflates a continuing *duty* with a continuing *breach*. Second, "[o]nce a beneficiary knows of one breach in a series of breaches of the same character[,] awareness of the later breaches would impart nothing new. The earliest date on which a plaintiff became aware of *any* such breach would thus start the limitation period of §1113(a)(2) running." *Guenther v. Lockheed Martin Corp.*, 972 F.3d 1043, 1053 (9th Cir. 2020) (citations omitted); *see also Bernoaola*, 322 F. Supp. 3d at 842 ("[e]ven if [plaintiff] asserts a continuing-breach-of-fiduciary duty claim, … actual knowledge of the first violation … started the clock" for ERISA three-year statute of limitations). The First Circuit has similarly rejected a continuing breach theory relating to ERISA long-term disability payments. *See Riley v. Metropolitan Life Ins. Co.*, 744 F.3d 241, 246 (1st Cir. 2014).

B. Mr. Waldner Had Actual Knowledge Of Facts Deemed Sufficient To State a Claim in 2017, More Than Three Years Before Commencing Litigation.

Although the Complaint here includes conclusory allegations that the Committee used a deficient process, its core nonconclusory allegations are that some of the Plan's proprietary funds had higher fees than certain other non-proprietary funds, that some of the Plan's proprietary funds underperformed their benchmarks during certain periods, that there were other funds available in the marketplace but not available in the Plan that performed better than some of the proprietary funds in the Plan, and that Natixis earned profits by including proprietary funds in the Plan. Doc. 19 ¶¶ 41-61. In response to a motion to dismiss, this Court concluded that those factual allegations were sufficient to state a claim. Doc. 33 at 9-10.

Mr. Waldner had actual knowledge in 2017 that he could have used to make the same core factual allegations in 2017. He was a sophisticated financial professional, was a former fund manager and investment committee chair, had advised business clients about retirement plans, had participated in multiple retirement plans, and was trained to advise clients how to invest their retirement savings. *See supra* page 2. His job responsibilities required him to be intimately familiar with all the Plan's proprietary funds, he knew which funds in the Plan were proprietary and which (like the Delafield Fund) were not, and he carefully researched every Plan investment option before making his decision. He had actual knowledge of the funds' fees and expenses, of their performance compared to benchmarks, and of other funds available in other plans and in the marketplace. *See supra* pages 2-3. He did not like the Plan because of its inclusion of proprietary funds, which he knew generated revenue for Natixis. *See supra* page 4. And he knew all these things in 2017 when he invested 30% of his Plan retirement account in Natixis-affiliated funds—and 70% in an unaffiliated Vanguard fund. *See supra* page 4.

C. Knowledge of the Committee's Internal Process Is Not Necessary For the Statute of Limitations to Run.

Mr. Waldner may argue that the statute of limitations did not begin to run in 2017, because he did not have actual knowledge of the Committee's process or its internal deliberations. That argument is wrong, as a matter of both law and common sense. Mr. Waldner had no more knowledge of the Committee's process or internal deliberations in 2021, when he filed this lawsuit, and the Complaint included no nonconclusory allegations about them. The knowledge he did have in 2017—about the funds, their fees and expenses, their performance, and the potential conflict from Natixis's earning revenue from having proprietary funds in the Plan—were allegations he could have used to draft essentially the same complaint in 2017 that he filed in 2021. Indeed, if knowledge of the Committee's internal deliberations were necessary, then the Complaint, which contained only conclusory allegations about the Committee's process, would have been dismissed. Even today, with discovery ongoing, Mr. Waldner still lacks "actual knowledge" of what the Committee did or did not do.

But in 2017, Mr. Waldner did have actual knowledge of the *outcome* of the Committee's process and of the funds that were available to him as a result of that process. As the First Circuit made clear in *Edes*, it is sufficient if a plaintiff knows the outcome and "need not have had actual knowledge of the plan's eligibility criteria to start the statute of limitations running." *Edes*, 417 F.3d at 142. Similarly, as Judge Talwani made clear, the statute would begin running if, as is the case here, a plaintiff had actual knowledge that funds were proprietary funds, that the plan sponsor financially benefited from including proprietary funds, and of the funds' fees and performance versus comparators. *In re G.E. ERISA Litigation*, 2019 WL 5592864, at *3. Mr. Waldner had actual knowledge of all these things.

The Supreme Court's discussion of actual knowledge in *Intel* is also instructive. The

Supreme Court did not discuss whether the plaintiff had actual knowledge of the Intel retirement committee's actions or deliberations, but rather whether he had actual knowledge of the outcome of the committee's decisions. Specifically, a participant in Intel's retirement plan had alleged that the plan's committee had breached its fiduciary duty by overinvesting in "alternative assets" like hedge funds and private equity. 140 S. Ct. at 774. The district court had originally granted summary judgment on statute of limitations grounds because information disclosing the plan's investment in alternative assets had been provided to the plaintiff more than three years before the litigation. *Id.* at 775. But both the Supreme Court and the Ninth Circuit disagreed, holding that to have "actual knowledge" meant more than that the plaintiff had received the information, but instead that the plaintiff actually had "be[en] aware of it." *Id.* at 776. Although the plaintiff had received financial disclosures with the relevant information, a factual dispute about whether the plaintiff had actually read the document made his prior awareness of the alternative investments a trial issue rather than one susceptible to summary judgment. *Id.* at 773, 775, 779.

Notably, what was *not* at issue in *Intel* was whether the plaintiff had actual knowledge of the actions or process undertaken by the Intel retirement committee when it decided to invest in "alternative assets." No one disputed that, before filing suit, the plaintiff lacked knowledge of the committee's process by which it had decided to invest in alternative investments. Rather, the parties disputed whether the plaintiff had actual knowledge of the *results* of the Committee's actions, namely the plan's investment in those alternatives. Before the Supreme Court's review, the Ninth Circuit had concluded that although actual knowledge three years earlier that "the monies that [the plaintiff] had invested through the Intel retirement plans had been invested in hedge funds or private equity" would be sufficient to bar the claim, disputed issues of fact over whether the plaintiff actually had that knowledge precluded summary judgment and required

trial. *Sulyma v. Intel Corp. Inv. Pol'y Comm.*, 909 F.3d 1069, 1077-78 (9th Cir. 2018). The Supreme Court, in turn, did not address the issue "of what exactly a plaintiff must actually know about a defendant's conduct and the relevant law," leaving that part of the Ninth Circuit's decision unreviewed. 140 S. Ct. at 775 n.2.

D. Mr. Waldner's Actual Knowledge and Other Issues Specific to Him Will Become A Major Focus Of The Litigation.

Whether Mr. Waldner's claims are barred will become "the focus of the litigation." *In re Pharma. Indus. Average Wholesale Price Litig.*, 230 F.R.D. at 80.[9] The parties will need to brief summary judgment on the issue, focused solely on Mr. Waldner and his personal knowledge. If his claims are barred, then the litigation will lack a named plaintiff, and any class, if one were certified, will lack a representative. If, on the other hand, the Court concludes that disputed material issues about Mr. Waldner's knowledge precluded summary judgment, then the parties will need to devote substantial trial time to those issues.

Mr. Waldner may also be subject to a "unique defense" concerning his waiver of his ERISA claims and agreement not to sue.

[9] *See also Baffa v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 222 F.3d 52, 59-60 (2d Cir. 2000) (affirming denial of motion to intervene as class representative where the movant "was a sophisticated broker who had access to more information than other investors in the putative class" and who "bought [] stock after the value had drastically declined amidst reports of financial difficulty" and was thus an atypical representative); *Wiseman v. First Citizens Bank & Trust Co.*, 212 F.R.D. 482, 488 (W.D.N.C. 2003) (denying class certification in ERISA action "[b]ecause of the unique knowledge of the named Plaintiffs, the dominance of the defenses specific to them, and the associated risk of putting the claims of the class in jeopardy").

Dacey Decl. Ex. 3. *Id.* Mr. Waldner read and understood the agreement when he signed it. Tr. 260:24-265:6. A proposed class representative who has signed a "release and a covenant not to sue … may be subject to unique defenses that could become a focus of the litigation, rendering her atypical and making class certification inappropriate." *In re Schering Plough Corp. ERISA Litig.*, 589 F.3d at 599. Other putative class members may have signed agreements with different releases or covenants, but the issue of Mr. Waldner's release and agreement not to sue would be specific to him and would need to be addressed at summary judgment or trial.

II. Mr. Waldner Is An Inadequate Class Representative Because His Interests As a Former Participant Diverge From Those of Current Participants.

Mr. Waldner is an inadequate class representative, not only because his own claims are barred, but also because his goals are not aligned with all other class members. Mr. Waldner is no longer a Plan participant, so any future Plan changes would not affect him. Doc. 19 ¶ 18; Tr. 138:4-21. His interests therefore differ in significant respects from putative class members who remain participants and have an interest in what happens to the Plan going forward.

Despite no longer being a participant, Mr. Waldner purports to seek certain changes in the Plan. The Complaint seeks affirmative relief such as an injunction against future violations relating to the Plan. Doc. 19, Prayer for Relief ¶ G. Mr. Waldner states that he wants better investment options for participants, and that controls and structures should be in place to ensure that those responsible for the Plan "live up to their obligations." Tr. 136:16-138:3, 143:3-11.

But leaving aside whether such changes are necessary or appropriate (and, to be clear, they are not), whether those changes do or do not occur will have no impact on Mr. Waldner. As Mr. Waldner himself acknowledges, he has "no personal skin in the game as to any future

changes in the plan," Tr. 138:4-21.[10] Any Plan changes could affect only individuals who, unlike Mr. Waldner, continue to participate in the Plan and would have to live with any undesirable consequences of changes to the Plan. Mr. Waldner has not spoken to other participants and does not know whether they support the changes he seeks. Tr. 153:16-154:23.[11]

III. The Proposed Class Definition Is Overbroad.

A. The Proposed Class Includes Participants Whose Claims Are Barred By The Statute of Limitations.

The proposed class definition includes all Plan participants and beneficiaries who invested in Natixis-affiliated funds from 2015 to present. Mot. at 13. As Mr. Waldner's own circumstances illustrate, each putative class member may have had their own personal knowledge of "the essential facts of the transaction or conduct constituting the violation," *Edes*, 417 F.3d at 142, from their own research, personal experience, or job responsibilities at Natixis. ERISA's three-year statute of limitations would bar the claims of each putative class member who had that knowledge prior to February 18, 2018. 29 U.S.C. § 1113(2). The class is overbroad by including them.

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[10] *See, e.g.*, *Hubert v. Med. Info. Tech., Inc.*, 2007 WL 9797660 at *4 (D. Mass. Mar. 20, 2007) (denying class certification in ERISA action where plaintiffs' proposed valuation methodology was "in fundamental conflict with absent class members who would receive a greater recovery from an alternate methodology"); *see also In re Pharma. Indus. Average Wholesale Price Litig.*, 230 F.R.D. at 80 (declining to certify a class in part because of "a possible conflict between [the class representative] and [the class members] with respect to possible settlements, given the different economic interest of the groups"); *Schering*, 589 F.3d at 600 ("interests and incentives" of named plaintiff who signed "release and covenant not to sue" "may not be sufficiently aligned with those of the class").

[11] Moreover, Mr. Waldner's own knowledge and learning undermine the allegations in the Complaint, further rendering him an inadequate class representative. Despite the Complaint's extensive citation to three- and five-year performance, *see, e.g.*, Doc. 19 ¶¶ 51-65, Mr. Waldner opined, as a CFA charterholder and CFP, that a fund's prior three- and five-year performance tells you nothing about how a fund's future performance, and that it makes no sense to look at three- and five-year performance history without also looking at one- and ten-year performance history, which the Complaint ignores. Tr. 108:3-14, 109:20-110:3, 117:5-9.

B. The Proposed Class Includes Uninjured Plan Participants.

The proposed class definition (Mot. at 13) is also overbroad because it includes uninjured class participants. The class purports to include plan participants who invested in any of thirteen Natixis proprietary funds. Specht Decl. Exhibit 19.

As an initial matter, that list includes the Delafield Fund, which was not a proprietary fund during the putative class period. *See supra* pages 6-7. The class definition is overbroad if it includes any participants who invested in the Delafield Fund but no proprietary funds.

With respect to the twelve proprietary funds, neither the Complaint nor the Motion suggest that inclusion of each particular fund caused any participant an injury-in-fact. Even under Plaintiff's flawed theory, some participants did not suffer any injury-in-fact if their proprietary fund investments performed well in comparison to benchmarks and/or peer funds. Indeed, the Complaint makes no specific allegations about four of the twelve proprietary funds in Specht Decl. Exhibit 19—"Loomis Sayles Bond Instl," "Loomis Sayles Core Plus Bond Y," "Natixis AEW Real Estate Y" (in which Mr. Waldner invested), and "Natixis ASG Global Alternatives Y." For four other proprietary funds—"Loomis Sayles Growth Y," "Loomis Sayles Small Cap Growth Instl," "Loomis Sayles Small Cap Value Instl," and "Oakmark International Investor" (in which Mr. Waldner also invested)—the Complaint alleges only that the fund had higher than average expenses but makes no allegation that investors in those funds failed to get value for the higher fees they were paying. Doc. 19 ¶¶ 44-45. As Mr. Waldner himself acknowledged, the additional cost of active management may be worth it. Tr. 91:22-92:3. In short, Plaintiff has not even purported to show any injury-in-fact for the participants who invested in two-thirds of the proprietary funds in the Plan. Because standing requires injury-in-fact, the proposed class is overbroad if it includes participants who have not suffered an injury. *See, e.g., In re Boston Sci. Corp. ERISA Litig.*, 254 F.R.D. 24, 32 (D. Mass. 2008) (Tauro, J.)

(denying class certification where "Plaintiffs have failed to demonstrate individual injury in fact and therefore lack Article III standing"); *cf. Merrimon v. Unum Life Ins. Co. of America*, 758 F.3d 46, 52-53 (1st Cir. 2014) (granting class certification where all class members suffered actual injury).

IV. The Class Fails to Satisfy Rule 23(b)(3).

The Motion argues in the alternative (at 20) that the class satisfies Fed. R. Civ. P. 23(b)(3), ostensibly because common questions predominate. As Mr. Waldner himself demonstrates, individual inquiries into "actual knowledge" for issues such as the statute of limitations and injury-in-fact for standing will be required for each putative class member. The First Circuit has made clear that "to determine whether a class certified for litigation will be manageable, the district court must at the time of certification offer a reasonable and workable plan for how" evidence will be presented at trial "in a manner that is protective of the defendant's constitutional rights and does not cause individual inquiries to overwhelm common issues." *In re Asacol Antitrust Litig.*, 907 F.3d 42, 58 (1st Cir. 2018). The Motion does not and cannot offer a plan to address the individualized statute of limitations and injury-in-fact inquiries for the members of the proposed class, let alone explain how those inquiries would not overwhelm any purported common issues. Accordingly, a class cannot be certified under Rule 23(b)(3).

CONCLUSION

For the foregoing reasons, the Motion should be denied.

REQUEST FOR ORAL ARGUMENT

Pursuant to Local Rule 7.1(d), Defendants respectfully request that the Court hold oral argument on Plaintiff's Motion for Class Certification.

Respectfully submitted,

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Dated: October 26, 2022

CERTIFICATE OF SERVICE

I hereby certify that on October 26, 2022, I caused a true and correct copy of the foregoing to be served in redacted form by CM/ECF to the parties registered to the Court's CM/ECF system, and that I caused a true and correct copy of the foregoing to be served in unredacted form by email on counsel listed below pursuant to an agreement to accept service by email:

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