IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

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

TABLE OF CONTENTS

INTRODUCTION 1

BACKGROUND 3

I. PROCEDURAL HISTORY 3

A. Pleadings 3

B. Court Proceedings 4

II. SETTLEMENT TERMS AND PRELIMINARY APPROVAL 5

III. WORK OF CLASS COUNSEL 5

A. Work Conducted to Date 6

B. Remaining Work to Be Performed 7

IV. WORK OF CLASS REPRESENTATIVES 7

V. WORK OF THE SETTLEMENT ADMINISTRATOR, ESCROW AGENT, AND INDEPENDENT FIDUCIARY 8

VI. ATTORNEYS' FEES, EXPENSES, AND SERVICE AWARDS SOUGHT 9

ARGUMENT 9

I. LEGAL STANDARD 9

II. THE COURT SHOULD GRANT CLASS COUNSEL'S REQUEST FOR ATTORNEYS' FEES 10

A. The Requested Fee is Reasonable in Comparison to Awards in Similar Cases 10

B. The Benefit Obtained for Class Members is Substantial 12

C. ERISA Litigation is Complex and Involves Significant Risks 13

D. Class Counsel Are Skilled and Provided High Quality Representation 14

E. Class Counsel Invested Significant Time and Effort to the Case 15

F. There Have Been No Objections to the Settlement or the Requested Fees 16

G. Public Policy Supports the Requested Fee Award 17

III. THE COURT SHOULD APPROVE THE REQUESTED COSTS AND EXPENSES 18

A. Litigation Costs.....18

B. Administrative Expenses 18

IV. THE COURT SHOULD APPROVE THE REQUESTED SERVICE AWARDS.....19

CONCLUSION.....20

TABLE OF AUTHORITIES

Cases

Abbott v. Lockheed Martin Corp.,
2015 WL 4398475 (S.D. Ill. July 17, 2015) 13, 16, 20

Andrus v. New York Life Ins. Co.,
No. 16-05698, ECF No. 83 (S.D.N.Y. June 15, 2017) 2, 11, 19, 20

Bacchi v. Mass. Mut. Life Ins. Co.,
2017 WL 5177610 (D. Mass. Nov. 8, 2017) 10, 17

Bacchi v. Mass. Mut. Life Ins. Co.,
2018 WL 2337712 (1st Cir. Mar. 29, 2018) 10

Beesley v. Int'l Paper Co.,
2014 WL 375432 (S.D. Ill. Jan. 31, 2014).....18

Bezdek v. Vibram USA Inc.,
79 F. Supp. 3d 324 (D. Mass. Jan. 16, 2015).....13, 15

Bezdek v. Vibram USA Inc.,
809 F.3d 78 (1st Cir. 2015).....13

Boeing Co. v. Van Gemert,
444 U.S. 472 (1980).....9, 10

Brotherston v. Putnam Invs. LLC,
No. 1:15-cv-13825, ECF No. 214 (D. Mass. Apr. 17, 2020).....12

Brotherston v. Putnam Invs. LLC,
No. 1:15-cv-13825, ECF No. 232 (D. Mass. Sept. 18, 2020).....2, 12

City of Detroit v. Grinnell,
495 F.2d 448 (2d Cir. 1974).....15

Clark v. Oasis Outsourcing Holdings Inc.,
No. 18-81101, ECF No. 23 (S.D. Fla. Dec. 20, 2018).....2, 11, 19

Conant v. FMC Corp.,
No. 2:19-cv-00296, ECF No. 42 (D. Me. Sept. 1, 2020).....15

Conley v. Sears Roebuck & Co.,
222 B.R. 181 (D. Mass. 1998) 16

Hill v. State St. Corp.,
2015 WL 127728 (D. Mass. Jan. 8, 2015) 15, 18

In re Fidelity,
167 F.3d 735 (1st Cir. 1999) 9, 18

In re Lupron Mktg. & Sales Practices Litig.,
2005 WL 2006833 (D. Mass. Aug. 17, 2005) 10, 14, 17, 19

In re Lupron Mktg. & Sales Practices Litig.,
228 F.R.D. 75 (D. Mass. 2005) 13

In re Marsh ERISA Litig.,
265 F.R.D. 128 (S.D.N.Y. 2010) 13, 17, 19

In re M&T Bank Corp. ERISA Litig.,
No. 1:16-cv-375, ECF No. 190 (W.D.N.Y. Sept. 3, 2020) 2, 11, 19, 20

In re Prudential Ins. Co. of Am. SGLI/VGLI Contract Litig.,
2014 WL 6968424 (D. Mass. Dec. 9, 2014) 9-10, 18

In re Relafen Antitrust Litigation,
231 F.R.D. 52 (D. Mass 2005) 10, 11

In re Rite Aid Corp. Sec. Litig.,
146 F. Supp. 2d 706 (E.D. Pa. 2001) 12

In re Stocker Yale, Inc. Sec. Litig.,
2007 WL 4589772 (D.N.H. Dec. 18, 2007) 11

In re Thirteen Appeals Arising Out of San Juan Dupont Plaza Hotel Fire Litig.,
56 F. 3d 295 (1st Cir. 1995) 10

Johnson v. Fujitsu Tech. & Business of America, Inc.,
2018 WL 2183253 (N.D. Cal. May 11, 2018) 12

Kanawi v. Bechtel Corp.,
2011 WL 782244 (N.D. Cal. Mar. 1, 2011) 18

Krueger v. Ameriprise Fin., Inc.,
2015 WL 4246879 (D. Minn. July 13, 2015) 2, 11, 13, 20

Kruger v. Novant Health, Inc.,
2016 WL 6769066 (M.D.N.C. Sept. 29, 2016) ..... *passim*

Lapan v. Dick's Sporting Goods,
No. 13-cv-11390, ECF No. 220 (D. Mass. Apr. 19, 2016).....11

Larson v. Allina Health System,
No. 0:17-cv-03835, ECF No. 132 (D. Minn. May 22, 2020) 2, 11

Lauture v. A.C. Moore Arts & Crafts, Inc.,
2017 WL 5900058 (D. Mass. Nov. 28, 2017) 11

Mills v. Elec. Auto-Lite Co.,
396 U.S. 375 (1970).....9

Moreno v. Deutsche Bank Americas Holding Corp.,
2017 WL 3868803 (S.D.N.Y Sept. 5, 2017).....14

New England Carpenters Health Benefits Fund v. First Databank, Inc.,
2009 WL 2408560 (D. Mass. Aug. 3, 2009) 16

Nilsen v. York Cty.,
400 F. Supp. 2d 266 (D. Me. 2005) 13

Price v. Eaton Vance Corp.,
No. 18-12098, ECF No. 32 (D. Mass. May 6, 2019).....12

Price v. Eaton Vance Corp.,
No. 18-12098, ECF No. 62 (D. Mass. Nov. 25, 2019) 11, 15

Price v. Eaton Vance Corp.,
No. 18-12098, ECF No. 63 (D. Mass. Nov. 25, 2019) 11, 15

Roberts v. TJX Companies, Inc.,
2016 WL 8677312 (D. Mass. Sept. 30, 2016) 11, 16, 17

Sacerdote v. New York Univ.,
328 F. Supp. 3d 273 (S.D.N.Y. 2018).....13

Savani v. URS Prof. Solutions LLC,
121 F. Supp. 3d 564 (D.S.C. 2015).....14

Sims v. BB&T Corp.,
2019 WL 1993519 (M.D.N.C. May 6, 2019) ..... *passim*

Spano v. Boeing Co.,
2016 WL 3791123 (S.D. Ill. Mar. 31, 2016) 16, 18

Steiner v. Am. B'casting Co., Inc.,
248 Fed. Appx. 780 (9th Cir. 2007) 16

Stevens v. SEI Invs. Co.,
2020 WL 996418 (E.D. Pa. Feb. 28, 2020) ..... *passim*

S*ylvester v. Cigna Corp.*,
401 F. Supp. 2d 147 (D. Me. 2005) 11

Tussey v. ABB, Inc.,
2017 WL 6343803 (W.D. Mo. Dec. 12, 2017) 14

Tussey v. ABB, Inc.,
2019 WL 3859763 (W.D. Mo. Aug. 16, 2019) 2, 11, 17, 18, 20

Waldbuesser v. Northrop Grumman Corp.,
2017 WL 9614818 (C.D. Cal. Oct. 24, 2017) 17

Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.,
396 F.3d 96 (2d Cir. 2005) 17

Wildman v. Am. Century Servs., LLC,
362 F. Supp. 3d 685 (W.D. Mo. 2019) 13

Rules, Statutes, Regulations

Fed. R. Civ. P. 23(h) 9

29 U.S.C. § 1106(b)(3) 3

29 U.S.C. § 1132(a)(3) 3

29 U.S.C. § 1132(g) 20

68 Fed. Reg. 75,632 (Dec. 31, 2003) 7

Other Authorities

Restatement (Third) of Trusts § 100 cmt. b(1) (2012) 14

Jacklyn Wille, *Deutsche Bank Can't Shake 401(k) Fee Lawsuit*, Bloomberg BNA (Oct. 14, 2016) 14

INTRODUCTION

In light of the Settlement they have achieved for the participants and beneficiaries of the Fidelity Retirement Savings Plan ("Plan"), Plaintiffs and Class Counsel respectfully petition the Court to approve the following disbursements: (1) attorneys' fees to Class Counsel in the amount of $9,002,127.67 (one-third of the $28.5 million settlement fund, net of expenses); (2) $1,378,437.13 in litigation costs and $115,302 in settlement administration expenses; and (3) service awards in the amount of $10,000 to each of the Named Plaintiffs as class representatives.

As discussed below, Class Counsel effectively pursued this complicated ERISA class action involving a multi-billion-dollar 401(k) plan and invested significant time and financial resources on behalf of the Settlement Class. Because of their efforts, Class Counsel have achieved a substantial Settlement that provides $28.5 million in monetary relief. In addition, Defendants[1] have agreed to prospective relief that will further benefit the class (i.e., fiduciary monitoring of Plan recordkeeping fees and monitoring of all Plan investment options other than investments available through the Plan's self-directed brokerage account).

To date, Class Counsel have received no payment for any of their efforts in this litigation, nor have they received reimbursement for any of the out-of-pocket costs that they have advanced. All compensation to Class Counsel is contingent upon the Court's approval of fees and costs as provided in the Settlement. Likewise, the class representatives have not received any compensation for the time they have invested in the litigation, the benefits they have provided to the Settlement Class, or the risks they undertook in bringing this action.

[1] The Defendants are FMR LLC, the FMR LLC Funded Benefits Investment Committee ("FBIC"), the FMR LLC Retirement Committee ("Retirement Committee"), Fidelity Management & Research Company, FMR Co., Inc., and Fidelity Investments Institutional Operations Company, Inc. (collectively "Fidelity" or "Defendants").

In similar cases, "courts have found that a one-third fee is consistent with the market rate in a complex ERISA 401(k) fee case such as this[.]" *Kruger v. Novant Health, Inc.*, 2016 WL 6769066, at *2 (M.D.N.C. Sept. 29, 2016) (quotation omitted);[2] *see also, e.g.*, *Stevens v. SEI Invs. Co.*, 2020 WL 996418, at *14 (E.D. Pa. Feb. 28, 2020) (approving one-third fee to Nichols Kaster, PLLP in ERISA class action); *Sims v. BB&T Corp.*, 2019 WL 1993519, at *2 (M.D.N.C. May 6, 2019) (same); *In re M&T Bank Corp. ERISA Litig.*, No. 1:16-cv-375, ECF No. 190 at ¶ 1 (W.D.N.Y. Sept. 3, 2020) (same); *Clark v. Oasis Outsourcing Holdings Inc.*, No. 18-81101, ECF No. 23 at ¶ 1 (S.D. Fla. Dec. 20, 2018) (same); *Andrus v. New York Life Ins. Co.*, No. 16-05698, ECF No. 83 at ¶ 1 (S.D.N.Y. June 15, 2017) (same); *Larson v. Allina Health System*, No. 0:17-cv-03835, ECF No. 132 at ¶¶ 4-5 (D. Minn. May 22, 2020) (same); *Brotherston v. Putnam Invs. LLC*, No. 1:15-cv-13825, ECF No. 232 (Sept. 18, 2020) ("Attorney's fees are awarded 1/3 of the net."). Likewise, the proposed $10,000 service awards are within the bounds of what has been approved in other cases and are appropriate in light of the class representatives' significant contributions. *See e.g.*, *Stevens*, 2020 WL 996418, at *14 (approving $10,000 service award to named plaintiff in ERISA action); *In re M&T Bank Corp. ERISA Litig.*, No. 1:16-cv-00375, ECF No. 190 at ¶ 4 (same); *Andrus*, No. 16-05698, ECF No. 83 at ¶ 4 (same); *see also Sims*, 2019 WL 1993519, at *4 (approving $20,000 service award to each named plaintiff); *Tussey*, 2019 WL 3859763, at *6 (approving $25,000 service award to each named plaintiff); *Novant Health*, 2016 WL 6769066, at *6 (same); *Ameriprise*, 2015 WL 4246879, at *3 (same). Finally, the requested litigation costs are reasonable and typical for a case such as this. Accordingly, Plaintiffs and Class Counsel respectfully request that the Court approve the requested distributions.

[2] *See also Krueger v. Ameriprise Fin., Inc.*, 2015 WL 4246879, at *2 (D. Minn. July 13, 2015) ("In such cases, courts have consistently awarded one-third contingent fees."); *Tussey v. ABB, Inc.*, 2019 WL 3859763, at *4 (W.D. Mo. Aug. 16, 2019) ("Class Counsel's requested one-third fee is common in these cases.").

BACKGROUND

I. PROCEDURAL HISTORY

A. Pleadings

Plaintiffs filed this action on October 10, 2018, alleging that FMR LLC and related entities breached their fiduciary duties of prudence and loyalty under ERISA with respect to the Plan's investment lineup and by failing to secure revenue sharing rebates for Plan participants. *See ECF No. 1*.[3] On November 9, 2018, Plaintiffs filed an Amended Complaint that added a prohibited transaction claim under 29 U.S.C. § 1106(b)(3) and certain supporting allegations. *ECF No. 31*. On January 10, 2019, Plaintiffs filed a Second Amended Complaint ("SAC"), *ECF No. 37*, which: (1) included a new allegation that "the Plan Fiduciaries failed to prudently monitor and control the Plan's recordkeeping expenses," *id.* ¶ *12*; (2) alleged that the "Revenue Credits" that Fidelity makes available to current employees under the Plan are not made available to former employees, *id.* ¶ *15*; (3) revised the class definition to include only former employees who participated in the Plan, *id.* ¶ *137*; and (4) added the FBIC as a defendant.[4] On March 25, 2019, Plaintiffs filed a Third Amended Complaint which added Sheryl Arndt as a class representative. *ECF No. 56.* Finally, on May 2, 2019, Plaintiffs filed a Fourth Amended Complaint ("FAC") that removed certain claims described in footnote 4 above.[5] The FAC remains the operative complaint, and Defendants filed an Answer to the FAC on May 16, 2019. *ECF No. 88*.

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

[4] The SAC also added a claim for breach of the duty of impartiality (Count II), a disclosure claim (Count III), and a claim regarding the management of the Portfolio Advisory Service at Work ("PAS-W") managed account program (Count IV). In addition, the SAC also added Strategic Advisors, Inc. (the managed account provider of the PAS-W program) as a defendant.

[5] Specifically, Plaintiffs removed the disclosure claim and the claim related to the management of the PAS-W program, and removed Strategic Advisers, Inc. as a defendant. *ECF No. 77*.

B. Court Proceedings

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

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

On April 17, 2020, the Parties filed a Joint Stipulation in which Defendants voluntarily withdrew and dismissed their statute of limitations defense with respect to all remaining claims, and Plaintiffs waived their right to appeal the Court's Case Stated Order as to their prohibited transaction claim. *ECF No. 226*. For the remaining issues of causation and loss on the monitoring claims, the Court set a trial date of July 6, 2020. *ECF No. 232*. Following the Court's Case Stated Order, the Parties engaged in direct negotiations and reached a settlement-in-principle in June

2020. *See ECF No. 240.* The terms of the Settlement are memorialized in the Settlement Agreement that has been preliminarily approved by the Court. *See ECF Nos. 243-01, 250.*

II. SETTLEMENT TERMS AND PRELIMINARY APPROVAL

Under the Settlement, Fidelity will cause its insurers to contribute a Gross Settlement Amount of $28.5 million to a common settlement fund (the "Settlement Fund"). *Settlement Agreement (ECF No. 243-01*) ¶¶ *1.31, 4.1, 4.2.* In addition to this monetary relief, the Settlement also provides that the following procedures shall apply to the management of the Plan on a prospective basis beginning no later than 30 days after the Settlement Effective Date:

i. One or more Plan fiduciaries will undertake to monitor Plan recordkeeping fees; and

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

Settlement Agreement ¶ *6.1.*

Plaintiffs filed a motion seeking preliminary approval of the Settlement on July 2, 2020. *ECF No. 242.* The Court granted that motion on July 9, 2020. *ECF No. 250.* Plaintiffs are filing the present motion 14 days in advance of the deadline for objections, pursuant the Court's order preliminarily approving the Settlement. *Id.* ¶ *6.* To date, no objections to the Settlement have been received. *Declaration of Kai Richter in Support of Motion for Attorneys' Fees and Costs, and Class Representative Service Awards ("Second Richter Decl.")* ¶ *36.*

III. WORK OF CLASS COUNSEL

Class Counsel have expended significant time and effort prosecuting this action and achieving the Settlement on behalf of the Class. To date, the total amount of time invested by Class Counsel is approximately 7,862 hours, and additional work will be required going forward to

implement the Settlement. *Second Richter Decl.* ¶¶ *19, 24*. This work is detailed in the accompanying declaration from Class Counsel and is briefly summarized below.

A. Work Conducted to Date

Prior to filing this action, Class Counsel conducted a thorough investigation of the claims that were asserted. *Second Richter Decl.* ¶ *18*. Thereafter, Class Counsel vigorously prosecuted the action on behalf of the class. Among other things, Class Counsel: (1) drafted the initial class action Complaint, First Amended Complaint, Second Amended Complaint, Third Amended Complaint, and Fourth Amended Complaint; (2) drafted a comprehensive set of discovery requests; (3) repeatedly met and conferred with Defendants during the course of discovery; (4) filed a motion to compel discovery; (5) reviewed over 151,000 pages of documents and extensive class data produced by Defendants; (6) produced over 32,000 pages of documents; (7) responded to interrogatories; (8) deposed nine fact witnesses; (9) defended the depositions of all four Named Plaintiffs; (10) engaged four experts and reviewed their expert reports; (11) defended the depositions of Plaintiffs' experts; (12) deposed Defendants' three expert witnesses; (13) extensively briefed and argued a request for a jury; (14) filed a joint stipulation for class certification; (15) filed a motion for partial summary judgment and responded to Defendants' motion for summary judgment; (16) appeared for an in-person hearing on the motions for summary judgment; (17) appeared for an in-person case stated hearing; (18) filed a *Daubert* motion; (19) responded to Defendants' *Daubert* motions; (20) responded to Defendants' motion to bifurcate the trial; (21) prepared drafts of numerous pre-trial filings, including a Joint Preliminary Pretrial Memorandum, witness and exhibit lists, and a pre-trial brief (among other documents); (22) engaged in direct settlement negotiations following the Court's Case Stated Order; and (23) consulted with the Class Representatives throughout the course of the case. *Id.*

In addition, Class Counsel have undertaken considerable work in connection with the Settlement and settlement administration. This has included (1) assisting in the drafting the Settlement Agreement and exhibits thereto; (2) preparing Plaintiffs' Preliminary Approval Motion papers; (3) reviewing the bid received from the Settlement Administrator (Analytics Consulting); (4) reviewing the final drafts of the Settlement Notice and Rollover Form prepared by the Settlement Administrator, and ensuring that they were timely mailed; (5) working with the Settlement Administrator to create a settlement website and telephone support line for Class Members; (6) communicating with Class Members; and (7) preparing the present motion. *Id.*

B. Remaining Work to Be Performed

Class Counsel's work on this matter remains ongoing. Prior to the Fairness Hearing, Class Counsel will draft Plaintiffs' motion for final approval of the Settlement and respond to any objections. *Id.* ¶ *24*. Class Counsel also will communicate with the Independent Fiduciary and provide it with all necessary information in connection with its review of the proposed release on behalf of the Plan.[6] *Id.* Class Counsel will then attend the Fairness Hearing, and if final approval is granted, supervise the distribution of payments to Class Members. *Id.* In addition, Class Counsel will respond to questions from Class Members and take other actions necessary to support the Settlement until the conclusion of the Settlement Period. *Id.*

IV. WORK OF CLASS REPRESENTATIVES

The Class Representatives also have worked to advance the interests of the Class. Among other things, the Class Representatives: (1) reviewed the allegations in the Complaints; (2) provided information to counsel in connection with the lawsuit; (3) produced documents in

[6] A release on behalf of a plan is subject to independent fiduciary review under Prohibited Transaction Class Exemption 2003-39, 68 Fed. Reg. 75,632, as amended (Dec. 31, 2003). This independent review is also required by Paragraph 2.2 of the Settlement Agreement.

response to Defendants' discovery requests; (4) reviewed and signed answers to interrogatories; (5) appeared for their depositions and prepared for their depositions in advance; (6) communicated with counsel regarding the litigation and Settlement; and (7) reviewed the Settlement Agreement in its entirety. *Id.* ¶ *34*; *see also ECF Nos. 244, 245, 246, 247* (Plaintiff declarations).

V. WORK OF THE SETTLEMENT ADMINISTRATOR, ESCROW AGENT, AND INDEPENDENT FIDUCIARY

In order to be administered and effectuated, the Settlement also requires time, resources, and expertise from several non-parties. *See Settlement Agreement* ¶¶ *1.25, 1.32, 1.54*.

The Settlement Administrator (Analytics Consulting LLC) has reviewed the class member information supplied by Defendants (*id.* ¶ 3.2(a)); prepared and mailed the Settlement Notices (*id.* ¶ 3.2(b)); searched for valid addresses for any Settlement Class Members whose Notices were returned as undeliverable (*id.* ¶ 3.2(e)); created and hosted the Settlement Website (*id.* ¶ 3.3(a)); established a telephone support line for Class Members (*id.* ¶ 3.3(c)); and distributed the notices required by the Class Action Fairness Act (*id.* ¶ 3.1). In addition, Analytics will review the Rollover Forms submitted by Former Participant Class Members and coordinate the processing of payments to Class Members upon final approval of the Settlement. *Id.* ¶¶ *3.4, 5.1-5.5.*

The Escrow Agent (Alerus Financial) will hold and invest the monies in the Qualified Settlement Fund while approval of the Settlement is pending. *Id.* ¶¶ *4.1, 4.5, 4.8*. Upon final approval of the Settlement, Alerus will release these funds and also execute the investment and tax qualification mandates in the Settlement Agreement. *Id.* ¶¶ *4.4, 4.6, 4.9*.

Finally, an Independent Fiduciary will review the Settlement, and independently determine whether it is in the best interest of the Plan to release the claims against Defendants in exchange for the relief provided. *Id.* ¶ *2.2*. This independent fiduciary review is required by DOL regulations and Paragraph 2.2 of the Settlement Agreement. *See supra* at n.6.

VI. ATTORNEYS' FEES, EXPENSES, AND SERVICE AWARDS SOUGHT

In consideration of the work summarized above and associated expenses, Article 7 of the Settlement Agreement provides that Plaintiffs may seek (1) reasonable attorneys' fees of no more than one-third of the Gross Settlement Amount; (2) litigation costs and administrative expenses; and (3) service awards of up to $10,000 for each Class Representative. *Settlement Agreement* ¶¶ *7.1-7.2*. Accordingly, Plaintiffs seek the following amounts in connection with this motion:

- Attorneys' fees: $9,002,127.67 (one-third of the settlement amount, net of expenses)
- Litigation Costs: $1,378,437.13
- Settlement Administration Expenses: $115,302 (itemized below)
    - Settlement Administrator: $97,802
    - Escrow Agent: $2,500
    - Independent Fiduciary: $15,000
- Class Representative service awards: $40,000 total ($10,000 each)

ARGUMENT

I. LEGAL STANDARD

When counsel obtain a settlement for a class, courts "may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement." Fed. R. Civ. P. 23(h). Here, the requested distributions are authorized by applicable law as well as the parties' Settlement Agreement (*see* Background at Section VI).

The Supreme Court "has recognized consistently that a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). Likewise, "reasonable expenses of litigation" may be recovered from a common fund, *Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375, 391-92 (1970),[7] as well as administrative expenses of settlement, *see In re Prudential Ins. Co. of Am. SGLI/VGLI Contract Litig.*, 2014 WL 6968424, at

[7] *See also In re Fidelity*, 167 F.3d 735, 737 (1st Cir. 1999) (When a common fund is created "for the benefit of a class" then parties may seek from the fund "expenses, reasonable in amount, that were necessary to bring the action to a climax.").

*7 (D. Mass. Dec. 9, 2014). Finally, class representative service awards "serve an important function in promoting class action settlements" and may be awarded to compensate efforts undertaken on behalf of class members. *In re Lupron Mktg. & Sales Practices Litig.*, 2005 WL 2006833, at *7 (D. Mass. Aug. 17, 2005). In summary, the requested distributions are customary in a class action such as this, and should be approved for the reasons set forth below.

II. THE COURT SHOULD GRANT CLASS COUNSEL'S REQUEST FOR ATTORNEYS' FEES

Courts typically employ either the "percentage of [the] fund" method or the "lodestar" method to compute fees, with the First Circuit preferring the former. *Bacchi v. Mass. Mut. Life Ins. Co.*, 2017 WL 5177610, at *4 (D. Mass. Nov. 8, 2017), *appeal dismissed*, 2018 WL 2337712 (1st Cir. Mar. 29, 2018) ("The First Circuit has recognized that the 'prevailing praxis' for such determination is the 'percentage of fund' approach[.]") (citing *In re Thirteen Appeals Arising Out of San Juan Dupont Plaza Hotel Fire Litig.*, 56 F. 3d 295, 305 (1st Cir. 1995)). Under either method, the Court's primary concern is whether the requested fee is reasonable. *In re Lupron*, 2005 WL 2006833, at *2 (citing *Boeing Co*, 444 U.S. at 478).

Although the First Circuit has not endorsed a particular set of factors for assessing the reasonableness of a fee request, district courts in the circuit generally analyze factors such as: (1) awards in similar cases; (2) the size of the fund and benefit to class members; (3) the risk that the litigation would be unsuccessful; (4) the skill and experience of counsel; (5) the time and labor expended by counsel; (6) any objections to the settlement; and (7) applicable public policy considerations. *See In re Relafen Antitrust Litigation*, 231 F.R.D. 52, 79 (D. Mass 2005); *In re Lupron*, 2005 WL 2006833, at *3. Each of these factors support approval of the requested fee.

A. The Requested Fee Is Reasonable in Comparison to Awards in Similar Cases

The requested fee of one-third of the settlement is consistent with awards in similar cases. As the court stated in *Ameriprise* (another case involving proprietary funds in a retirement plan):

> [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 (emphasis added); *see also Novant Health*, 2016 WL 6769066, at *2 ("[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[.]") (quotation omitted); *Tussey*, 2019 WL 3859763, at *4 ("Class Counsel's requested one-third fee is common in these cases.").

Consistent with this established benchmark, Nichols Kaster, PLLP ("Nichols Kaster") has received one-third fee awards in several other ERISA cases, including cases involving proprietary funds in a 401(k) plan. *See Stevens*, 2020 WL 996418, at *14 (approving one-third fee to Nichols Kaster in ERISA case involving proprietary funds); *Sims*, 2019 WL 1993519, at *2 (same); *In re M&T Bank Corp. ERISA Litig.*, No. 1:16-cv-375, ECF No. 190 at ¶ 1 (same); *Andrus*, No. 1:16-cv-05698, ECF No. 83 (same); *see also Clark*, No. 18-81101, ECF No. 23 ¶ 1 (approving one-third fee to Nichols Kaster); *Larson*, No. 0:17-cv-03835, ECF No. 132 at ¶¶ 4-5 (same).

Other class action cases in this district and within the First Circuit also support a one-third fee. *See, e.g.*, *In re Relafen Antitrust Litigation*, 231 F.R.D. at 82 (awarding one-third of $67 million settlement as "well within" the applicable range of percentage awards).[8] Indeed, this Court previously approved a one-third fee in another ERISA case in this District involving proprietary funds. *See Price v. Eaton Vance Corp.*, No. 18-12098, ECF Nos. 62, 63 (D. Mass. Nov. 25, 2019) (approving one-third fee net of administrative expenses). Further, this Court also indicated that it

[8] *See also Lauture v. A.C. Moore Arts & Crafts, Inc*., 2017 WL 5900058, at *1 (D. Mass. Nov. 28, 2017) (awarding one-third fee); *Roberts v. TJX Companies, Inc.*, 2016 WL 8677312, at *13-14 (D. Mass. Sept. 30, 2016); *Lapan v. Dick's Sporting Goods*, No. 13-cv-11390, ECF No. 220 ¶ 17 (D. Mass. Apr. 19, 2016); *In re Stocker Yale, Inc. Sec. Litig*., 2007 WL 4589772, at *6 (D.N.H. Dec. 18, 2007); S*ylvester v. Cigna Corp.*, 401 F. Supp. 2d 147, 151 (D. Me. 2005).

would approve a one-third fee request in a similar suit against Putnam Investments. *See Brotherston v. Putnam Invs. LLC*, No. 1:15-cv-13825, ECF No. 232 (D. Mass. Sept. 18, 2020) (stating that "[a]ttorney's fees are awarded 1/3 of the net").[9] Consistent with the Court's request in *Putnam*, Class Counsel are only seeking one-third of the net amount after deduction of expenses, even though most cases have awarded one-third of the gross settlement amount. Accordingly, the first factor (awards in similar cases) weighs strongly in favor of approval of the requested fee.

B. The Benefit Obtained for Class Members is Substantial

The results achieved in this case also support the requested fee. The $28.5 million settlement amount compares favorably to other ERISA settlements involving 401(k) plans, *see First Richter Decl.* ¶ *6*, and represents approximately 29.2% of the total estimated damages, *see id.* ¶ *7*.[10] By comparison, the recovery in *Putnam* was 28% of estimated damages,[11] and the recovery in *Eaton Vance* was 23%.[12] *See also Sims*, 2019 WL 1995314, at *5 (approving $24 million ERISA 401(k) settlement that represented 19% of estimated damages); *Johnson v. Fujitsu Tech. & Business of America, Inc.*, 2018 WL 2183253, at *6-7 (N.D. Cal. May 11, 2018) (approving $14 million ERISA 401(k) settlement that represented "just under 10% of the Plaintiffs' most aggressive 'all in' measure of damages"); *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, the settlement provides for important prospective relief, including monitoring of the Plan's recordkeeping expenses and investment options (other than any investments available

[9] A full written order has not yet been entered in *Putnam*.
[10] The recovery percentage is even higher after accounting for the overlap in alleged damages associated with the lack of monitoring of recordkeeping fees and certain Fidelity funds.
[11] *See Putnam*, No. 1:15-cv-13825, ECF No. 214 at 12.
[12] *See Eaton Vance*, No. 18-12098, ECF No. 32 at 12.

through the Plan's self-directed brokerage account). *See supra* at 5. These non-monetary benefits directly address the alleged deficiencies in Defendants' fiduciary processes, and further support approval of the requested fees. *See Novant Health, Inc.*, 2016 WL 6769066, at *3 ("Considering the non-monetary benefits and relief created by counsel's efforts is important because it encourages attorneys to obtain meaningful affirmative relief."); *Bezdek v. Vibram USA Inc.*, 79 F. Supp. 3d 324, 347 (D. Mass.), *aff'd*, 809 F.3d 78 (1st Cir. 2015) ("I find the injunctive relief to be a valuable contribution to this settlement agreement."); *Nilsen v. York Cty.*, 400 F. Supp. 2d 266, 284 (D. Me. 2005) (injunctive relief benefitting class members supported fee).

C. ERISA Litigation is Complex and Involves Significant Risks

The results that were achieved are especially impressive in light of the risks involved. Litigation inherently involves "a significant element of risk." *In re Lupron Mktg. & Sales Practices Litig.*, 228 F.R.D. 75, 97 (D. Mass. 2005). These risks are only amplified in complex ERISA cases such as this. *See Ameriprise*, 2015 WL 4246879, at *1 ("ERISA is a complex field that involves difficult and novel legal theories and often leads to lengthy litigation."); *Abbott*, 2015 WL 4398475, at *2 (noting that ERSIA 401(k) cases are "particularly complex"); *In re Marsh ERISA Litig.*, 265 F.R.D. 128, 138 (S.D.N.Y. 2010) ("Many courts have recognized the complexity of ERISA breach of fiduciary duty [actions].").

These risks are illustrated by two recent trial judgments in favor of defendants in ERISA cases involving defined contribution plans. *See Wildman v. Am. Century Servs., LLC*, 362 F. Supp. 3d 685, 711-12 (W.D. Mo. 2019); *Sacerdote v. New York Univ.*, 328 F. Supp. 3d 273, 317 (S.D.N.Y. 2018). Moreover, in the *Putnam* case that this Court recently tried, the defendants also were initially the prevailing party before the case was remanded for further proceedings on appeal. The significant risks associated with this action, which Class Counsel handled on a strictly

contingent fee basis, further support the reasonableness of the fee request. *See In re Lupron*, 2005 WL 2006833, at *4.

D. Class Counsel Are Skilled and Provided High Quality Representation

Handling a large and complex ERISA case involving a retirement plan requires counsel with specialized skills. *See Savani v. URS Prof. Solutions LLC*, 121 F. Supp. 3d 564, 573 (D.S.C. 2015) ("Very few plaintiffs' firms possess the skill set or requisite knowledge base to litigate" "class-wide, statutorily-based claims for pension benefits[.]"). Counsel must possess "expertise regarding industry practices" and also be able to analyze pertinent records and data. *Novant Health*, 2016 WL 6769066, at *3. In addition, there are "difficult" questions regarding the appropriate measure of "recovery from a trustee for imprudent or otherwise improper investments." Restatement (Third) of Trusts § 100 cmt. b(1) (2012); *see also Tussey v. ABB, Inc.*, 2017 WL 6343803, at *1-3 (W.D. Mo. Dec. 12, 2017) (summarizing more than five years of post-trial briefing, including appeals, on the measure of damages in a 401(k) case, and declaring the need for further submissions from the parties).

Courts have recognized Class Counsel's experience and qualifications in this difficult area. *See, e.g., Moreno v. Deutsche Bank Americas Holding Corp.*, 2017 WL 3868803, at 11 (S.D.N.Y Sept. 5, 2017) ("Plaintiffs' counsel are experienced litigators who serve as class counsel in ERISA actions involving defined-contribution plans[.]"). Indeed, a recent Bloomberg BNA article stated that "Nichols Kaster has been the driving force behind [the] flurry of litigation over proprietary mutual funds." Jacklyn Wille, *Deutsche Bank Can't Shake 401(k) Fee Lawsuit*, Bloomberg BNA (Oct. 14, 2016).[13] As set forth in the accompanying Declaration, Class Counsel have won favorable rulings on class certification and dispositive motions in several ERISA cases, recently tried two

[13] Available at https://news.bloomberglaw.com/employee-benefits/deutsche-bank-cant-shake-401-k-fee-lawsuit?context=article-related (last visited November 10, 2020).

other ERISA class actions, and have negotiated class action settlements that have received court approval in numerous cases in addition to this case. *Second Richter Decl.* ¶¶ *7-8*. Class Counsel's experience in similar litigation further weighs in favor of the requested fee. *See Hill v. State St. Corp.*, 2015 WL 127728, at *17 (D. Mass. Jan. 8, 2015); *Bezdek*, 79 F. Supp. 3d at 350.

E. Class Counsel Invested Significant Time and Effort to the Case

There is no question that Class Counsel devoted significant time and effort to this case. As noted above, Plaintiffs litigated this case vigorously, pursuing the case up to one month before trial was set to begin. This Court and other courts have approved one-third fee awards in cases at far earlier stages of litigation. *See, e.g.*, *Eaton Vance*, No. 18-12098, ECF Nos. 62, 63 (approving one-third fee net of administrative expenses in action that was resolved while motion to dismiss was pending); *Novant Health*, 2016 WL 6769066, at *6 (approving one-third fee of $32 million settlement entered into while motion to dismiss was pending); *Stevens*, 2020 WL 996418, at *14 (approving one-third fee to Nichols Kaster where settlement was reached after parties agreed to early mediation during initial Rule 16 conference); *Conant v. FMC Corp.*, No. 2:19-cv-00296, ECF No. 42 (D. Me. Sept. 1, 2020) (approving one-third fee in an action that was resolved during discovery). Class Counsel's more extensive efforts in this case amply support the reasonableness of the fee.

As a result of these extensive efforts, Class Counsel's lodestar as of the date of this motion amounts to more than $4.3 million. *Second Richter Decl.* ¶ *22*. This further supports Class Counsel's fee request, as it is typical for courts to approve fees in excess of the lodestar to compensate counsel for the risks that they assume in handling the action on a contingent fee basis. *See City of Detroit v. Grinnell*, 495 F.2d 448, 470 (2d Cir. 1974) ("No one expects a lawyer whose compensation is contingent upon his success to charge, when successful, as little as he would

charge a client who in advance had agreed to pay for his services, regardless of success."). In general, courts consider multipliers of two and more reasonable in common fund cases. *Roberts*, 2016 WL 8677312, at *12; *see also Steiner v. Am. B'casting Co., Inc.*, 248 Fed. Appx. 780, 783 (9th Cir. 2007) (multiplier of 6.85 "falls well within the range of multipliers that courts have allowed"); The requested multiplier here (2.09) falls at the low end of this range. *Cf. Stevens*, 2020 WL 996418, at *13 (noting that approved one-third fee to Nichols Kaster represented a multiplier of approximately 6.16); *Conley v. Sears Roebuck & Co.*, 222 B.R. 181, 182 (D. Mass. 1998) (approving $7.5 million in attorneys' fees at a lodestar multiplier of 8.9); *New England Carpenters Health Benefits Fund v. First Databank, Inc.*, 2009 WL 2408560, at *2 (D. Mass. Aug. 3, 2009) (finding a lodestar multiplier of 8.3 reasonable).[14]

F. There Have Been No Objections to the Settlement or the Requested Fees

Notably, there have been no objections to the Settlement or the requested attorneys' fees as of the date of this motion. The Settlement Notice that the Court approved explicitly disclosed that Class Counsel and the Class Representatives would seek a one-third fee. *See ECF No. 243-01 at 35* ("Class Counsel will [also] apply to the Court for an award of reasonable attorneys' fees (not

[14] Further, the hourly rates used to calculate Class Counsel's lodestar are "reasonable and are comparable to fees that have been recently approved in [other] ERISA class actions." *Sims*, 2019 WL 1993519, at *3 (addressing and approving Nichols Kaster's billing rates). Nichols Kaster's reported billing rates for ERISA actions range from $625 to $875 per hour for attorneys with more than 10 years of experience, $425 to $575 per hour for attorneys with 10 years or less experience, and $250 per hour for paralegals and clerks. *Second Richter Decl. ¶ 20.* These rates are consistent with (and slightly less than) the rates approved for other experienced ERISA litigators. *See, e.g.*, *Novant Health*, 2016 WL 6769066, at *4 (adopting rates of $460 to $998 per hour based on years of experience); *Spano v. Boeing Co.*, 2016 WL 3791123, at *3 (S.D. Ill. Mar. 31, 2016) (same); *Abbott*, 2015 WL 4398475, at *3 (adopting rates of $447 to $974 per hour based on years of experience); *see also Second Richter Decl., Ex. 3* (Valeo Report excerpts showing that among ERISA practice groups within the top 200 law firms, the 2018 hourly rate range for senior partners was $320-$1,363 (with an average of $835), for partners was $296-1,202 (with an average of $751), and for senior associates was $238-$938 (with an average of $580)). Moreover, the hours expended were reasonable given the difficult and complex nature of the action. Other firms with less experience would not have been able to litigate the case nearly as efficiently.

to exceed one-third of the settlement fund), plus their costs and expenses."). In response, no class member out of 41,281 who were sent a notice has lodged an objection. *See Richter Decl.* ¶ *36.* This further demonstrates the fairness of the Settlement and the reasonableness of the requested fees. *See Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 118 (2d Cir. 2005) (finding that "the absence of substantial opposition is indicative of class approval"); *Roberts*, 2016 WL 8677312, at *11 (approving one-third fee and noting that the "Court has considered that no class members have objected to the Settlement generally, or to the attorneys' fee award in particular"); *Tussey*, 2019 WL 3859763, at *5 (approving one-third fee, noting that "no class member filed an objection to any portion of the Settlement or Class Counsel's request for attorneys' fees, the reimbursement of expenses, and compensation awards to the Class Representatives."); *Waldbuesser v. Northrop Grumman Corp.*, 2017 WL 9614818, at *5 (C.D. Cal. Oct. 24, 2017) ("[T]he Court concludes that the lack of significant objections to the requested fees justifies an award of one-third of the settlement fund.").

G. Public Policy Supports the Requested Fee Award

Finally, public policy considerations support the requested fee. There is a "significant" public interest achieved by lawyers bringing class actions benefitting a large group of people that would not otherwise pursue their claims individually. *In re Lupron*, 2005 WL 2006833, at *6. These public policy considerations are particularly compelling in the ERISA context for two reasons. First, relatively few counsel are willing and able to pursue ERISA class actions because of their complexity and the high costs associated with experts (which counsel must advance). *See Bacchi*, 2017 WL 5177610, at *5 (public interest supports fee award where litigation is complex and counsel are experienced). Second, "Congress passed ERISA to promote the important goals of protecting and preserving the retirement savings of American workers." *In re Marsh*, 265 F.R.D. at 149-50. By prosecuting the present action, Class Counsel helped achieve those goals.

III. THE COURT SHOULD APPROVE THE REQUESTED COSTS AND EXPENSES

In addition to awarding the requested fees, the Court should approve the requested litigation costs and administrative expenses.

A. Litigation Costs

It is well established that "[l]awyers who recover a common fund for a class are entitled to reimbursement of litigation expenses that were reasonably and necessarily incurred in connection with the litigation." *Hill*, 2015 WL 127728, at *20 (citing *In re Fidelity*, 167 F. 3d at 737). Such expenses commonly include expert fees, e-discovery costs, court reporters, out of town travel, copying costs, or other expenses that are typically billed to clients in an hourly billing arrangement. *Id*. at *21; *see also Sims*, 2019 WL 1993519, at *4 (approving expenses that "included the costs of hiring experts and consultants, taking depositions, travel, lodging and parking, copies and communication costs, and mediation and settlement costs, and professional fees, among others"). Those are precisely the type of expenses that are sought here. *See Second Richter Decl.* ¶ *26*. Moreover, the total amount of litigation costs being sought ($1,378,437.13) is reasonable in light of the advanced stage of the case (which was approximately one month away from trial) and the amounts awarded in similar cases. *See, e.g.*, *Tussey*, 2019 WL 3859763, at *6 (approving $2,256,805 in litigation expenses in an ERISA class action); *Spano*, 2016 WL 3791123, at *4 (approving $1,813,198.85 in litigation expenses in an ERISA class action); *Beesley v. Int'l Paper Co.*, 2014 WL 375432, at *4 (S.D. Ill. Jan. 31, 2014) (approving $1,563,046.39 in litigation expenses in an ERISA class action); *Kanawi v. Bechtel Corp.*, 2011 WL 782244, at *3 (N.D. Cal. Mar. 1, 2011) (approving $1,571,102.56 in litigation expenses in an ERISA class action).

B. Administrative Expenses

In addition, the Court should approve the requested expenses for settlement administration. *See In re Prudential*, 2014 WL 6968424, at *7 (awarding settlement notice and administration

expenses). The class notice and other administrative services provided by Analytics are essential to carrying out the settlement. The cost of providing those services ($97,802) is reasonable and amounts to less than $2.37 per class member. *Second Richter Decl.* ¶ 30. The Escrow Agent expense of $2,500 is also reasonable and amounts to less than 0.01% of the settlement fund. *Id.* ¶ *31*. Finally, review of the Settlement by the Independent Fiduciary is required by DOL regulations, and is deemed to be a "critically important" benefit to plan participants. *See In re Marsh ERISA Litig.*, 265 F.R.D. at 139. All of these expenses are routinely approved in other ERISA cases. *See, e.g.*, *Stevens*, 2020 WL 996418, at *14 (approving expenses for settlement administrator, escrow agent, and independent fiduciary); *In re M&T Bank Corp. ERISA Litig.*, No. 1:16-cv-375, ECF No. 190 at ¶ 3 (same); *Clark*, No. 18-81101, ECF No. 23 at ¶ 2 (same); *Andrus*, No. 16-05698, ECF No. 83 at ¶ 3 (same).

IV. THE COURT SHOULD APPROVE THE REQUESTED SERVICE AWARDS

Finally, this Court also should approve the requested service awards to the Class Representatives. "Courts routinely approve incentive awards to compensate named plaintiffs for the services they provided and the risks they incurred during the course of the class action litigation." *In re Lupron*, 2005 WL 2006833, at *7 (quotation omitted).

The awards sought in this case are fully consistent with these recognized rationales. First, the Class Representatives invested significant time pursuing the case. As noted above, they (1) reviewed the allegations in the complaints that were filed with the Court; (2) provided information to counsel in connection with the lawsuit; (3) produced documents in response to Defendants' discovery requests; (4) reviewed and signed answers to interrogatories; (5) appeared for their depositions and prepared for their depositions in advance; (6) communicated with counsel regarding the litigation and Settlement; and (7) reviewed the Settlement Agreement in its entirety. *Second Richter Decl.* ¶ *32; see also ECF Nos. 244, 245, 246, 247* (Plaintiffs' declarations).

Second, they assumed financial risks, *see* 29 U.S.C. § 1132(g) (providing that "the court may allow a reasonable attorney's fee and costs of action to either party"), as well as reputational risks by suing their former employer.[15]

The requested awards of $10,000 per Class Representative are consistent with awards in similar cases. *See Stevens*, 2020 WL 996418, at *14 (approving $10,000 service award to named plaintiff in ERISA action); *In re M&T Bank Corp. ERISA Litig.*, No. 1:16-cv-00375, ECF No. 190 at ¶ 4 (same); *Andrus*, No. 16-05698, ECF No. 83 at ¶ 4 (same); *see also Sims*, 2019 WL 1993519, at *4 (approving $20,000 service award to each plaintiff); *Tussey*, 2019 WL 3859763, at *6 (approving $25,000 service awards to named plaintiffs in ERISA action); *Novant Health*, 2016 WL 6769066, at *6 (same); *Ameriprise*, 2015 WL 4246879, at *3 (same); *Abbott*, 2015 WL 4398475, at *4 (same). Given that this case proceeded all the way up to a month before trial, there is no reason why the Class Representatives should not receive such an award here. Once again, the requested service awards were disclosed in the Settlement Notice that was approved by the Court,[16] and no class member (out of more than 41,000) has objected.

CONCLUSION

For the above reasons, Plaintiffs respectfully request that the Court approve the proposed distributions.

[15] Courts have noted that bringing a lawsuit against an employer relating management of a 401(k) plan entails risk that the plaintiff will be viewed unfavorably by future employers. *See Lockheed Martin*, 2015 WL 4398475, at *4.

[16] *See ECF No. 243-01 at 35* ("Subject to approval by the Court, Class Counsel has proposed that up to $10,000 may be paid to each of the Plaintiffs as the Class Representatives in recognition of the time and effort they expended on behalf of the Class.").

Respectfully Submitted,

Dated: December 8, 2020

NICHOLS KASTER, PLLP

s/Kai Richter
Kai Richter (admitted *pro hac vice*)
Paul J. Lukas (admitted *pro hac vice)*
James H. Kaster (admitted *pro hac vice*)
Brock J. Specht (admitted *pro hac vice*)
Carl F. Engstrom (admitted *pro hac vice*)
Mark E. Thomson (admitted *pro hac vice*)
Grace I. Chanin (admitted *pro hac vice*)
4700 IDS Center, 80 S. 8th Street
Minneapolis, Minnesota 55402
krichter@nka.com
lukas@nka.com
kaster@nka.com
bspecht@nka.com
cengstrom@nka.com
mthomson@nka.com
gchanin@nka.com

BLOCK & LEVITON LLP
Jason M. Leviton (BBO #678331)
Jacob A. Walker (BBO #688074)
260 Franklin Street, Suite 1860
Boston, Massachusetts 02110
(617) 398-5600
jason@blockesq.com
jacob@blockesq.com

ATTORNEYS FOR PLAINTIFFS AND THE CLASS

CERTIFICATE OF SERVICE

I hereby certify that on December 8, 2020, a true and correct copy of the foregoing was served by CM/ECF to the parties registered to the Court's CM/ECF system.

Dated: December 8, 2020

s/Kai Richter
Kai Richter