

**UNITED STATES DISTRICT COURT  
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

**DECLARATION OF KAI RICHTER  
IN SUPPORT OF PLAINTIFFS’  
MOTION FOR ATTORNEYS’ FEES  
AND COSTS, ADMINISTRATIVE  
EXPENSES, AND CLASS  
REPRESENTATIVE SERVICE  
AWARDS**

I, Kai Richter, hereby submit this Declaration in support of Plaintiffs’ Motion for Attorneys’ Fees and Costs, Administrative Expenses, and Class Representative Service Awards.

**Professional Overview**

1. I am a partner at Nichols Kaster, PLLP (“Nichols Kaster”), and I am one of the attorneys appointed by the Court to represent the Class in the above-captioned action.

2. I am currently licensed in good standing to practice law in the State of Minnesota, and also have been admitted to practice in several federal district courts and appellate courts across the country. A list of jurisdictions and courts in which I am admitted is set forth below:

Supreme Court of the United States
1st Circuit Court of Appeals
2nd Circuit Court of Appeals
3rd Circuit Court of Appeals
6th Circuit Court of Appeals
8th Circuit Court of Appeals
9th Circuit Court of Appeals
U.S.D.C. for the District of Minnesota
U.S.D.C. for the Eastern District of Michigan
U.S.D.C. Western District of New York
Minnesota Supreme Court

I am in good standing in every jurisdiction in which I have been admitted to practice.

3. I have been actively engaged in the practice of law since 1999, and have substantial class action experience and other complex litigation experience.

4. Since joining Nichols Kaster in April 2010, my practice has focused exclusively on class action cases. I have been appointed class counsel for litigation or settlement purposes in over two dozen class cases. In connection with those cases, I have personally negotiated class action settlements providing for more than \$300 million in available relief to class members nationwide.

5. The principal types of cases that I have handled at the firm are consumer class actions and ERISA class actions.

6. As a former leader of our firm's Consumer Class Action Team, I spearheaded class action litigation against several major financial institutions, including JPMorgan Chase, Bank of America, U.S. Bank, Wells Fargo, Citibank, GMAC Mortgage, RBS Citizens, and MidFirst Bank. For example, I successfully argued contested class certification motions in *Hofstetter v. Chase Home Finance, LLC*, 2011 WL 1225900 (N.D. Cal. Mar. 31, 2011) and *Ellsworth v. U.S. Bank, N.A.*, 2014 WL 2734953 (N.D. Cal. June 13, 2014), successfully argued before the First Circuit Court of Appeals in *Lass v. Bank of America, N.A.*, 695 F.3d 129 (1st Cir. 2012), and successfully argued and/or briefed dispositive motions in numerous other consumer class cases, including *Jackson v. Wells Fargo Bank, N.A.*, 2013 WL 5945732 (W.D. Pa. Nov. 7, 2013); *Leghorn v. Wells Fargo Bank, N.A.*, 950 F. Supp. 2d 1093 (N.D. Cal. 2013); *Casey v. Citibank, N.A.*, 915 F. Supp. 2d 255 (N.D.N.Y. 2013); *Berger v. Bank of America, N.A.*, 2013 WL 1164497 (D. Mass. Mar. 21, 2013); *Morris v. Wells Fargo Bank, N.A.*, 2012 WL 3929805 (W.D. Pa. Sept. 7, 2012); *Ulbrich v. GMAC Mortgage, LLC*, 2012 WL 3516499 (Aug. 15, 2012); *Walls v. JPMorgan Chase Bank, N.A.*, 2012 WL 3096660 (W.D. Ky. July 30, 2012); *Skansgaard v. Bank of America, N.A.*, 896 F.

Supp. 2d 944 (W.D. Wash. 2011); and *Wulf v. Bank of America, N.A.*, 798 F. Supp. 2d 586 (E.D. Pa. June 27, 2011).

7. I am currently co-leading our firm's ERISA Class Action Team. In addition to the present case, the firm's lawyers (including myself) have been appointed class counsel for litigation and/or settlement purposes in 20 other breach of fiduciary duty cases involving retirement plans, as set forth below:

- *Andrus v. NY Life Ins. Co.*, No. 1:16-cv-05698 (S.D.N.Y.);
- *Main v. American Airlines, Inc.*, No. 3:16-cv-01033 (N.D. Tex.);
- *Sims v. BB&T Corp.*, No. 1:15-cv-00732 (M.D.N.C.);
- *Stevens v. SEI Invs. Co.*, No. 2:18-cv-04205 (E.D. Pa.);
- *Urakhchin v. Allianz Asset Mgmt. of America, L.P.*, No. 8:15-cv-01614 (C.D. Cal.);
- *Johnson v. Fujitsu Tech. & Bus. of America, Inc.*, No. 5:15-cv-03698 (N.D. Cal.);
- *In re M&T Bank Corp. ERISA Litig.*, No. 1:16-cv-00375 (W.D.N.Y.);
- *Wildman v. American Century Servs., LLC*, No. 4:16-cv-00737 (W.D. Mo.);
- *Moreno v. Deutsche Bank Americas Holding Corp.*, No. 1:15-cv-09936 (S.D.N.Y.);
- *Clark v. Oasis Outsourcing Holdings Inc.*, No. 9:18-cv-81101 (S.D. Fla.);
- *Velazquez v. Massachusetts Financial Services Co.*, No. 1;17-cv-11249 (D. Mass.);
- *Beach v. JPMorgan Chase Bank, N.A.*, No. 1:17-cv-00563 (S.D.N.Y.);
- *Intravaia v. Nat'l Rural Electric Cooperative Assoc.*, No. 1:19-cv-00973 (E.D. Va.);
- *Larson v. Allina Heath System*, No. 17-cv-03835 (D. Minn.);
- *Brotherston v. Putnam Investments, LLC*, No. 1:15-cv-13825 (D. Mass.);
- *Karpik v. Huntington Bancshares Inc.*, No. 2:17-cv-1153 (S.D. Ohio);
- *Mass v. The Regents of the University of California*, No. RG17-879223 (Alameda County Super. Ct.);

- *Bhatia v. McKinsey & Co., Inc.*, No. 1:19-cv-01466 (S.D.N.Y.);
- *Reetz v. Lowe's Companies, Inc.*, No. 5:18-cv-00075 (W.D.N.C.); and
- *Toomey v. Demoulas Super Markets, Inc.*, No. 1:19-cv-11633 (D. Mass.).

8. Our firm took the *Putnam* and the *American Century* cases to trial in April 2017 and September 2018, respectively. We have received final court approval of settlements in *New York Life*, *American Airlines*, *BB&T*, *SEI*, *Allianz*, *Fujitsu*, *Deutsche Bank*, *Oasis Outsourcing*, *Massachusetts Financial Services*, *Allina*, and *M&T*, and also recently received preliminary court approval of settlements with the National Rural Electric Cooperative Association (“NRECA”), *Putnam*, *Huntington Bank*, *McKinsey & Co.*, and *Demoulas Super Markets*. We won contested class certification motions in *Putnam*, *BB&T*, *Allianz*, *American Century*, *Deutsche Bank*, *JPMorgan Chase*, and *University of California*. We also defeated motions to dismiss in several of these cases in whole or in part (*American Airlines*, *BB&T*, *Allianz*, *Fujitsu*, *M&T*, *American Century*, *Deutsche Bank*, *Massachusetts Financial Services*, *JPMorgan Chase*, *NRECA*, *Putnam*, *Huntington Bank*, *University of California*, *Lowe's*, and *Demoulas Super Markets*), as well as in *Morin v. Essentia Health*, 2017 WL 4083133 (D. Minn. Sept. 14, 2017), *report and recommendation affirmed*, 2017 WL 4876281 (D. Minn. Oct. 27, 2017), *Nelsen v. Principal Global Investors Trust Company*, 362 F. Supp. 3d 627 (S.D. Iowa 2019), *Davis v. Stadion Money Management*, 2020 WL 1248580 (D. Neb. March 16, 2020), *Falberg v. The Goldman Sachs Group*, 2020 WL 3893285 (S.D.N.Y. July 9, 2020), and *Baker v. John Hancock Life Ins. Co.*, No. 1:20-cv-10397, ECF No. 43 (D. Mass. July 23, 2020).

9. The firm is viewed as a leader in ERISA 401(k) cases. According to a recent Bloomberg BNA article, “Nichols Kaster has been the driving force” behind recent 401(k) self-dealing litigation. See Jacklyn Wille, *Deutsche Bank Can't Shake 401(k) Fee Lawsuit*, Bloomberg BNA (Oct. 17, 2016). Attorneys from Nichols Kaster have been interviewed by National Public

Radio (for the program “All Things Considered”), the Wall Street Journal, Bloomberg, Financial Times, Pensions & Investments, Investment News, Bankrate.com, and other trade publications in connection with their ERISA work. I also have spoken by invitation at several national conferences and seminars on ERISA litigation, including (1) two employee benefits programs sponsored by the American Law Institute (October 22, 2020 and October 24, 2019); (2) a webinar on “Fee Litigation” sponsored by the American Bar Association (November 12, 2019); (3) a Professional Liability Directors & Officers conference on a panel regarding “Plan Fee Litigation” (February 6, 2019); (4) an American Bankers Association Insurance Risk Management Conference on a panel concerning excessive fee ERISA class actions (February 5, 2019); (5) an American Law Institute webcast on Excessive Fee Litigation (November 28, 2018); (6) the American Law Institute’s tax-exempt and government plans education series (September 24, 2018), where I co-presented on “The Current State of Fee Litigation and Its Implications”; (7) the American Conference Institute’s National Forum on ERISA Litigation (on both March 1, 2017 and November 2, 2017), where I was a member of the “Fiduciary Investment Litigation Update” panel; and (8) the Retirement Advisor Council’s annual meeting (May 22, 2018), where I was a member of a panel on “The Moving Litigation Frontier”.

10. Prior to joining Nichols Kaster, I served as the Manager of the Complex Litigation Division of the Office of the Minnesota Attorney General. During my tenure there (from February 2008 to March 2010), I supervised and handled a large number of complex matters. For example, in June and September of 2009, I co-chaired a three-week trial involving claims for fraudulent sales of annuities and legal plans to over 1,200 Minnesota senior citizens, which ultimately resulted in a favorable judgment from the trial court. In addition, I handled a significant consumer

enforcement action against Sprint Nextel related to wrongfully imposed contracts and termination fees, which resulted in a comprehensive settlement in October of 2009.

11. I also had significant prior class action experience in private practice, including two multi-week class action trials: a statewide wage and hour class action against Wal-Mart Stores in Minnesota (tried in 2007) and a landmark class action against the University of Michigan Law School. *See Grutter v. Bollinger*, 539 U.S. 306 (2003).

12. I received my law degree from the University of Minnesota Law School in 1999, and my B.A. from Dartmouth College in 1995.

### **Law Firm Overview**

13. Nichols Kaster has been engaged in the practice of law for over 30 years, and is devoted to representing the interests of both consumers and employees. The firm has offices in Minneapolis and San Francisco, and currently employs 39 attorneys and a sizeable staff of paralegals, legal assistants, class action clerks, and information technology professionals. A copy of Nichols Kaster's law firm resume (which includes attorney biographies) is attached hereto as **Exhibit 1**.

14. Nichols Kaster has extensive class action and collective action experience. The firm has been appointed lead counsel or co-counsel on hundreds of class and collective actions, and has recovered over \$750 million for its clients.

15. Nichols Kaster was named one of the top 50 elite trial firms by National Law Journal in September 2014, and also has been ranked as a Best Law Firm by U.S. News and World Report. In addition, Nichols Kaster has received praise from numerous courts for its work.

16. The firm's lawyers have litigated dozens of cases through trial, and have managed discovery in cases involving millions of pages of documents. The firm is also well regarded for its

appellate work, and has been involved in two successful appeals before the United States Supreme Court, *Perez v. Mortgage Bankers Ass'n*, 135 S.Ct. 1199 (2015) and *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325 (2010).

**Work Performed by Class Counsel**

17. As a result of our firm's experience litigating ERISA cases and other class action cases, we were able to effectively handle this action and achieve a significant result for the Settlement Class.

18. Notwithstanding the efficiencies that we were able to gain based on our experience, Nichols Kaster has devoted a significant amount of time to this case. Among other things, we: (1) conducted a thorough investigation of the class-wide claims; (2) drafted a detailed Complaint (ECF No. 1) and subsequently drafted a First Amended Complaint (ECF No. 31), Second Amended Complaint (ECF No. 37), Third Amended Complaint (ECF No. 56), and the operative Fourth Amended Complaint (ECF No. 77); (3) drafted a comprehensive set of discovery requests; (4) repeatedly met and conferred with Defendants during the course of discovery; (5) filed a motion to compel discovery (ECF No. 46); (6) reviewed over 151,000 pages of documents and extensive class data produced by Defendants; (7) produced over 32,000 pages of documents; (8) responded to interrogatories; (9) deposed nine fact witnesses; (10) defended the depositions of all four Named Plaintiffs; (11) engaged four experts and reviewed their expert reports; (12) defended the depositions of Plaintiffs' experts; (13) deposed all three of Defendants' expert witnesses; (14) extensively briefed and argued a request for a jury; (15) filed a joint stipulation for class certification; (16) filed a motion for partial summary judgment and responded to Defendants' motion for summary judgment; (17) appeared for an in-person hearing on the motions for summary judgment; (18) appeared for an in-person case stated hearing; (19) filed a *Daubert* motion (ECF

No. 123); (20) responded to Defendants' *Daubert* motions (ECF Nos. 126, 129, 132); (21) 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; (23) assisted in drafting the Settlement Agreement and exhibits thereto; (24) prepared Plaintiffs' Preliminary Approval Motion papers; (25) reviewed the bid received from the settlement administrator (Analytics Consulting LLC); (26) reviewed the final drafts of the Settlement Notice and Rollover Form prepared by Analytics, and ensured that they were timely mailed by Analytics; (27) worked with Analytics to create a settlement website and telephone line for Class Members who wished to obtain additional information about the Settlement; (28) communicated with Class Members who contacted our office; (29) consulted with the Class Representatives throughout the course of the case; and (30) prepared the present motion and supporting papers. This work is further detailed in my Declaration in Support of Plaintiffs' Motion for Preliminary Approval of Class Action Settlement (ECF No. 243).

19. The work summarized above required the efforts of numerous attorneys and professional staff at Nichols Kaster. Attached hereto as **Exhibit 2** is a true and correct copy of Nichols Kaster's timekeeper summary in this action. As reflected by this summary, Nichols Kaster attorneys have expended 6,754.5 hours pursuing this matter through the date of this Declaration, and Nichols Kaster professional staff (including paralegals, law clerks, legal assistants, class action clerks, and information technology professionals) have expended an additional 1,081.2 hours, for a total of 7,835.7 hours by Nichols Kaster personnel. Our co-counsel from Block & Leviton, LLP invested an additional 26.3 hours, for a grand total of 7,862 hours invested by all Class Counsel.

We would be happy to provide detailed billing records if the Court deems them necessary or helpful.

20. Nichols Kaster's reported billing rates for ERISA actions such as this 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.

21. In setting these rates, our firm is cognizant of the rates approved in other ERISA class action cases (as set forth in our accompanying Memorandum of Law), as well as the rates charged by the defense bar in this field. Attached hereto as **Exhibit 3** are excerpts of a report (the "Valeo Report") 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).

22. All of the work of Class Counsel has been undertaken on a contingent basis. To date, Class Counsel have not been compensated for any of this work. Based on the hourly rates and work performed, the total lodestar for our firm amounts to \$4,301,573.00, and the total lodestar for all counsel amounts to \$4,319,335.50. *See* Exhibit 2.

23. In my professional opinion, and based on my personal knowledge of the work that was performed and the requirements of this case and similar cases, the time expended on this action by Class Counsel was reasonable and necessary.

24. After the date of this Declaration, we expect to perform additional work on behalf of the Settlement Class, including: (1) drafting Plaintiffs' motion for final approval of the Settlement; (2) communicating with the Independent Fiduciary engaged by Defendants as part of the independent review of the proposed release on behalf of the Plan (as called for by Prohibited

Transaction Exemption 2003-39 and Paragraph 2.2 of the Settlement Agreement); (3) preparing for and attending the final approval hearing; (4) if final approval is granted, supervising the Settlement Administrator and Escrow Agent to ensure proper and efficient distribution of payments to the Class Members; (5) responding to questions from Class Members; and (6) taking other actions necessary to support the Settlement until the conclusion of the Settlement Period. Based on my experience supporting and supervising similar settlements, I estimate that our firm will expend at least an additional 50 to 150 hours of professional time on this matter after the date of this Declaration.

### **Litigation Costs**

25. In connection with the action, Nichols Kaster advanced all costs of litigation. Because our law firm handled this action on a contingent basis, we have not yet received reimbursement for any of these expenses.

26. As of the date of this Declaration, Nichols Kaster has incurred \$1,377,062.08 in litigation-related costs in connection with this matter. These expenses are broken down below:

<b>Category</b>	<b>Cost</b>
Expert fees	\$1,241,587.83
Travel Expenses	\$66,390.49
Depositions/Trial Transcripts	\$43,750.96
Financial Data Charges	\$15,814.95
Postage, Shipping, Copies	\$2,537.58
Westlaw/PACER	\$6,776.79
Public records	\$106.40
Zoom fees	\$97.08
<b>TOTAL (Nichols Kaster only)</b>	<b>\$1,377,062.08</b>

In addition, our co-counsel has incurred \$1,375.05 in litigation costs, for a grand total of \$1,378,437.13 in litigation costs.

27. These expenses do **not** include expenses of settlement administration, which are broken out separately below. *See infra* at ¶¶ 30-32. In the event that the Court would like further detail or documentation concerning our litigation expenses, we would be happy to provide it.

28. In my professional opinion, and based on my experience prosecuting this action and overseeing the conduct of the litigation, these expenses were reasonable and necessarily incurred in connection with the action.

29. In addition to these expenses, it is anticipated Nichols Kaster will incur additional expenses in connection with this case going forward, including certain expenses that will be incurred in connection with appearing for the final approval hearing. We do not intend to seek reimbursement of those additional expenses.

### **Settlement Administration Expenses**

#### *Analytics*

30. Analytics Consulting LLC (“Analytics”) has been selected to serve as the Settlement Administrator in this matter. *See Settlement Agreement (ECF No. 243-01) at ¶ 1.54.* Analytics has extensive experience administering class action settlements, including several ERISA settlements.<sup>1</sup> Based on the bid submitted by Analytics, it will cost \$97,802 (approximately \$2.37 per class member) to administer the settlement in this action. This covers all settlement administration work required by the Settlement Agreement, including (1) reviewing the class member information provided by Defendants; (2) preparing and mailing the Settlement Notices; (3) searching for valid addresses for any Settlement Class Members whose Notices were returned as undeliverable; (4) reviewing and processing Rollover Forms submitted by Former Participant

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<sup>1</sup> A copy of Analytics’ company profile was previously submitted with Plaintiffs’ motion for preliminary approval of the Settlement. *See ECF No. 243-04.*

Class Members; (5) establishing a telephone support line for Class Members; (5) creating and maintaining the Settlement Website; (6) distributing the notices to government officials required by the Class Action Fairness Act (“CAFA”); and (7) managing the project and communicating with the parties regarding the status of settlement administration. In addition, upon final approval of the Settlement, Analytics will facilitate delivery of settlement payments to Class Members as provided by the Settlement.

***Escrow Agent***

31. Alerus Financial (“Alerus”) has been selected to perform the duties of the Escrow Agent under the Settlement Agreement. *See Settlement Agreement (ECF No. 243-01) at ¶ 1.25.* Alerus has successfully performed a similar role with respect to several other ERISA settlements overseen by our firm. Consistent with the rate charged in other cases, Alerus has agreed to a flat fee of \$2,500 (representing less than 0.01% of the Settlement Fund) for its services as Escrow Agent.

***Independent Fiduciary***

32. Additional administrative expenses will be incurred relating to the review of the proposed release on behalf of the Plan by the independent fiduciary appointed pursuant to PTE 2003-39 and Paragraph 2.2 of the Settlement Agreement. Under the Settlement Agreement, Defendants are responsible for arranging the required review by the Independent Fiduciary, and the expense is an Administrative Expense that may be paid from the Settlement Fund. We understand that the Defendants have engaged Fiduciary Counselors Inc. to perform the role of the Independent Fiduciary, and the fee for its services in this matter will be \$15,000.

**Assistance of the Class Representatives**

33. It has been my honor to represent the class representatives in this matter.<sup>2</sup>

34. Throughout the course of this action, the Named Plaintiffs have been mindful of their responsibilities as class representatives, and have actively participated in the action. Among other things, they (1) reviewed the allegations in the complaints; (2) provided information to our firm 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.

35. Based on the time and assistance that the Named Plaintiffs have provided as class representatives, and their initiative in pursuing this action, I believe that the requested class representative service awards are reasonable and appropriate. As noted in our motion papers, the amount that the Named Plaintiffs are seeking (\$10,000) is consistent with other ERISA cases.

**No Objections**

36. The Settlement Notices that were approved by the Court disclosed the terms of the Settlement and also contained an explanation of the amount of attorneys' fees and class representative service awards that would be sought in connection with the Settlement. To my knowledge, none of the Settlement Class Members have objected to the Settlement terms or the proposed fees, expenses, or service awards as of the date of this motion.

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<sup>2</sup> In connection with the representation, the Named Plaintiffs agreed to a one-third contingency fee, and to reimbursement of expenses in the event that the action was successfully resolved.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Dated: December 8, 2020

s/Kai Richter  
Kai Richter