UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

In re GE ERISA LITIGATION

This Document Relates To:

ALL ACTIONS.

Master File No. 1:17-cv-12123-IT

CLASS ACTION

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

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Plaintiffs submit this memorandum in support of their unopposed motion for preliminary approval of a proposed Settlement of this class action brought on behalf of participants in the GE Retirement Savings Plan (f/k/a General Electric Savings and Security Program), as well as participants whose accounts were transferred from the GE Retirement Savings Plan and merged into a successor plan created in connection with the spinoff of a GE company (collectively, the "Plan") who invested in any of the five GE Funds[1] from September 26, 2011 through and including August 3, 2023 (the "Class Period"), alleging claims under the Employee Retirement Income Security Act of 1974 ("ERISA") against General Electric Company ("GE"), its wholly-owned investment subsidiary GE Asset Management ("GEAM"), and various individual defendants.[2]

I. INTRODUCTION

The Settlement Agreement provides that GE, GEAM, and/or their respective insurers will pay $61,000,000 in cash (the "Settlement Amount") to resolve all of Plaintiffs' Released Claims against Defendants and the Released Parties. This Settlement is the largest ever in an ERISA case alleging a retirement plan improperly offered proprietary funds.

The Settlement culminated from nearly six years of litigation after full fact and expert discovery involving seven experts, and was only reached due to a mediator's proposal shortly before summary judgment and *Daubert* arguments. Plaintiffs' damages expert calculated reasonable

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[1] "GE Funds" means the following five funds: (i) GE Institutional Strategic Investment Fund, a/k/a State Street Institutional Strategic Investment Fund ("Strategic Investment Fund"); (ii) GE Institutional Small Cap Equity Fund, a/k/a State Street Institutional Small Cap Equity Fund ("Small Cap Equity Fund"); (iii) GE Institutional International Equity Fund, a/k/a State Street Institutional International Equity Fund ("International Equity Fund"); (iv) GE RSP Income Fund, a/k/a State Street Income Fund ("Income Fund"); and (v) GE RSP U.S. Equity Fund, a/k/a State Street U.S. Core Equity Fund ("U.S. Equity Fund").

[2] A proposed order granting the relief requested herein (the "Preliminary Approval Order") is attached to the Settlement Agreement as Exhibit A and is also attached to the Motion for Preliminary Approval of Class Action Settlement.

recoverable damages to be approximately $283,000,000, so the cash settlement amount represents approximately 21.5% of such damages, which is at the higher end of the range of settlement recoveries approved in other ERISA class action settlements. The Settlement also avoids the risk of an unfavorable ruling on summary judgment or at trial, and provides an immediate recovery to the Class.

In determining whether preliminary approval is warranted, the issue before the Court is whether the Court will likely be able to approve the Settlement under Rule 23(e)(2). The Settlement satisfies each of the elements of Rule 23(e)(2), and the proposed class notice satisfies the due process requirements. Accordingly, notice of the Settlement should be given to Class Members and a hearing scheduled to consider final settlement approval. The Court is not required at this point to make a final determination as to the fairness of the Settlement.

Because the Settlement meets the foregoing criteria and is well within the range of what might be approved as fair, reasonable, and adequate, Plaintiffs ask this Court to enter an Order: (1) granting preliminary approval of the Settlement; and (2) directing that the Class be given notice of the Settlement in the form and manner proposed by the parties.[3]

II. BACKGROUND OF THE LITIGATION

Plaintiffs allege the GE Funds, managed by GEAM, were the only actively managed options available to Plan participants, and that those funds substantially underperformed other comparable investment options during the Class Period. Plaintiffs further allege Defendants refused to consider replacing those funds or their managers and thereby breached their duties of loyalty and prudence by failing to adequately monitor Plan investment options. Around the same time, GE explored the sale

[3] At the final Fairness Hearing, the Court will consider the motion for final approval of the Settlement and entry of the parties' proposed final order and judgment and Class Counsel's application for an award of attorneys' fees and expenses.

of GEAM and ultimately sold GEAM to State Street for $485 million in 2016. Plaintiffs allege Defendants retained the underperforming funds to keep GEAM's assets under management elevated and to collect fees, inflated the sale price of GEAM, and used the proceeds to pay-down debt GE owed to its underfunded defined benefit pension plan, thereby breaching the duty of loyalty to Plan participants.

On April 25, 2018, Defendants moved to dismiss the Second Amended Complaint. ECF 63. The Court denied Defendants' motion with regard to all counts except Count III. ECF 93, 102. Defendants moved for reconsideration on January 11, 2019, and after oral argument the Court granted Defendants' motion only to the extent of "correcting certain conclusions of law" stated in the Court's order on Defendants' original motion to dismiss. ECF 106, 132. Discovery commenced in or about November 2019 (ECF 134), during which Plaintiffs obtained and reviewed over 139,000 pages of relevant documents and conducted 23 depositions. *See* Declaration of Theodore J. Pintar in Support of Plaintiffs' Motion for Preliminary Approval of Class Action Settlement (the "Pintar Decl."), ¶¶2-3, submitted herewith. After the close of fact discovery (April 30, 2021 (ECF 186)), the Court granted Plaintiffs' motion to compel the production of certain documents Defendants had claimed were privileged. ECF 228. This resulted in the additional production of more than 7,700 pages of valuable documents. Pintar Decl., ¶2.

The parties also completed expert disclosures and depositions. Plaintiffs proffered two experts – a liability expert and a damages expert – and Defendants proffered five experts in response. All experts were deposed. Pintar Decl., ¶8. On September 2, 2022, Defendants moved for summary judgment, and Plaintiffs moved for partial summary judgment. Defendants also filed *Daubert* motions to exclude certain of Plaintiffs' experts' opinions, and Plaintiffs filed *Daubert* motions to

exclude certain of the opinions of three of Defendants' experts and to disqualify another of Defendants' experts.

After the summary judgment and *Daubert* motions were fully briefed, on May 19, 2023, the parties participated in a full day in-person mediation with Robert A. Meyer, Esq., who is experienced in complex civil cases, including ERISA class actions. The parties did not settle during the mediation and continued preparing for the summary judgment and *Daubert* hearing. Pintar Decl., ¶9. Over the course of several weeks, the parties continued to negotiate through Mr. Meyer and each side provided supplemental materials and analyses. On August 3, 2023, just eight days before oral argument on the pending summary judgment and *Daubert* motions, the parties reached an agreement in principle to settle the action in response to a mediator's proposal by Mr. Meyer and notified the Court. ECF 333. Pintar Decl., ¶10.

III. OVERVIEW OF THE SETTLEMENT AND PLAN OF ALLOCATION TERMS

A. Monetary Relief

Under the Settlement, GE, GEAM, and/or their respective insurers will pay, or cause to be paid, $61,000,000 into an Escrow Account. Following any deductions for Court-approved (a) attorneys' fees and expenses, (b) class representative awards, and (c) Notice and Administration Costs which include taxes and tax expenses and settlement administrator, recordkeeper, and independent fiduciary costs, the Net Settlement Fund will be distributed to Class Members according to the Plan of Allocation.

B. Attorneys' Fees

Class Counsel will apply for reasonable attorneys' fees of up to one-third of the $61,000,000 Settlement Amount. *See* Ex. A-1, at 6 to the Settlement Agreement; *see also Kruger v. Novant Health, Inc.*, 2016 WL 6769066, at *2 (M.D.N.C. Sept. 29, 2016) (collecting cases and noting that

"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 matter") (alteration in original).[4] Class Counsel will also apply for an award of their litigation expenses in an amount not to exceed $1.7 million. Class Counsel's attorneys' fees and expenses, as awarded by the Court, shall be paid from the Settlement Fund.

C. Class Representative Awards

Plaintiffs shall petition the Court for incentive awards of $25,000 each in recognition of their service as Class Representatives. *See, e.g.*, *Tracey v. M.I.T.*, No. 1:16-cv-11620-NMG, ECF 317 (D. Mass. May 29, 2020) (class representatives awarded $25,000 each in connection with final approval of $18.1 million settlement). Public policy strongly supports incentive awards as recognition for plaintiffs' important service of participating in the suit and promoting class action settlements. Such awards compensate plaintiffs for the efforts and risks they have undertaken, without which no settlement would be possible. And, they provide an incentive for other employees to bring successful cases that vindicate the public's interest in having retirement funds prudently managed. The First Circuit recently affirmed the importance of case contribution awards in class actions. *See Murray v. Grocery Delivery E-Servs. USA Inc.*, 55 F.4th 340, 353 (1st Cir. 2022) ("Rule 23 class actions . . . require named plaintiffs to bear the brunt of litigation . . . , which is a burden that could guarantee a net loss for the named plaintiffs" if case contribution awards were not permitted . . .).

D. Release of Claims

In exchange for the relief provided by the Settlement, Class Members will release Defendants and affiliated persons from all Plaintiffs' Released Claims, defined in ¶1.42 of the Settlement Agreement.

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[4] Unless otherwise noted, emphasis is added and citations are omitted throughout.

E. Review by Independent Fiduciary

In addition to being the result of arm's-length negotiations, the Settlement will need to be approved by an Independent Fiduciary prior to submission to the Court for final approval. GE will select and retain an Independent Fiduciary on behalf of the Plan to review the Settlement to determine whether it satisfies the conditions under Prohibited Transaction Exemption 2003-39, 68 Fed. Reg. 75632, as amended, 75 Fed. Reg. 33830 ("PTE 2003-39"). Settlement Agreement, ¶1.33. The Independent Fiduciary will issue its report 50 calendar days before the Fairness Hearing. *Id.*, ¶2.2(b). All reasonable costs and expenses of the Independent Fiduciary shall be borne by the Settlement Fund. *Id.*, ¶2.2(e).

IV. THE CLASS DEFINITION SHOULD BE AMENDED FOR PURPOSES OF THE SETTLEMENT

Rule 23 provides that "'[a]n order that grants or denies class certification may be altered or amended before final judgment.'" *In re Pharm. Indus. Average Wholesale Price Litig.*, 588 F.3d 24, 39 (1st Cir. 2009) (quoting Fed. R. Civ. P. 23(c)(1)(C)). Courts, therefore, have discretion to alter or amend a previously certified class for purposes of settlement. *Id.* (affirming district court's expansion of previously certified class for purposes of settlement). In doing so, the Court need not make new findings to support certification of the amended class and may incorporate its previous orders. *Id.*

Here, Plaintiffs request that the Court amend the class definition to match the current procedural circumstances – a signed settlement agreement as of September 29, 2023 – to facilitate the Settlement. The Class is currently defined, in relevant part, as: "[a]ll participants in the GE Retirement Savings Plan . . . from September 26, 2011 ***to the date of Judgment*** (the 'Class Period'),

who were invested in [the GE Funds]."[5] ECF 176, ¶2. Although ending the Class Period at "the date of Judgment" may be appropriate if there was a trial, here, where there is a Settlement, the Class Period should end earlier and be applicable to a fixed class of members to satisfy Rule 23's notice requirements and due process.

First, if the Class Period continues to the date of judgment (final approval in this situation) those who become Class Members after notice is provided would not receive timely notice of the Settlement. Second, if the Class Period is not shortened, individuals who were not in the Class prior to distribution of the notice could purchase shares of the GE Funds to participate in the Settlement and/or obtain rights to object to the Settlement, to which they are not equitably entitled and which would be unfair to existing Class Members. Accordingly, the Parties propose that the Class Period end on August 3, 2023, the date the Parties reached a settlement in principle of this Action and publicly notified the Court of the agreement in the Notice of Settlement (ECF 333). Stipulation, ¶1.10. *See Berry v. Wells Fargo & Co.*, 2020 WL 9311859, at *2 n.1 (D.S.C. July 29, 2020) (court approved amendment of "the original class definition by establishing an end to the class period"; new class period ended on date of preliminary approval).

V. PRELIMINARY SETTLEMENT APPROVAL

A. The Standard for Judicial Approval of Class Action Settlements

Rule 23(e) of the Federal Rules of Civil Procedure requires judicial approval of any class action settlement. "Federal Rule of Civil Procedure 23(e) provides that a proposed settlement in a class action must be approved by the court." *Meaden v. HarborOne Bank*, 2023 WL 3529762, at *1 (D. Mass. May 18, 2023). "The approval of a class-action settlement agreement is a 'two-step

[5] The Class definition in the Settlement also contains certain exclusions not relevant to the amendment of the Class Period and should not be altered.

process, which first requires the court to make a preliminary determination regarding the fairness, reasonableness, and adequacy of the settlement terms.'" *Id*. (quoting *Hochstadt v. Bos. Sci. Corp.*, 708 F. Supp. 2d 95, 97 n.1 (D. Mass 2010)). "The second step in the settlement approval process requires a fairness hearing, after which the court may give final approval of the proposed settlement agreement." *Id*.

"The determination of whether a settlement is fair, reasonable and adequate rests in the court's sound discretion [] and should be evaluated within the context of the public policy favoring settlement." *Hill v. State St. Corp.*, 2015 WL 127728, at *6 (D. Mass. Jan. 8, 2015). As the Eleventh Circuit has noted, "[c]omplex litigation – like the instant [class action] case – can occupy a court's docket for years on end, depleting the resources of the parties and the taxpayers while rendering meaningful relief increasingly elusive. Accordingly, the Federal Rules of Civil Procedure authorize district courts to facilitate settlements . . . ." *In re U.S. Oil & Gas Litig.*, 967 F.2d 489, 493 (11th Cir. 1992).

As set forth below, Plaintiffs and their counsel respectfully submit that the proposed Settlement satisfies all applicable factors and therefore merits preliminary approval and warrants notice apprising Class Members of the Settlement and the scheduling of a final Fairness Hearing.

B. The Relevant Factors for Preliminary Approval

Pursuant to Rule 23(e)(1), the issue at preliminary approval is whether the Court "will likely be able to . . . approve the proposal under Rule 23(e)(2)[.]" Fed. R. Civ. P. 23(e)(1). Federal Rule of Civil Procedure 23(e)(2) provides:

> (2) ***Approval of the Proposal***. If the proposal would bind class members, the court may approve it only after a hearing and only on finding that it is fair, reasonable, and adequate after considering whether:
>
> (A) the class representatives and class counsel have adequately represented the class;

(B) the proposal was negotiated at arm's length;

(C) the relief provided for the class is adequate, taking into account:

(i) the costs, risks, and delay of trial and appeal;

(ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;

(iii) the terms of any proposed award of attorney's fees, including timing of payment; and

(iv) any agreement required to be identified under Rule 23(e)(3); and

(D) the proposal treats class members equitably relative to each other.

Fed. R. Civ. P. 23(e)(2).

In addition, courts in this District have held that in determining whether a proposed settlement is "fair, adequate and reasonable," a court should look to additional factors – some of which overlap with the Rule 23(e)(2) factors – including whether: "'(1) the negotiations occurred at arm's length; (2) there was sufficient discovery; (3) the proponents of the settlement are experienced in similar litigation; and (4) only a small fraction of the class objected.'" *In re M3 Power Razor Sys. Mktg. & Sales Prac. Litig.*, 270 F.R.D. 45, 62-63 (D. Mass. 2010) (quoting *In re Lupron Mktg. & Sales Pracs. Litig.*, 345 F. Supp. 2d 135, 137 (D. Mass. 2004)). In particular, district courts give substantial weight to the opinion and judgment of experienced counsel who conducted arm's-length negotiations. *See Roland v. Cellucci*, 191 F.R.D. 3, 10 (D. Mass. 2000) ("When the parties' attorneys are experienced and knowledgeable about the facts and claims, their representations to the court that the settlement provides class relief which is fair, reasonable and adequate should be given significant weight."); *Bussie v. Allmerica Fin. Corp.*, 50 F. Supp. 2d 59, 77 (D. Mass. 1999) (when the proponents of settlement are counsel with experience in the type of litigation in which they seek

to settle, significant weight is given to such counsel's representations that the proposed settlement provides class-wide relief that is fair, reasonable and adequate).

C. The Proposed Settlement Meets Each of the Rule 23(e)(2) Factors

1. Plaintiffs and Their Counsel Have Adequately Represented the Class

Plaintiffs and their counsel have adequately represented the Class as required by Rule 23(e)(2)(A) by diligently investigating and prosecuting this Action. As an initial matter, the Court previously granted Plaintiffs' unopposed motion for class certification (ECF 176), which required a finding that Plaintiffs and their counsel will adequately represent the Class. *See* Fed. R. Civ. P. 23(a)(4).

Plaintiffs' counsel took all steps to ensure that this Action was successful. Among other things, Plaintiffs and their counsel investigated the relevant factual events, requested and analyzed the disclosure documents provided to Plan participants pursuant to §§104(b)(2) and 104(b)(4) of ERISA, including, without limitation, the Plan's Summary Plan Description, Department of Labor filings filed by the Plan, U.S. Securities and Exchange Commission filings filed by GE, and the fees and performance of the investment options offered to Plan participants. Furthermore, Class Counsel researched the legal issues underlying Plaintiffs' claims, drafted detailed initial complaints, an Amended Class Action Complaint and a Second Consolidated Amended Complaint; successfully opposed Defendants' motion to dismiss; and successfully opposed Defendants' motion for partial reconsideration of the denial of their motion to dismiss. Class Counsel also completed fact discovery. They propounded and responded to written discovery, including the review and analysis of more than 139,000 pages of documents. Class Counsel took 23 depositions of Defendants and their agents and two depositions of non-parties and defended ten plaintiff depositions. They also completed expert disclosure and discovery, including: (a) the submission of expert reports by two

experts; and (b) the depositions of Defendants' five experts and Plaintiffs' two experts. Class Counsel filed a motion for partial summary judgment and opposed Defendants' motion for summary judgment, filed *Daubert* motions with respect to four of Defendants' five experts, and opposed Defendants' *Daubert* motions with respect to Plaintiffs' experts. Plaintiffs mediated and held post-mediation discussions with an experienced mediator that resulted in a settlement shortly before oral argument on the pending summary judgment and *Daubert* motions.

2. The Settlement Was Negotiated at Arm's Length

Rule 23(e)(2)(B), as well as the first *M3 Power* factor, asks whether the Settlement was negotiated at arm's length. *See In re M3 Power*, 270 F.R.D. at 62-63. There can be no question the Settlement is the result of arm's-length negotiations in which there is no hint of collusion since the settlement negotiations took place under the supervision of Mr. Meyer, "a well-respected and experienced mediator." *Glynn v. Maine Oxy-Acetylene Supply Co.*, 2022 WL 17617138, at *4 (D. Me. Dec. 13, 2022). Plaintiffs left the mediation with the parties still far apart, and through Mr. Meyer, engaged in post-mediation discussions that lasted weeks and resulted in a settlement in principle only after a mediator's proposal. Courts generally hold that use of a mediator is a hallmark of an arm's length negotiation. *See, e.g.*, *Flynn v. N.Y. Dolls Gentlemen's Club*, 2014 WL 4980380, at *2 (S.D.N.Y. Oct. 6, 2014) (granting preliminary approval) ("An experienced class action employment mediator . . . assisted the parties with the settlement negotiations . . . . This reinforces the non-collusive nature of the settlement.").

The circumstances are the same here as in *Glynn*, where the parties also used Mr. Meyer:

> In advance of the mediation, the parties submitted comprehensive mediation statements to Mr. Meyer. Moreover, the settlement was the product of the mediator's proposal, which was circulated after it became clear the parties would not achieve a settlement on their own. Accordingly, I find that the settlement is the product of fair, arm's-length negotiations, which entitles the parties to a presumption that the settlement is reasonable.

2022 WL 17617138, at *4; *Kemp-DeLisser v. Saint Francis Hosp. & Med. Ctr.*, 2016 WL 6542707, at *2 (D. Conn. Nov. 3, 2016) ("the parties agreed to mediation before Robert A. Meyer . . . who is experienced with mediating large, complex matters similar to this case, including other ERISA class actions"); *Palm Tran, Inc. Amalgamated Transit Union Loc. 1577 Pension Plan v. Credit Acceptance Corp.*, 2022 WL 17582004, at *4 (E.D. Mich. Dec. 12, 2022) ("The parties employed an experienced mediator, Robert Meyer, Esq., who himself has been involved in hundreds of disputes and has served as a mediator since 2006.").

Given the parties' negotiations through Mr. Meyer, including post-mediation discussions and a settlement that was reached as a result of a mediator's proposal, the parties' settlement was at arm's length. *See In re Flint Water Cases*, 571 F. Supp. 3d 746, 780 (E.D. Mich. 2021) ("'[T]here appears to be no better evidence of [a truly adversarial bargaining process] than the presence of a neutral third party mediator[.]'") (quoting 4 *Newberg* §13:48 (5th ed. June 2021 update) (alterations in original)).

3. The Settlement Is Adequate in Light of the Costs, Risks, and Delay of Trial and Appeal

In assessing the proposed Settlement, the Court should balance the benefits afforded to the Class – including the immediacy and certainty of a recovery – against the significant costs, risks, and delay of proceeding with the Action. Indeed, "ERISA is a complex field that involves difficult and novel legal theories and often leads to lengthy litigation." *Krueger v. Ameriprise Fin., Inc.*, 2015 WL 4246879, at *1 (D. Minn. July 13, 2015). ERISA class actions present numerous hurdles to proving liability that are difficult for plaintiffs to meet. Defendants have denied that they breached their fiduciary duties under ERISA or engaged in prohibited transactions and have denied that Plan participants suffered any losses as the result of the alleged breaches of fiduciary duty. They have also maintained that they have meritorious defenses to all claims alleged in the Action, and maintain

that they have always acted in the best interests of participants and beneficiaries when discharging their obligations with respect to the Plan. Plaintiffs are confident that they would have survived summary judgment; however, proving Plaintiffs' claims at trial would have involved significant risks.

For one, to prove their claims, Plaintiffs would need to rely extensively on two expert witnesses for analysis of key issues. Each expert's testimony would be critical to demonstrating Defendants' liability, as well as damages, and the conclusions of each expert would be contested at trial. If, for some reason, the Court determined that even one of Plaintiffs' experts should be excluded from testifying at trial, Plaintiffs' case would become more difficult to prove.

In complex cases such as this one, "'[t]he risks surrounding a trial on the merits are always considerable.'" *Beneli v. BCA Fin. Servs.*, 324 F.R.D. 89, 103-04 (D.N.J. 2018). Plaintiffs recognize they faced risks in proving liability. For example, Plaintiffs allege Defendants breached the duty of prudence by offering proprietary funds that significantly underperformed their benchmarks. Defendants highlighted in their motion for summary judgment, however, that they had retained five consultants to render advice concerning their administration of the Plan, and had three separate committees monitoring their proprietary investments. ECF 272 at 9-10.

Furthermore, Plaintiffs faced risks in proving damages. Defendants and their experts took issue with the analyses by Plaintiffs' expert that the Plan had suffered losses as a result of the underperformance of certain funds. Defendants argued, among other things, that Plaintiffs' expert improperly based his analysis on "hindsight," which, if successful, could undermine Plaintiffs' showing of damages.

Finally, few ERISA plaintiffs have been successful at trial. In one case, the plaintiffs won at trial but then faced a partial reversal on appeal, followed by a reduced damages award after a second

appeal. *See Tussey v. ABB, Inc.*, 2019 WL 3859763, at *1 (W.D. Mo. Aug. 16, 2019); *Krueger*, 2015 WL 4246879, at *1 ("the Eighth Circuit Court of Appeals in [*Tussey*] remanded in part a judgment obtained by Class Counsel after trial, resulting in what will be additional litigation for a case first filed in 2006"). In two other ERISA class action trials, the plaintiffs lost and obtained nothing for the class. *Reetz v. Aon Hewitt Inv. Consulting, Inc.*, 74 F.4th 171 (4th Cir. 2023) (affirming defense verdict); *Wildman v. Am. Century Servs., LLC*, 362 F. Supp. 3d 685 (W.D. Mo. 2019). Also, in the *Brotherston v. Putnam* case tried in this District, the parties tried some claims and held a "case stated" hearing on others. The court found for the defendant on all counts, although the plaintiffs obtained a partial reversal on appeal. *Brotherston v. Putnam Invs., LLC*, No. 1:15-cv-13825-WGY (D. Mass.), ECF 214 at 3-4. Plaintiffs are avoiding these potential losses and delays while obtaining a significant, guaranteed recovery for the Class.

Plaintiffs also considered the potential costs and delays of taking this case to trial. To date, Plaintiffs' counsel have incurred almost $1.4 million in expenses and charges. Pintar Decl., ¶11. These expenses would have increased substantially if the matter went to trial. Plaintiffs also considered that, even if they were victorious at trial, the case could be tied up for years with post-trial motions and appeals similar to the *Tussey* matter discussed above. The Settlement avoids these potential costs and delays.

4. The Proposed Method of Distributing Relief to the Class Is Effective

As demonstrated below in §V and in the Declaration of Kristen Stallings in Support of Plaintiffs' Motion for Preliminary Approval of Class Action Settlement ("Stallings Decl."), submitted herewith, the method of the proposed notice and claims administration process (Rule 23(e)(2)(C)(ii)) is effective. The notice plan includes direct email and mail notice to all those who can be identified with reasonable effort. In addition, toll-free telephone and email support will be

provided, and a settlement-specific website will be created where key documents will be posted, including the Settlement Agreement, Notice, and Preliminary Approval Order. *See* Stallings Decl., ¶¶6-8. The distribution of the Net Settlement Fund to the Class is also effective as no claim form will be required. The Settlement Administrator shall distribute the Net Settlement Fund in accordance with the Plan of Allocation which governs how Class Members' claims will be calculated.

5. Proposed Attorneys' Fees Present No Obstacle to Approval

Rule 23(e)(2)(C)(iii) requires an examination of "the terms of any proposed award of attorney's fees, including timing of payment." As stated in the Notice, Class Counsel intend to file a motion for an award of attorneys' fees in an amount up to one-third of the Settlement Amount. This is the same award granted in two ERISA class action settlements similar in size to this case. *Abbott v. Lockheed Martin Corp.*, 2015 WL 4398475, at *2 (S.D. Ill. July 17, 2015) (33.3% of $63 million settlement) ("in ERISA 401(k) fee litigation, 'a one-third fee is consistent with the market rate'"); *Spano v. Boeing Co.*, 2016 WL 3791123, at *1 (S.D. Ill. Mar. 31, 2016) (33.3% of $57 million ERISA settlement) (the "requested fee is well within reasonable levels for a case such as this one"); *see Bekker v. Neuberger Berman Grp. 401(k) Plan Inv. Comm.*, 504 F. Supp. 3d 265, 270 (S.D.N.Y. 2020) ("In numerous prior settlements of 401(k) fee cases, class counsel have been awarded one-third of the monetary recovery to the plans.").

Courts in this District agree that "[t]he [one-third] fee here is identical to other awards in other excessive 401(k) fee cases . . . including in [the District of Massachusetts]." *Ford v. Takeda Pharms. U.S.A., Inc.*, 2023 WL 3679031, at *3 (D. Mass. Mar. 31, 2023) (examining "awards in similar cases") (citing *Gordan v. Mass. Mut. Life. Ins. Co.*, 2016 U.S. Dist. LEXIS 195935, at *3, *11 (D. Mass. Nov. 3, 2016) (Ponsor, J.) (awarding a fee of one-third of the monetary recovery in

401(k) excessive fee case)). Other districts have also granted one-third attorney fee awards in class action settlements of similar size. *See, e.g.*, *Khoday v. Semantic Corp.*, No. 11-cv-0180 (JRT/TNL) (D. Minn. Apr. 26, 2016) (awarding 33.3% of $60 million recovery in consumer class action).

The Settlement Agreement provides that any attorneys' fees and expenses awarded by the Court shall be paid to Class Counsel upon an order awarding such fees and expenses. *See* Settlement Agreement, ¶6.1. Such "provisions are common." *Pelzer v. Vassalle*, 655 F. App'x 352, 365 (6th Cir. 2016); *see also In re Genworth Fin. Sec. Litig.*, 2016 WL 7187290, at *2 (E.D. Va. Sept. 26, 2016) (ordering that "attorneys' fees and Litigation Expenses awarded above may be paid to Lead Counsel immediately upon entry of this Order").

6. Class Members Are Treated Equitably

The final factor under Rule 23(e)(2) is whether Class Members are treated equitably. Fed. R. Civ. P. 23(e)(2)(D). As reflected in the Plan of Allocation set forth in the Notice (Settlement Agreement, Ex. A-1), the Settlement treats Class Members equitably relative to each other by providing that each Class Member shall receive his, her or its *pro rata* share of the Net Settlement Fund based on their Settlement Allocation Score. Thus, each factor identified under Rule 23(e)(2) is satisfied. Given the litigation risks involved, the complexity of the underlying issues, and the skill of defense counsel, the $61,000,000 recovery is outstanding. Such a result could not have been achieved without the full commitment of Plaintiffs and Class Counsel.

D. The Settlement Also Satisfies the Remaining Additional Factors Analyzed by Courts in This District

1. The Parties Completed Sufficient Discovery to Evaluate the Merits of the Action

In light of the full record that was developed, the Parties were able "'to make an intelligent judgment about settlement.'" *Bezdek v. Vibram USA Inc.*, 79 F. Supp. 3d 324, 348 (D. Mass. 2015), *aff'd* 809 F.3d 78 (1st Cir. 2015).

The parties engaged in extensive discovery, including exchanging written discovery resulting in the production of more than 139,000 pages of documents by Defendants and non-parties. Pintar Decl., ¶2. Class Counsel reviewed and analyzed all documents produced, took 23 depositions of Defendants and their representatives, deposed two non-parties, and defended depositions of each of the ten Plaintiffs. *Id.*, ¶¶3-4. The parties also completed expert disclosures and discovery involving Plaintiffs' liability and damages experts and Defendants' five experts. *Id.*, ¶¶5-8. Plaintiffs also prevailed on a motion to compel the production of documents that Defendants claimed were protected by attorney-client privilege. ECF 203, 228. As a result, Defendants produced over 7,700 additional pages of highly relevant documents. Pintar Decl., ¶2.

The parties' extensive fact and expert discovery over nearly three years was more than sufficient to enable an "'intelligent judgment about [the] settlement.'" *Bezdek*, 79 F. Supp. at 348; *M3 Power*, 270 F.R.D. at 63 (production of more than 100,000 documents was sufficient discovery for purposes of preliminary approval); *Hill v. State Street Corp.*, 2015 WL 127728 (D. Mass. Jan. 8, 2015) (extensive document production and depositions over more than two years was sufficient).

2. The Proponents of the Settlement Are Experienced in Similar Litigation

"'When the parties' attorneys are experienced and knowledgeable about facts and claims, their representations to the court that the settlement provides class relief which is fair, reasonable and

adequate should be given significant weight.'" *Meaden*, 2023 WL 3529762, at *4; *Hill*, 2015 WL 127728, at * 7. That is the situation here. Plaintiffs' counsel, including each of the four attorneys appointed by the Court as Class Counsel, have litigated this Action from the start, are knowledgeable and experienced in ERISA class action litigation and other class actions for breach of fiduciary duty, and have concluded the relief provided by the Settlement is fair, adequate, and reasonable. Pintar Decl., ¶12; ECF 143 at 9-11 (setting forth qualifications of Plaintiffs' counsel).

3. There Have Been No Objections to the Settlement

Although this fourth factor examining any objections is more instructive at the final approval stage after the Class has been notified of the Settlement, Plaintiffs are not aware of any objections at this time and have not been notified by Defendants of any objections. *Meaden*, 2023 WL 3529762, at *4 (preliminary approval granted where neither party is aware of any objections at this preliminary stage).

VI. NOTICE TO THE CLASS

"The final hurdle the parties must clear for preliminary approval is whether the proposed form and manner of notice satisfy due process. Notice is intended to inform class members of their rights to" object to the Settlement. *Meaden* 2023 WL 3529762, at *4.[6] Rule 23(e)(1)(B) requires the Court to "direct notice in a reasonable manner to all class members who would be bound by the proposal," and class members should receive "the best notice practicable" under the circumstances. Fed. R. Civ. P. 23(e)(1)(B).

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[6] Although a typical settlement notice will also inform class members of their right to opt out of a settlement (*id.* at *4), in this case the Class has been certified pursuant to Rule 23(b)(1), which does not allow for opt-outs. *See* Advisory Committee Notes to 2003 Amendments to Rule 23(c) (Notice of class certification need not be given to class members as there is no right to opt-out of a Rule 23(b)(1) class); ECF 178 at 2, n.1 (motion to send notice of class certification explains that class notice did not include opt-out provision).

> The notice must state in plain, easily understandable language:
>
> (i) the nature of the action; (ii) the definition of the class certified; (iii) the class claims, issues, or defenses; (iv) that a class member may enter an appearance through an attorney if the member so desires; (v) that the court will exclude from the class any member who requests exclusion; (vi) the time and manner for requesting exclusion; and (vii) the binding effect of a class judgment on members under Rule 23(c)(3). Fed. R. Civ. P. 23(c)(2)(B). The notice must also inform proposed class members of class counsel's request for attorneys' fees and costs.

Fed. R. Civ. P. 23(h)(1).

Here, the parties have negotiated the form of a Notice to be disseminated by email and first-class mail (where no email is available), which is permitted by Rule 23(c)(2)(B), to all persons who fall within the definition of the Class and whose names and addresses can be identified by the recordkeeper. The Notice sent to former participants will include a Former Participant Rollover Form enabling them to elect to receive their payments through a rollover into an eligible retirement account. *See* Settlement Agreement, Ex. A-2. The parties further propose to utilize a Settlement website to post Settlement-related documents and information.

The proposed form of the Notice describes the nature, history, and status of the Action; sets forth the definition of the Class; states the Class claims and issues; discloses the right of people who fall within the definition of the Class to object, as well as the deadline and procedure for doing so, and warns of the binding effect of the Settlement approval proceedings.

In addition, the Notice describes the Settlement and sets forth the $61,000,000 Settlement Amount; explains the proposed Plan of Allocation; states the maximum amount of attorneys' fees and expenses that Class Counsel intend to seek; provides contact information for Class Counsel; and summarizes the reasons the parties are proposing the Settlement. The Notice also discloses the date, time, and place of the Fairness Hearing, and the procedures for commenting on the Settlement and appearing at the hearing. The contents of the Notice therefore satisfy all applicable requirements.

Accordingly, in granting preliminary settlement approval, the Court should also approve the parties' proposed form and method of giving notice to the Class.

VII. PROPOSED SCHEDULE OF SETTLEMENT EVENTS

If the Court grants preliminary approval of the proposed Settlement, Plaintiffs respectfully request approval of the proposed schedule, attached hereto as Appendix A for the Court's review.

VIII. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully ask that the Court grant preliminary approval of the proposed Settlement and enter the proposed Order Preliminarily Approving Settlement and Providing for Notice, submitted herewith.

DATED: October 6, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Theodore J. Pintar, hereby certify that on October 6, 2023, I authorized a true and correct copy of the foregoing document to be electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of such public filing to all counsel registered to receive such notice.

/s/ Theodore J. Pintar
THEODORE J. PINTAR