UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Jennifer Baker and Jean Greenberg, as representatives of a class of similarly situated persons, and on behalf of the Investment-Incentive Plan for John Hancock Employees, Plaintiffs, v. John Hancock Life Insurance Company (U.S.A.) and the John Hancock US Benefits Committee, Defendants.	Case No. 1:20-cv-10397-RGS **MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT**

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INTRODUCTION

Plaintiffs Jennifer Baker and Jean Greenberg ("Plaintiffs") submit this Memorandum in support of their Motion for Preliminary Approval of Class Action Settlement. The proposed Settlement Agreement is attached as **Exhibit A** to the accompanying Declaration of Kai Richter ("*Richter Decl.*"), and resolves Plaintiffs' class action claims against Defendants John Hancock Life Insurance Company (U.S.A.) ("John Hancock") and the John Hancock US Benefits Committee (the "Benefits Committee") (together, Defendants) under the Employee Retirement Income Security Act ("ERISA"), concerning Defendants' administration and management of the Investment-Incentive Plan for John Hancock Employees ("Plan").

Under the terms of the proposed Settlement, John Hancock will pay a gross settlement amount of $14,000,000 into a common fund for the benefit of Settlement Class. This is a significant monetary recovery for the Class that falls well within the range of court-approved settlements in similar ERISA cases. Moreover, the Settlement also provides for prospective relief. Among other things: (1) Defendants will retain an independent investment consultant to provide ongoing monitoring and review of the options in the Plan's investment lineup for at least five years; (2) Defendants will develop and approve an investment policy statement ("IPS") for the Plan; and (3) at or before the expiration of the Plan's current recordkeeping contract, Defendants will retain an independent consultant to assist with the negotiation of the next recordkeeping agreement. These changes are intended to address the issues that Plaintiffs identified in the lawsuit regarding Defendants' process for managing the Plan's investment lineup and recordkeeping expenses.

For the reasons set forth below, the Settlement is fair, reasonable, and adequate, and merits preliminary approval so that the proposed Notices can be sent to the Settlement Class. Among other things supporting preliminary approval:

- The Settlement was negotiated at arm's length, following motion practice and discovery, with the assistance of a well-respected mediator;
- The proposed Settlement Class is consistent with the requirements of Rule 23;
- The Settlement Class has been adequately represented by the Named Plaintiffs and Class Counsel, and the terms of the Settlement treat all class members fairly and equitably;
- The Settlement provides for significant monetary relief that is in line with settlements in other cases;
- The Settlement conveniently provides for automatic distribution of the settlement proceeds to the Plan accounts of current participants in the Plan, while former participants have the option of submitting a Rollover Form or otherwise receiving their distribution via check;
- The Settlement provides for prospective relief regarding the ongoing management of the Plan;
- The Released Claims are tailored to the claims that were asserted in the action;
- The proposed Notices provide fulsome information to Class Members about the Settlement, and will be distributed via first-class mail; and
- The Settlement Agreement provides Class Members the opportunity to raise any objections they may have to the Settlement in writing or at the final approval hearing.

Accordingly, Plaintiffs respectfully request that the Court enter an order: (1) preliminarily approving the Settlement; (2) approving the proposed Notices and authorizing distribution of the Notices; (3) certifying the proposed Settlement Class; (4) scheduling a final approval hearing; and (5) granting such other relief as set forth in the proposed Preliminary Approval Order submitted herewith. This motion is not opposed by Defendants.

BACKGROUND

I. PROCEDURAL HISTORY

A. Pleadings and Court Proceedings

Plaintiff Jennifer Baker filed the initial Class Action Complaint on February 27, 2020, alleging that Defendants breached their fiduciary duties of prudence and loyalty under ERISA by selecting, monitoring, and retaining John Hancock-affiliated investments for the Plan that

performed worse than nonproprietary alternatives. *See ECF No. 1*. Plaintiffs later filed a First Amended Complaint ("FAC") that included additional allegations regarding the investments in the Plan (including their expenses), a claim for failure to monitor the Plan's fiduciaries against John Hancock, and an additional Named Plaintiff, Jean Greenberg.[1] *ECF No. 19*. Defendants moved to dismiss, *ECF No. 32*, and the Court denied Defendants' motion on July 23, 2020. *ECF No. 32*. Defendants filed an Answer on August 7, 2020. *ECF No. 44*.

On February 12, 2021, Plaintiffs filed an unopposed motion for class certification, *ECF No. 53*, which the Court granted on February 17, 2021. *ECF No. 59*. In the meantime, the Parties engaged in discovery, as outlined below.

B. Discovery, Mediation, and Settlement

Prior to settling, Defendants produced over 5,000 pages of documents, and Plaintiffs produced over 4,000 pages. *Richter Decl. ¶ 10*. Plaintiffs also served interrogatories on Defendants (to which Defendants responded), and responded to interrogatories served by Defendants. *Id.* In addition, Class Counsel noticed the deposition of a witness associated with John Hancock for February 10, 2021, but that deposition was postponed when a necessary participant was diagnosed with COVID-19. *Id.*

On February 12, 2021, the Parties jointly requested a 75-day stay of the action to allow the parties to attempt to voluntarily resolve this action through mediation. *ECF No. 57*. The Parties then engaged in a full-day mediation on April 9, 2021 before the Honorable Layn Phillips, a former United States District Judge. *Richter Decl. ¶ 11*. Judge Phillips is an experienced and well-respected mediator who has successfully facilitated the resolution of a number of ERISA class actions similar to this one. *Id.* As part of the mediation in this case, Judge Phillips made a

[1] Plaintiffs' FAC included Gregory Benloss as a plaintiff, who was subsequently voluntarily dismissed from this action without prejudice. *See ECF Nos. 51, 52.*

mediator's proposal to settle the Action that both Parties accepted, *id.* ¶ *12*, and the Parties subsequently advised the Court on April 21, 2021 that they had reached a settlement-in-principal. *ECF No. 60.* The terms of the Settlement are memorialized in the Settlement Agreement that is the subject of this motion.

II. OVERVIEW OF SETTLEMENT TERMS

A. The Settlement Class

The Settlement Agreement applies to the following Settlement Class:

> All participants and beneficiaries of the Investment-Incentive Plan for John Hancock Employees at any time between February 27, 2014 and the date the Court enters the Preliminary Approval Order, excluding any members of the John Hancock US Benefits Committee or the John Hancock US Investment Subcommittee.

See Settlement Agreement ¶ *1.9.*[2]

B. Monetary Relief

Under the Settlement, John Hancock will contribute a Gross Settlement Amount of $14 million to a common settlement fund (the "Settlement Fund"). *Settlement Agreement* ¶¶ *1.30, 4.1, 4.2.* After accounting for any Attorneys' Fees and Costs, Administrative Expenses, and class representative Service Awards approved by the Court, the Net Settlement Amount will be distributed to eligible Class Members. *Id.* ¶¶ *1.34, 5.2-5.3.*

The Net Settlement Amount will be allocated among eligible Class Members in proportion to their Average Qualifying Account Balance, which is based on Class Members' quarterly account balances in the John Hancock funds in the Plan. *Id.* ¶ *5.1.* Participant Class Members' accounts will be automatically credited with their share of the Settlement Fund. *Id.* ¶ *5.2.* Former Participant Class Members will have the opportunity to submit a Rollover Form allowing them to

[2] This Settlement Class is consistent with the class that the Court certified for litigation purposes, *see ECF Nos. 53, 59*, and now includes an end date for the class period.

have their distribution rolled over into an individual retirement account or other eligible employer plan. *Id.* ¶ *5.3(a)(i).* Former Participants who do not timely submit a Rollover Form will be sent a check. *Id.* ¶ *5.3(a)(ii)*. Under no circumstances will any monies revert to John Hancock. Any checks that are uncashed will revert to the Qualified Settlement Fund and will be paid to the Plan for the purpose of defraying administrative fees and expenses. *Id.* ¶ *5.6(b).*

C. Prospective Relief

The Settlement also provides that the following procedures shall be undertaken on a prospective basis as of the Settlement Effective Date:

(a) Defendants shall retain an independent third-party investment consultant to provide ongoing monitoring and review of the investment options in the Plan's investment lineup for at least five years from the Settlement Effective Date;

(b) Defendants shall develop and approve an Investment Policy Statement ("IPS") for the Plan; and,

(c) At or before the expiration of the Plan's current recordkeeping contract, Defendants will utilize the services of an independent consultant to assist with negotiating the next recordkeeping agreement and issuing a request for information for recordkeeping services.

Settlement Agreement ¶ *6.1*.

D. Release of Claims

In exchange for the foregoing relief, the Settlement Class will release Defendants and affiliated persons and entities (the "Released Parties" as defined in the Settlement) from all claims:

1.39(a) that were asserted in the Action or could have been asserted in the Action based on any of the allegations, acts, omissions, purported conflicts, representations, misrepresentations, facts, events, matters, transactions, or occurrences asserted in the Action …;[3]

1.39(b) that would be barred by res judicata based on the Court's entry of the Final Approval Order;

[3] The release language has been truncated due to space limitations. The full release language, incorporated by reference, is in the Settlement Agreement, ¶ 1.39.

1.39(c) that arise from the direction to calculate, the calculation of, and/or the method or manner of the allocation of the Net Settlement Fund pursuant to the Plan of Allocation; or

1.39(d) that arise from the approval by the Independent Fiduciary of the Settlement Agreement.

The release carves out claims "to enforce the Settlement Agreement" and for "individual claims for denial of benefits from the Plan." *Id.* ¶ *1.39.*

E. Class Notice and Settlement Administration

Settlement Class Members will be sent a direct notice of the settlement ("Notice") via U.S. Mail. *Id.* ¶¶ *3.2 & Exs. 1-2.* The Notice sent to Former Participant Class Members will also include a Former Participant Rollover Form enabling them to make the election described above. *Id.* ¶ *3.2 & Ex. 2.* These Notices provide information to the Settlement Class regarding, among other things: (1) the nature of the claims; (2) the scope of the Settlement Class; (3) the terms of the settlement; (4) the process for submitting Rollover Forms (Former Participants only); (5) Settlement Class Members' right to object to the Settlement and the deadline for doing so; (6) the class release; (7) the identity of Class Counsel and the amount of Attorneys' Fees they will seek in connection with the Settlement; (8) the amount of any requested class representative Service Awards; (9) the date, time, and location of the final approval hearing; and (10) Settlement Class Members' right to appear at the final approval hearing. *Id.* ¶ *1.35 & Exs. 1-2.*

To the extent that Class Members would like more information about the Settlement, the Settlement Administrator will establish a Settlement Website on which it will post the Notice, Former Participant Rollover Form, and relevant case documents, including but not limited to the operative First Amended Complaint and a copy of all documents filed with the Court in connection with the Settlement. *Id.* ¶ *3.3.*

F. Attorneys' Fees and Administrative Expenses

The Settlement Agreement requires that Class Counsel file their Motion for Attorneys' Fees and Costs at least 14 days before the deadline for objections to the proposed Settlement. *Id.* ¶ *7.1.* Under the Settlement, the requested fees may not exceed one-third of the Gross Settlement Amount and are subject to Court approval and Independent Fiduciary review. *Id.* ¶¶ *1.4, 7.1.* In addition, the Settlement Agreement provides for recovery of Administrative Expenses related to the Settlement, *id.*, ¶¶ *1.2, 7.1*, and for service awards up to $10,000 per Class Representative, *id.* ¶¶ *1.48, 7.2.*

G. Review by Independent Fiduciary

As required under ERISA, Defendants will retain an Independent Fiduciary to review and authorize the Settlement on behalf of the Plan. *Id.* ¶ *2.2; see also* Prohibited Transaction Exemption 2003-39, 68 Fed. Reg. 75632, as amended, 75 Fed. Reg. 33830 ("PTE 2003-39"). The Independent Fiduciary will issue its report at least 30 days before the final Fairness Hearing so that the Court may consider it. *Settlement Agreement* ¶ *2.2(b).*

ARGUMENT

I. STANDARD OF REVIEW

Federal Rule of Civil Procedure 23(e) requires judicial approval of any settlement agreement that will bind absent class members. "Approval is to be given if a settlement is untainted by collusion and is fair, adequate, and reasonable." *In re Lupron Mktg. & Sales Practices Litig.*, 228 F.R.D. 75, 93 (D. Mass. 2005). The First Circuit has expressed a "strong public policy in favor of settlements, particularly in very complex and technical regulatory contexts" such as this. *See Puerto Rico Dairy Farmers Ass'n v. Pagan*, 748 F.3d 13, 20 (1st Cir. 2014); *In re Pharm. Indus. Average Wholesale Price Litig.*, 588 F.3d 24, 36 (1st Cir. 2009) (discussing policy favoring settlements in "hard-fought, complex class action[s]").

Settlement approval involves two stages: "First, the judge reviews the proposal preliminarily to determine whether it is sufficient to warrant public notice and a hearing. If so, the final decision on approval is made after the hearing." *Hochstadt v. Boston Scientific Corp.*, 708 F. Supp. 2d 95, 106-07 (D. Mass. 2010) (citing MANUAL FOR COMPLEX LITIGATION (Fourth) § 13.14 (2004)). At the preliminary approval stage, courts "examine the proposed settlement for obvious deficiencies before determining whether it is in the range of fair, reasonable, and adequate." *In re M3 Power Razor Sys. Mktg. & Sales Practice Litig.*, 270 F.R.D. 45, 62 (D. Mass. 2010). The ultimate fairness determination is left for final approval, after class members receive notice of the settlement and have an opportunity to be heard.

In 2018, Rule 23(e) was amended to clarify this process and specify uniform standards for settlement approval. *See* Fed. R. Civ. P. 23(e) advisory committee note (2018). The amended rule states that, at the preliminary approval stage, the court must determine whether it "will likely be able to: (i) approve the proposal under Rule 23(e)(2); and (ii) certify the class for purposes of judgment on the proposal." Fed. R. Civ. P. 23(e)(1)(B). Rule 23(e)(2), in turn, specifies the following factors the court must ultimately consider at the final approval stage in determining whether a settlement is "fair, reasonable, and adequate":

> (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). "The goal of this amendment is not to displace any [existing] factor, but rather to focus the court … on the core concerns of procedure and substance that should guide the decision whether to approve the proposal." Fed. R. Civ. P. 23(e) advisory committee note (2018).

II. THE SETTLEMENT SATISFIES THE STANDARD FOR PRELIMINARY APPROVAL

As discussed below: (1) the settlement was negotiated at arm's length by experienced counsel with the assistance of an experienced mediator after significant litigation, (2) the class was adequately represented by the Named Plaintiffs and Class Counsel, and (3) the relief provided is adequate and equitable to all class members. Accordingly, this Court should grant preliminary approval of the Settlement and authorize notice to the Settlement Class.

A. The Settlement Was Negotiated at Arm's-Length with the Assistance of a Respected Mediator, After Discovery and Motion Practice

A proposed class action settlement enjoys a "presumption in favor of the settlement" if "sufficient discovery has been provided and the parties have bargained at arms-length." *City P'ship Co. v. Atl. Acquisition Ltd. P'ship*, 100 F.3d 1041, 1043 (1st Cir. 1996). That is the situation presented here. The Parties benefited from the Court's ruling on Defendants' motion to dismiss, conducted discovery, and exchanged fulsome mediation statements setting forth the evidence assembled by the Parties as part of the mediation process. In light of the foregoing, the Parties were clearly 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).[4] Moreover, the involvement of Judge Phillips and the fact that he made a mediator's proposal to resolve the matter

[4] Courts in the First Circuit have approved settlements at similar and less advanced stages. *See Price v. Eaton Vance Corp.*, No. 18-12098, Dkt. 32 at 21 (May 6, 2019) (memorandum supporting successful preliminary approval motion, noting that motion to dismiss was pending at the time of settlement); *Curtis v. Scholarship Storage Inc.*, 2016 WL 3072247, at *2 (D. Me. May 31, 2016) (approving settlement entered into 16 months after filing of complaint, "before many of the complex issues were raised"); *In re P.R. Cabotage Antitrust Litig.*, 269 F.R.D. 125, 141 (D.P.R. 2010) (noting that the parties were sufficiently informed by "limited discovery" that occurred prior to settlement).

objectively demonstrates the arm's length nature of the negotiations. *See Briana Wright v. S. New Hampshire Univ.*, 2021 WL 1617145, at *7 (D.N.H. Apr. 26, 2021) ("The court notes, first, that the presumption of reasonableness applies here. The record establishes that counsel for the parties negotiated the Agreement at arm's length, at times with the assistance of an experienced and neutral mediator, following a thorough investigation and mutual exchange of evidence."); *Roberts v. TJX Companies, Inc.*, 2016 WL 8677312, at *6 (D. Mass. Sept. 30, 2016) ("[T]he participation of an experienced mediator . . . also supports the Court's finding that the Settlement is fair, reasonable, and adequate.").

B. The Class Was Well Represented by the Named Plaintiffs and Class Counsel, Who Support the Settlement

"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." *Hill v. State St. Corp.*, 2015 WL 127728, at *7 (D. Mass. Jan. 8, 2015) (citation omitted). Once again, that is the situation presented here. Class Counsel are "experienced litigators who serve as class counsel in ERISA actions involving defined-contribution plans[.]" *Moreno v. Deutsche Bank Americas Holding Corp.*, 2017 WL 3868803, at 11 (S.D.N.Y Sept. 5, 2017). Indeed, "Class Counsel is one of the relatively few firms in the country that has the experience and skills necessary to successfully litigate a complex ERISA action such as this." *Karpik v. Huntington Bancshares Inc.*, 2021 WL 757123, at *9 (S.D. Ohio Feb. 18, 2021). As set forth in the accompanying attorney declaration, Class Counsel have won favorable rulings on class certification and dispositive motions in several ERISA cases, recently tried two other ERISA class actions, successfully litigated an appeal before the First Circuit in *Brotherston v. Putnam Investments, LLC*, 907 F.3d 17 (1st Cir. 2018), and have negotiated class action settlements that have received court approval in numerous other cases.

Richter Decl. ¶¶ *14-15*. Based on their experience, Class Counsel are clearly adequate to represent the class, and they have concluded that the relief provided by the Settlement is fair, reasonable, and adequate, *id*. ¶ *12*.

The Settlement Class Members also have been adequately represented by the Named Plaintiffs. At the outset of the case, each of the Named Plaintiffs signed an acknowledgement of their duties as class representatives, *see ECF No. 55-1; ECF No. 56-1,* and they have fulfilled their duties by (among other things) reviewing the operative complaints, producing documents, reviewing and signing interrogatory responses, communicating regularly with Class Counsel, making themselves available during the Parties' mediation, and reviewing the proposed Settlement Agreement. *See Baker Decl.* ¶ *3*; *Greenberg Decl.* ¶ *3.* The Named Plaintiffs also support the Settlement. *See Baker Decl.* ¶¶ *4-7; Greenberg Decl.* ¶¶ *4-7*.

C. The Settlement Provides Significant Relief to Class Members through an Effective Distribution Method, and Treats Class Members Equitably

The product of the Parties' adequate and informed negotiations is a Settlement that provides significant relief to the Settlement Class. The $14 million Gross Settlement Amount falls well within the range of other settlements that have been approved when measured as a percentage of Plan assets. *See Richter Decl.* ¶ *6.*

Moreover, the negotiated settlement amount represents a significant portion of the damages that Plaintiffs estimated were caused by Defendants' alleged fiduciary breaches. *Richter Decl.* ¶ *7*. On a preliminary basis, Plaintiffs estimated those damages as follows:

- ' Alleged damages from retention of proprietary funds in Plan: $62.2 million
- Alleged damages from excessive recordkeeping expenses: $9.45 million.

Id. Because the Plan's recordkeeping expenses were paid through a fee applicable to all of the investments in the Plan (amounting to 0.1% of assets invested), Plaintiffs' recordkeeping damages

arguably overlapped with their investment-related damages. *Id.* The $14 million recovery therefore represents approximately 23% of the investment damages that Plaintiffs estimated to be associated with Defendants' alleged fiduciary breaches, and approximately 20% of Plaintiffs' total estimated damages (without accounting for any overlap between the damages categories). *Id.* This is on par with other class action settlements that have been approved. *See Sims v. BB&T Corp.*, 2019 WL 1995314, at *5 (M.D.N.C. May 6, 2019) (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"); *accord Toomey v. Demoulas Super Markets, Inc.*, No. 1:19-cv-11633, Dkt. 95 at 10 (Mar. 24, 2021) (noting that recovery represented approximately 15% – 20% of alleged damages); Dkt. 100 (D. Mass. Apr. 7, 2021) (granting final approval); *Price v. Eaton Vance Corp.*, No. 18-12098, Dkt. 32 at 12 (May 6, 2019) (noting that recovery represented 23% of calculated damages); Dkt. 57 (D. Mass. Sept. 24, 2019) (granting final approval).[5]

Moreover, in addition to the foregoing monetary compensation, the Settlement also provides for multiple forms of prospective relief. *Richter Decl. ¶ 8.* Upon the Settlement Effective Date, Defendants will retain a third-party investment consultant to provide ongoing monitoring and review of the investment options in the Plan's investment lineup for at least five years, will develop and approve an IPS for the Plan, and will utilize the services of an independent consultant

[5] *See also Medoff v. CVS Caremark Corp.*, 2016 WL 632238, at *6 (D.R.I. Feb. 17, 2016) (settlement providing recovery of 5.33% of maximum recoverable damages was well above the median percentage of settlement recoveries in comparable securities class action cases); *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").

to assist with negotiating the next recordkeeping agreement and issuing a request for information for recordkeeping services. *Settlement Agreement* ¶ *6.1.* These safeguards directly address the issues that Plaintiffs raised in the lawsuit (alleged self-interested retention of proprietary funds and alleged failure to prudently negotiate the terms of the Plan's recordkeeping arrangement), and further support approval of the Settlement. *See Bezdek v. Vibram USA Inc.*, 79 F. Supp. 3d 324, 346-47 (D. Mass. 2015) (noting that prospective relief is "a valuable contribution" to a settlement agreement); *Nilsen v. York Cty.*, 400 F. Supp. 2d 266, 284 (D. Me. 2005) (prospective relief benefitting class members supports settlement); *Marcoux v. Szwed*, 2017 WL 679150, at *3 (D. Me. Feb. 21, 2017) (same).

Finally, the Settlement treats all Settlement Class Members equitably, and the proceeds will be delivered through an effective method of distribution. As discussed above, the Net Settlement Amount will be allocated among all eligible Settlement Class Members on a *pro rata* basis in proportion to their quarterly account balances in the John Hancock funds in the Plan during the class period. *Settlement Agreement* ¶ *5.1.* Participant Class Members will have their Plan accounts automatically credited with their share of the Settlement Fund. *Id.* ¶ *5.2.* Former Participant Class Members may elect to receive either a check or a rollover to an IRA or other tax-qualified plan. *Id.* ¶ *5.3.* This method of distribution is consistent with other ERISA class action settlements in this District. *See, e.g., Toomey v. Demoulas Super Markets, Inc.*, No. 1:19-cv-11633, Dkt. 79-1 §§ 6.5-6.6 (D. Mass. Nov. 20, 2020); *Moitoso v. FMR LLC*, No. 1:18-cv-12122, Dkt. 243-01 §§ 5.2-5.3 (D. Mass. July 2, 2020); *Velazquez v. Mass. Fin. Servs. Co.*, No. 1:17-CV-11249, Dkt. 91-1 §§ 6.5-6.6 (D. Mass. June 14, 2019).

D. Plaintiffs Would Have Faced Potential Litigation Risks and Substantial Delay in the Absence of the Settlement

In the absence of a Settlement, Plaintiffs would have faced significant litigation risk. *See Hill*, 2015 WL 127728, at *10 (noting that the risk of continued litigation includes the risk that there could be no recovery at all); *In re Lupron*, 228 F.R.D. at 97 ("[A] significant element of risk adheres to any litigation taken to binary adjudication"). These risks are objectively illustrated by the judgment entered in favor of the defendants following seven days of trial in another ERISA case in this district that (like this case) involved the inclusion of proprietary funds in a 401(k) plan. *See Brotherston v. Putnam Investments, LLC*, 2017 WL 2634361 (D. Mass. June 19, 2017), *aff'd in part, vacated in part, remanded,* 907 F.3d 17 (1st Cir. 2018). Although the parties settled after the First Circuit partially vacated the defense judgment in *Putnam* and remanded the matter for further proceedings, *see* 907 F.3d at 23, the proceedings in that case illustrate the risks posed by a case such as this. In two other recent trials involving defined contribution plans, the defendants were the prevailing party. *See Wildman v. Am. Century Servs., LLC*, 362 F. Supp. 3d 685, 711 (W.D. Mo. 2019); *Sacerdote v. New York Univ.*, 328 F. Supp. 3d 273 (S.D.N.Y. 2018).

Moreover, with respect to damages, even though the First Circuit in *Brotherston* partially reversed the trial court's judgment, in doing so the First Circuit noted that there were "questions of fact" regarding whether plaintiffs' expert had "picked suitable benchmarks, or calculated the returns correctly, or focused on the correct time period." *Brotherston*, 907 F.3d at 34. The *American Century* case illustrates this risk: the trial court concluded that plaintiffs failed to prove loss based on the damages models of the plaintiffs' expert. 362 F. Supp. 3d at 710 (finding plaintiffs' expert's models "did not use suitable benchmarks and relied on unfounded assumptions"). Similarly, in *Sacerdote*, the court found that "while there were deficiencies in the Committee's processes—including that several members displayed a concerning lack of

knowledge relevant to the Committee's mandate—plaintiffs have not proven that … the Plans suffered losses as a result." 328 F. Supp. 3d at 280. Although Plaintiffs believe that they developed sound loss models for this case, these decisions illustrate that Plaintiffs faced risk with respect to damages as well as liability. *See* Restatement (Third) of Trusts, § 100 cmt. b(1) (2012) (noting that determination of investment losses in breach of fiduciary duty cases is "difficult"). This further supports approval of the Settlement in this case. *See Hill*, 2015 WL 127728, at *9; *Kemp-DeLisser v. Saint Francis Hospital and Medical Center,* 2016 WL 6542707, at *9 (D. Conn. Nov. 3, 2016) (finding complex damages analysis weighed in favor of ERISA class settlement).

Moreover, aside from these risks, continuing the litigation would have resulted in additional complex and costly proceedings, which would have further delayed relief to class members, even if Plaintiffs had ultimately prevailed. "The complexity inherent in class actions is amplified in ERISA class actions," *Karpik*, 2021 WL 757123, at *4, and can "often lead[] to lengthy litigation." *See Krueger v. Ameriprise*, 2015 WL 4246879, at *1 (D. Minn. July 13, 2015). Indeed, ERISA cases such as this can extend for a decade or longer before final resolution, sometimes going through multiple appellate proceedings. *See Tussey v. ABB, Inc.*, 850 F.3d 951 (8th Cir. 2017) (recounting lengthy procedural history of case that was initially filed in 2006, and remanding for district court to address the issue of loss a second time); *Tibble v. Edison Int'l*, 2017 WL 3523737, at *15 (C.D. Cal. Aug. 16, 2017) (outlining remaining issues ten years after suit was filed on August 16, 2007). Given the risks, cost, and delay of further litigation, it was reasonable and appropriate for Plaintiffs to reach a settlement on the terms that were negotiated. *See Kruger v. Novant Health, Inc.*, 2016 WL 6769066, at *5 (M.D.N.C. Sept. 29, 2016) ("[S]ettlement of a 401(k) excessive fee case benefits the employees and retirees in multiple ways").

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

In addition to reviewing the substance of the Parties' Settlement Agreement, the Court must ensure that notice is sent in a reasonable manner to all class members who would be bound by the settlement. Fed. R. Civ. P. 23(e)(1). The "best notice" practicable under the circumstances includes individual notice to all class members who can be identified through reasonable effort. Fed. R. Civ. P. 23(c)(2)(B). That is precisely the type of notice proposed here. The Settlement Administrator will provide direct notice of the Settlement to the Settlement Class via U.S. Mail. *Settlement Agreement ¶ 3.2.* This type of notice is presumptively reasonable. *See Phillips Petroleum Co. v. Shutts,* 472 U.S. 797, 812 (1985).

The content of the Notices is also reasonable. The Notices include, among other things: (1) a summary of the lawsuit; (2) a clear definition of the Settlement Class; (3) a description of the material terms of the Settlement; (4) a disclosure of the release of claims; (5) instructions for submitting a Former Participant Rollover Form (Former Participants only); (6) instructions as to how to object to the Settlement and a date by which Settlement Class Members must object; (7) the date, time, and location of the final approval hearing; (8) contact information for the Settlement Administrator; (9) information regarding Class Counsel and the amount that Class Counsel will seek in Attorneys' Fees; and (10) information regarding the amount of Service Awards to be paid from the Gross Settlement Amount. *Settlement Agreement Exs. 1-2.* These Notices are clearly reasonable as they "fairly apprise the prospective members of the class of the terms of the proposed settlement and of the options that are open to them." *Hill*, 2015 WL 127728, at *15 (D. Mass. Jan. 8, 2015) (quoting *Greenspun v. Bogan*, 492 F.2d 375, 382 (1st Cir.1974)) (internal citations omitted).

IV. THE PROPOSED CLASS SHOULD BE CERTIFIED FOR SETTLEMENT PURPOSES

Finally, Plaintiffs request that the Court approve the certification of the Settlement Class. This Court previously granted Plaintiffs' motion for class certification, *see ECF No. 59*, and the proposed Settlement Class is consistent with the class that was the subject of Plaintiffs' earlier motion:

Proposed Settlement Class (Settlement Agreement ¶ 1.9)	**Litigation Class (ECF Nos. 53, 59)**
All participants and beneficiaries of the Investment-Incentive Plan for John Hancock Employees at any time between February 27, 2014 and the date ~~of final judgment~~ the Court enters the Preliminary Approval Order, excluding any members of the John Hancock US Benefits Committee or the John Hancock US Investment Subcommittee.	All participants and beneficiaries of the Investment-Incentive Plan for John Hancock Employees at any time between February 27, 2014 and the date of final judgment, excluding any members of the John Hancock US Benefits Committee or the John Hancock US Investment Subcommittee.

The only difference is that the Settlement Class now sets forth an end date for the class period.

For the reasons explained in Plaintiffs' earlier Motion for Class Certification *(ECF No. 53)*, all necessary criteria for class certification are satisfied in this case. The Settlement Class meets all of the requirements of Rule 23(a):

- The Class is numerous. There are at least 9,800 class members. *See ECF No. 53 ¶ 4.*
- Common issues exist regarding (among other things): (a) whether Defendants breached their duties of prudence and loyalty in violation of 29 U.S.C. § 1104(a)(1)(B); (b) whether John Hancock breached its fiduciary duties with respect to monitoring other Plan fiduciaries; and (c) the relief, if any, that may be appropriate in this case.
- The Named Plaintiffs are typical of other Class members, as they participated in the Plan during the relevant class period (*see ECF Nos. 55, 56*) and were treated consistently with other class members; and
- The Named Plaintiffs and Class Counsel have adequately represented the Class, and have committed additional resources and time to the suit since Plaintiffs' motion for class certification was originally granted.

Moreover, class certification is appropriate under Federal Rule of Civil Procedure 23(b)(1) due to the ongoing risk that separate actions would be dispositive of the interests of other participants not parties to those separate actions, or substantially impair other participants' ability to protect their own interests. *See Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 834 (1999) (noting that a breach of trust action is a "classic example" of a Rule 23(b)(1) class). Indeed, the Advisory Committee Notes to Rule 23 expressly recognize that class certification is appropriate under Rule 23(b)(1)(B) in "an action which charges a breach of trust by an indenture trustee or other fiduciary similarly affecting the members of a large class of security holders or other beneficiaries, and which requires an accounting or like measures to restore the subject of the trust." Fed. R. Civ. P. 23 advisory committee notes (1966). "Given that the present case involves an ERISA § 502(a)(2) claim brought on behalf of the Plan and alleg[es] breaches of fiduciary duty on the part of Defendants that will, if true, be the same with respect to every class member . . . 23(b)(1)(B) is clearly satisfied . . . [and] the Settlement Class should be certified." *Hochstadt*, 708 F. Supp. 2d at 105-106.[6]

[6] *See also e.g.*, *Tracey v. Mass. Inst. Tech.*, 2018 WL 5114167 (D. Mass. Oct. 19, 2018); *Brotherston v. Putnam Invs., LLC*, No. 1:15-cv-13825, ECF No. 88 (D. Mass. Dec. 13, 2016); *Vellali v. Yale Univ.*, 2019 WL 5204456 (D. Conn. Sept. 24, 2019); *Beach v. JPMorgan Chase Bank, Nat'l Ass'n*, 2019 WL 2428631 (S.D.N.Y. June 11, 2019); *Cunningham v. Cornell Univ.*, 1:16-cv-6525, ECF No. 219 (S.D.N.Y. Jan. 22, 2019); *Cates v. The Trustees of Columbia Univ.*, 1:16-cv-06524, ECF No. 210 (S.D.N.Y. Nov. 13, 2018); *Cassell v. Vanderbilt Univ.*, 2018 WL 5264640 (M.D. Tenn. Oct. 23, 2018); *Henderson v. Emory Univ.*, 2018 WL 6332343 (N.D. Ga. Sept. 13, 2018); *Fuller v. SunTrust Banks, Inc.*, 2018 WL 3949698, at *1 (N.D. Ga. June 27, 2018); *Wildman v. Am. Century Servs., LLC*, 2017 WL 6045487 (W.D. Mo. Dec. 6, 2017); *Moreno v. Deutsche Bank Am. Holding Corp.*, 2017 WL 3868803 (S.D.N.Y. Sept. 5, 2017); *Bowers v. BB&T Corp.*, 2017 WL 3730552 (M.D.N.C. Aug. 28, 2017); *Cryer v. Franklin Templeton Res., Inc.*, 2017 WL 4023149 (N.D. Cal. July 26, 2017); *Urakhchin v. Allianz Asset Mgmt. of Am., L.P.*, 2017 WL 2655678 (C.D. Cal. June 15, 2017); *Rozo v. Principal Life Ins. Co.*, 2017 WL 2292834 (S.D. Iowa May 12, 2017); *Leber v. Citigroup 401(k) Plan Inv. Comm.*, 323 F.R.D. 145 (S.D.N.Y. 2017).

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court (1) preliminarily approve the Settlement; (2) approve the proposed Notices and authorize distribution of the Notices; (3) certify the Settlement Class; (4) schedule a final approval hearing; and (5) enter the accompanying Preliminary Approval Order.

Dated: June 1, 2021

NICHOLS KASTER, PLLP

By: /s/ Kai H. Richter
Kai H. Richter, MN Bar No. 0296545*
Paul J. Lukas, MN Bar No. 022084X*
Brock J. Specht, MN Bar No. 0388343*
Jacob T. Schutz, MN Bar No. 0395648*
* *admitted pro hac vice*
4700 IDS Center
80 S 8th Street
Minneapolis, MN 55402
Telephone: 612-256-3200
Facsimile: 612-338-4878
lukas@nka.com
krichter@nka.com
bspecht@nka.com
jschutz@nka.com

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

LOCAL RULE 7.1 CERTIFICATION

I, Kai Richter, hereby certify that I conferred with counsel for Defendants in good faith on June 1, 2021 regarding the issues raised in this motion and have been advised that Defendants do not oppose the motion.

Dated: June 1, 2021

s/Kai Richter
Kai Richter

CERTIFICATE OF SERVICE

I hereby certify that on June 1, 2021, a true and correct copy of Plaintiffs' Motion for Preliminary Approval of Class Action Settlement was served by CM/ECF to the parties registered to the Court's CM/ECF system.

Dated: June 1, 2021

s/Kai Richter
Kai Richter