UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND
BALTIMORE DIVISION

DAVID G. FEINBERG, et al., and all others similarly situated,

Plaintiffs,

vs.

T. ROWE PRICE GROUP, INC., et al.,

Defendants.

Case No. 1:17-cv-00427-JKB

PLAINTIFFS' BRIEF IN SUPPORT OF MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT, THE FORM AND MANNER OF CLASS NOTICE, MODIFICATION OF CLASS DEFINITION, SUBSTITUTION OF CLASS COUNSEL, AND SCHEDULING OF A FAIRNESS HEARING

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Treatises

Other Authorities

I. INTRODUCTION

This class action lawsuit is an ERISA civil enforcement action brought pursuant to 29 U.S.C. §1132(a) on behalf of the T. Rowe Price U.S. Retirement Program ("Plan") a defined contribution 401(k) plan. Plaintiffs are Plan participants who seek to recover losses to the Plan that Plaintiffs allege resulted from Defendants' corporate self-dealing and breaches of their fiduciary duties of loyalty and prudence related to the offering of T. Rowe Price's own in-house funds in the Plan. The litigation has been hard-fought and vigorously litigated at every stage, and all that remains is trial. It has included a broad motion to dismiss, extensive fact discovery including sixteen fact depositions and Plaintiffs' review of over 100,000 pages of Defendants' documents, six expert reports from Plaintiffs' experts, three expert reports from Defendants' experts, six expert depositions, and comprehensive summary judgment motions from each side involving hundreds of exhibits.

The Parties have now agreed to a settlement which Plaintiffs present to the Court for preliminary approval.[1] The proposed settlement provides significant relief to the Class, including (i) a cash payment of $7,000,000 (the "Settlement Amount"), and (ii) the addition of a Brokerage Window feature which will allow Plan participants, for the first time, to invest in funds other than T. Rowe Price Funds. As discussed further below, the litigation also resulted, as this Court acknowledged in its summary judgment opinion, in a payment by T. Rowe Price of $6.6 million in 2019 to many Class members. (As is discussed further below, assuming it earned the overall Plan return, that $6.6 million would have appreciated to over $11 million through June 30, 2021).

[1] The Settlement Agreement is submitted as Exhibit 1 to the Preliminary Approval Motion. The provisions of the Settlement Agreement, including all definitions and defined terms, are incorporated by reference. Thus, capitalized terms not otherwise defined herein have the same meaning as in the Settlement Agreement.

The Parties agreed to the settlement only after arms-length negotiations, which were conducted by highly experienced Class Counsel and Defense Counsel who have litigated many similar cases. The principal settlement negotiations were mediated by U.S. Magistrate Judge A. David Copperthite of this Court; Robert Meyer of JAMS mediated a dispute regarding one issue.

Plaintiffs believe the proposed Settlement is a good result under the circumstances, which includes a summary judgment opinion in which the Court expressed skepticism regarding whether Plaintiffs' claims could succeed. The Settlement provides for a substantial, immediate payment to Class members, greater and unprecedented investment flexibility for Plan participants, and eliminates the risk and cost of trial, which could have resulted in no relief at all. As set forth below, the settlement is fair, reasonable, and adequate under governing law, and meets all requirements for preliminary approval.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. The Parties and the Class

The Named Plaintiffs and Class Representatives are Michelle Bourque, James Collins, David G. Feinberg, Daniel Fialkoff, Thomas Henry, Jitesh Jani, Sital Jani, Daniel Newman, Farrah Qureshi, Maria Stanton, and Regina Widderich. Defendants are alleged to be Plan fiduciaries and include (i) T. Rowe Price Group, Inc.; (ii) T. Rowe Price Associates, Inc.; (iii) T. Rowe Price Trust Company; (iv) the T. Rowe Price Group, Inc. Management Committee; (v) T. Rowe Price Group, Inc. Management Compensation Committee; (vi) T. Rowe Price Group Inc. Board of Directors; and (vii) Plan Trustees Preston Athey, Steve Banks, Cynthia Crocker, Celine Dufetel, Eric Gee, Michael McGonigle, Kenneth Moreland, Larry Puglia, and Meredith Stewart.

Pursuant to the Court's May 17, 2019 class certification order the Class in this case is currently defined as follows:

> All participants in the T. Rowe Price U.S. Retirement Program who had a balance in their plan account at any time from February 14, 2011 through the date of judgment. Any individual Defendants, any members of the T. Rowe Price Board of Directors, the Management Committee, the Management Compensation Committee, and their beneficiaries and immediate families are excluded from the class.

(Dkt. No. 83 ¶4). Plaintiffs estimate, based on data Defendants have provided, that there are approximately 18,000 Class members.

B. Claims for Relief

Plaintiffs' claims concern Defendants' conduct as Plan fiduciaries in favoring T. Rowe Price proprietary investments for the Plan. The claims alleged in the operative complaint are:

COUNT I: Breach of Duties of Loyalty and Prudence for Imprudent and Disloyal Monitoring and Selection of 401(k) Plan Investments during the Class Period, which Caused Losses to the 401(k) Plan

COUNT II: The Appointing Fiduciary Defendants Breached their ERISA Fiduciary Duties by Failing to Remove and Prudently Monitor the 401(k) Plan Trustees

COUNT III: Breach of Duties of Loyalty and Prudence by Providing Imprudent and Self-Interested Investment Advice to Committee Defendants

COUNT IV: Liability for Breach of Co-Fiduciary

COUNT V: Liability for Failing to Remedy Breach of Predecessor Fiduciaries

COUNT VI: Liability for Committing Prohibited Transactions in Violation of ERISA, 29 U.S.C. §1106

COUNT VII: Other Equitable Relief Based on Ill-Gotten Proceeds In Violation of ERISA, 29 U.S.C. §1132(a)(3)

(Second Amended Class Action Complaint (Dkt. No. 84) ¶¶120-63).

C. Procedural History

After Class Counsel's investigation and development of the claims and causes of action asserted, Plaintiff David G. Feinberg filed the original complaint in this case on February 14, 2017. Defendants filed a motion to dismiss, contending, *inter alia*, that Plaintiff lacked standing with respect to some of his claims. (Dkt. No. 27). Plaintiff filed an amended complaint adding ten additional named Plaintiffs. (Dkt. No. 32). Defendants moved to dismiss again, but dropped their

standing objections. (Dkt. No. 35). One of Defendants' principal arguments for dismissal was that their actions as fiduciaries with respect to offering T. Rowe Price's own funds in the Plan were mandated by the governing Plan document. After the Defendants' second motion to dismiss was fully briefed, oral argument was held before the Hon. Judge Garbis. (Dkt. No. 50). Judge Garbis subsequently retired; Chief U.S. District Judge James K. Bredar was assigned to the case. Judge Bredar listened to the recording of the oral argument and denied Defendants' motion to dismiss. (Dkt. Nos. 58, 59).

Following the denial of Defendants' motion to dismiss, the litigation entered the discovery phase. Class Counsel propounded 52 requests for production of documents, 22 requests for admission, and 17 interrogatories; Defense Counsel propounded 22 document requests and 14 interrogatories. (Moore Decl. ¶¶ 3-4).[2] Class Counsel and their staff had the over 114,000 pages of documents produced by Defendants loaded into an electronic document database and coded and reviewed them. *Id.* ¶¶ 2. There was also discovery-related motion practice, with Plaintiffs filing two motions to compel, and Defendants one. (Dkt. Nos. 74, 120, 121). Class Counsel deposed ten fact witnesses, and Defense Counsel deposed six Class Representatives; Plaintiffs' three proposed expert witnesses submitted initial and reply expert reports, Defendants' three experts submitted rebuttal reports, and each side deposed the other side's three experts. (Moore Decl. ¶¶ 5-6).

Subsequently, each side prepared voluminous summary judgment motions in the hope of resolving the case in their favor prior to trial. (Dkt. Nos. 142-86). Each motion was accompanied by more than 200 exhibits and statements of material facts spanning hundreds of pages. *Id.* On February 10, 2021, the Court denied in large part the Parties' motions for summary judgment.

[2] "Moore Decl." refers to the *Declaration of James Moore in Support of Plaintiffs' Motion for Preliminary Approval of Settlement,* filed herewith.

(Dkt. No. 200). However, the Court expressed skepticism regarding Plaintiffs' claims, e.g. indicating that on the record before it, it believed it "likely" that a fact-finder would find facts favorable to Defendants' position. *Id.* at 17. Plaintiffs subsequently filed a motion for reconsideration, and a motion for certification for interlocutory appeal to the United States Court of Appeals for the Fourth Circuit. Both motions were denied. (Dkt. Nos. 209, 219).

A trial date of September 13, 2021 was set by the Court. (Dkt. No. 206). The trial was subsequently postponed in light of the Parties' agreement on a Settlement in principle on July 23, 2021. (Dkt. No. 221). Defendants subsequently provided Plaintiffs data necessary to implement the settlement and the Parties exchanged numerous drafts of settlement papers. Further mediation before Judge Copperthite, as well as a private JAMS mediator, Robert Meyer, was necessary to fully resolve remaining disagreements between the Parties. A full settlement agreement was finalized on December 16, 2021.

D. The Proposed Settlement

The Action and the proposed settlement will provide (or have provided) significant relief to the Class in three ways: (i) a cash payment of $7,000,000 (Settlement Agreement §§5-6); (ii) addition of a Brokerage Window feature which will allow Plan participants to invest in non-T. Rowe Price funds, *id.* §7; and (iii) a 2019 payment by T. Rowe Price of $6.6 million to many Class members that resulted from this lawsuit.

1. $7 Million Cash Payment to be Distributed According to the Plan of Allocation

The $7 million Settlement Amount will be allocated to Class members pursuant to the proposed Plan of Allocation.[3] Under the Plan of Allocation all Class members will receive a

[3] The Plan of Allocation is Exhibit 2 to the instant motion.

minimum $20 payment from the settlement. The remaining amount will be allocated pro rata based on the extent of a Class member's investments during the Class Period in the 39 Challenged Funds – T. Rowe Price funds that Plaintiffs contend underperformed.[4] The amount of each Class Member's investments in these funds is assessed on a quarterly basis.[5]

2. Addition of a Brokerage Window

Under the Settlement, Defendants are required to begin offering a Brokerage Window feature to all Plan participants within six months of the Settlement's effective date. Since its

[4] The "Challenged Funds" are defined in the Settlement Agreement as:

> **(i)** the following thirty-one T. Rowe Price Funds that Plaintiffs contend should have been removed at the inception of the Class Period: Balanced, Corporate Income, Emerging Europe, Emerging Markets Bond, Emerging Markets Stock, Equity Income, Equity Index Trust-C, Extended Equity Market Index, GNMA, Global Infrastructure, Global Real Estate, Global Technology, Growth Stock, Growth and Income, High Yield, Inflation Protected Bond, International Discovery, International Stock, International Value Equity, Mid-Cap Value, Overseas Stock, Real Estate, Science and Technology, Short-Term Bond, Spectrum Growth, Spectrum Moderate Allocation, Summit Cash Reserves Fund, Summit GNMA, Total Equity Market Index, U.S. Treasury Long-Term, Value, and U.S. Treasury Money Fund; and **(ii)** the following eight T. Rowe Price funds that were added to the Plan during the Class Period and Plaintiffs contend should not have been added: Dynamic Global Bond (added 1/1/2016), Emerging Markets Discovery Stock (added 10/1/2016), Emerging Markets Local Currency Bond (added 6/1/2011), Floating Rate (added 8/1/2011), Institutional Frontier Markets Equity (added 8/1/2015), Institutional Global Value Equity (added 7/1/2014), International Disciplined Equity (added 8/1/2017), and Real Assets (added 6/1/2012). (In some cases, these funds include multiple versions or types, e.g. when what was originally offered in the plan was a mutual fund but was later replaced with a similar collective trust version of the same strategy).

(Ex. 1, §1.10).

[5] To the extent a Class member received the Special Payment referenced in §3 below, the amount of that payment will offset any allocation deriving from the Class member's investments in the Challenged Funds from 2011-2013. This adjustment (i) is appropriately limited to 2011-2013 because the Special Payment was only distributed to Class members who had a balance in their account for those years and was paid by Defendants to offset expenses for those years and (ii) is equitable because those who received a distribution from the Special Payment did not pay attorneys fees or expenses on those distributions.

inception, only T. Rowe Price funds have been offered in the Plan. The Brokerage Window will allow Plan participants, for the first time, to invest in a wide range of non-T. Rowe Price investment funds, including mutual funds and exchange traded funds, offered by other mutual fund families. This will allow participants to invest outside of T. Rowe Price in those situations where they believe there are better options elsewhere. Defendants will be required to offer this new feature for at least ten years.

3. $6.6 Million Already Paid to Class Members

In January 2019, Defendants paid $6.6 million to Plan participants who had a balance in their Plan accounts and were T. Rowe Price employees at the end of the years 2011, 2012, or 2013. (Dkt. No. 200 at 21-22). As this Court recognized in its summary judgment opinion in this case, this Special Payment was in response to this lawsuit. *Id.* Defendants made this payment in an attempt to mitigate their liability for Plaintiffs' claims that Defendants violated ERISA's self-dealing proscriptions by causing Plan assets to be used to pay fees for the use of T. Rowe Price's own mutual funds in the Plan. The payment was intended to put the Plan on an equal footing, for the years 2011-2013, with other plans offering T. Rowe Price funds that received credit for record-keeping fees. (See *id.* and sources cited therein for more information).

If that payment had been invested in the Plan and earned the overall Plan return, it would have an estimated appreciated value through June 30, 2021 (the latest date for which Defendants have provided Plaintiffs with relevant data) of over $11 million. (Pomerantz Decl. ¶5).[6] Over 6000 Class members were eligible for, and received, distributions from the Special Payment. Based on data Defendants have provided to Plaintiffs, all of these distributions exceeded $240, and some were as much as $1310.

[6] "Pomerantz Decl." refers to the *Declaration of Steve Pomerantz Ph.D.*, filed herewith.

4. Attorneys Fees and Expenses and Class Representative Service Awards

The Settlement Agreement provides that Class Counsel may seek up to $3.5 million in attorneys fees from the Gross Settlement Fund. (Settlement Agr. §8.1). This constitutes 19% of the $18 million total monetary benefit that could accrue to the Class through the proposed settlement (i.e. the sum of the settlement amount – $7 million – and the appreciated value of the Special Payment – $11 million).[7] As noted above, the proposed settlement also provides for injunctive relief in the form of a Brokerage Window feature being added to the Plan. The monetary value of this injunctive relief to the Class is difficult to quantify given the uncertainties of predicting how Class members will use this feature. However, Plaintiffs' expert determined the Plan had $58.9 million in losses during the Class Period through January 31, 2020 from using the 39 underperforming T. Rowe Price Challenged Funds compared to widely available Vanguard or Fidelity funds. (Dkt. No. 144-11 at 4). Hence, the Brokerage Window has the potential to be the most valuable feature of the Settlement for Plan participants since they could conceivably utilize it to mitigate or eliminate the large losses from these funds going forward. Thus, the injunctive relief also supports an award of attorneys fees.

Class Counsel will submit a detailed petition for attorneys fees and expenses prior to the hearing on final approval of the settlement, but they note now that a one-third fee is commonly awarded in ERISA class actions such as this. Kelly v. Johns Hopkins Univ., No. 1:16-cv-2835-GLR, 2020 WL 434473, at *3, U.S. Dist. LEXIS 14772, at *8 (D. Md. Jan. 28, 2020) (in "ERISA excessive fee cases…courts have consistently recognized that a one-third fee is the market rate"). It should also be noted that, as discussed further below, Class Counsel are highly

[7] It would constitute 26% of the Settlement amount plus the *initial value of the* $6.6 million Special Payment.

experienced and have exceptional qualifications for this type of litigation. Moreover, when Class Counsel submit their fee petition, the data will show that there is a negative lodestar multiplier for their work in this case, indicating that they would be providing their services to the Class at a discount.[8]

The Settlement Agreement also anticipates that Class Counsel will seek reimbursement for the reasonable litigation expenses they have incurred in litigating this action, which include, for example, payments to their three experts. (Ex. 1, §8.1). Class Counsel expect these expenses to be approximately $565,000.

The Settlement Agreement also provides that Class Counsel may seek service awards not to exceed $15,000 for each of the eleven Class Representatives, *id.*, who provided valuable assistance to Class Counsel in prosecuting the action. All the Class Representatives produced discovery in this case pursuant to document requests and interrogatories and followed its progress; six were deposed and several attended court hearings and mediation conferences. All also exposed themselves to the risk of adverse career consequences by being involved in a suit against their former or current employer.

This request is in line with service awards approved by courts in this Circuit in similar cases, which recognize the valuable contributions Class Representatives make to actions such as this that benefit the Class as a whole. Kelly v. Johns Hopkins Univ., 2020 WL 434473, at *7-8, U.S. Dist. LEXIS 14772, at *21 (approving $20,000 service awards to each of eight class

[8] Where the lodestar analysis supports it, even an award of 50% of the Settlement Fund has been considered appropriate by courts in this Circuit. *See* Chado v. Nat'l Auto Insps., No. JKB-17-2945, 2020 WL 4368106, at *6, U.S. Dist. LEXIS 135472, at *18 (D. Md. July 29, 2020) (Bredar, J., approving 45% fee and noting that courts approve similar high percentages where the lodestar approach supports it); Reed v. Big Water Resort, LLC, No. 2:14-cv-01583-DCN, 2016 WL, at *11, n.3, U.S. Dist. LEXIS 187745, at *36 n. 3 (D.S.C. May 26, 2016) (50% held reasonable in appropriate circumstances).

representatives in similar ERISA class action); Sims v. BB&T Corp., No. 1:15-CV-732, 2019 U.S. Dist. LEXIS 75839 at *18 (M.D.N.C. May 6, 2019) (approving $20,000 service awards to each of ten class representatives in similar ERISA proprietary fund class action).

5. Class Notice

Included as Exhibit C to the Settlement Agreement is a proposed Class Notice providing extensive information to Class members regarding the Settlement and related procedures. As is further discussed below, the notice will be sent to all Class members by first class mail or an email address used by the Plan for Plan communications. A Settlement Website will also be created where the Notice and other key documents will be posted and made accessible to Class members. A toll-free number will be provided for Class members who require additional information.

III. THE PROPOSED SETTLEMENT SATISFIES THE STANDARD FOR PRELIMINARY APPROVAL

A. The Standard for Preliminary Approval of a Class Action Settlement

Under Fed. R. Civ. P. 23, the Court is to direct notice of a proposed settlement if it seems "likely" that it would give final approval of the settlement. Fed. R. Civ. P. 23(e)(1)(B). Hence, at the preliminary approval stage, the Court is required to assess whether there is "'probable cause' to submit the proposal to members of the class and to hold a full-scale hearing on its fairness." In re Am. Cap. S'holder Derivative Litig., No. 11-2424-PJM, 2013 WL 3322294, at *3, U.S. Dist. LEXIS 90973, at *8 (D.Md. June 28, 2013) (quoting In re Mid-Atlantic Toyota Antitrust Litig., 564 F.Supp. 1379, 1384 (D. Md.1983)). There must be a "basic showing" that the proposed settlement "is sufficiently within the range of reasonableness so that notice should be given." *Id.* (internal quotation marks and ellipsis omitted). The court makes "a preliminary determination on the fairness, reasonableness, and adequacy of the settlement terms" and "direct[s] the preparation of notice of the certification, proposed settlement, and date of the final fairness hearing." *Id.* (quoting *Manual for Complex Litigation (Fourth),* §21.632 (2004)).

There are two primary prongs to the preliminary assessment of a class action settlement: fairness and adequacy. *Id.* The fairness prong focuses on the procedural propriety of the proposed settlement, while the adequacy prong focuses on "substantive propriety." *Id.*

B. The Settlement Satisfies the Fairness Prong for Preliminary Approval

The court considers the following factors in assessing the procedural fairness of the proposed settlement:

> [1] whether the proposed settlement is the product of good faith bargaining at arm's length; [2] the posture of the case at settlement; [3] the extent and sufficiency of discovery conducted; [4] counsel's experience with similar litigation and their relevant qualifications; and [5] any pertinent circumstances surrounding the negotiations

Id. These factors support preliminary approval here.

1. The Settlement is the Product of Good Faith Bargaining at Arm's Length

There is a strong initial presumption that a proposed class action settlement is fair and reasonable when it is the result of arm's-length negotiations. Horton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 855 F. Supp. 825, 830 (E.D.N.C. 1994); In re MicroStrategy, Inc. Sec. Litig., 148 F.Supp.2d 654, 663 (E.D.Va. 2001).

The negotiations here were definitely at arm's length. This case was vigorously contested and settled only upon the brink of trial. On January 9, 2020, the Court referred the case to Magistrate Judge A. David Copperthite for a Settlement Conference. (Dkt. No. 133). Plaintiffs did not believe settlement discussions would be productive at that time, so Judge Copperthite canceled the Settlement Conference in June. (Dkt. No. 141). After the Court's February 10, 2021 summary judgment opinion, (Dkt. No. 200), the Parties decided settlement discussions might be productive, and Judge Copperthite scheduled a Settlement Conference for April 13, 2021. (Dkt. No. 207). The settlement negotiations included a Settlement Conference

mediated by Judge Copperthite that took place via Zoom. Both sides provided Judge Copperthite with their respective mediation statements and ex parte letters and exchanged proposals and counter-proposals concerning potential settlement terms. Despite Judge Copperthite and the Parties' efforts an agreement on settlement was not reached. As trial approached, at Judge Copperthite's urging, the Parties revisited settlement discussions and agreed to a settlement in principle and term sheet on July 23, 2021. Judge Copperthite subsequently stayed associated deadlines. (Dkt. No. 221).

The Parties encountered some disagreements in attempting to complete a comprehensive Settlement Agreement and ancillary documents. Pursuant to the Term Sheet, Judge Copperthite mediated these differences between the Parties in October 2021. Some differences remained after this mediation, and in November the Parties mediated the remaining differences before a private JAMS mediator, Robert Meyer, who has experience in complex litigation, including ERISA class actions. The Parties continued to exchange drafts of settlement papers and finalized the Settlement Agreement on December 16, 2021.

The extended settlement negotiations mediated by an impartial U.S. Magistrate Judge and an experienced private mediator make clear that the negotiations were at arm's length. This factor thus supports a preliminary approval. Hutton v. Nat'l Bd. of Exam'rs in Optometry, No. JKB-16-3025, 2019 WL 3183651, at *5, 2019 U.S. Dist. LEXIS 120558, at *18 (D. Md. July 15, 2019) (Bredar, J.) ("reliance on a neutral mediator experienced in complex litigation [or a court-affiliated mediator], indicate the Settlement is fair and that it should be approved").

2. The Posture of this Case at the Time of Settlement – at the Brink of Trial – Also Supports Preliminary Approval

As summarized above in §II.C, this case has been vigorously litigated at every stage and the settlement in principle was agreed to on the brink of trial, which was scheduled to begin less

than two months before the settlement was reached (July 23 settlement – September 13 trial). There were multiple motions to dismiss, multiple motions to compel, and each party filed voluminous summary judgment motions. Plaintiffs reviewed over 114,000 pages of documents produced by Defendants. This was obviously not a case of Class Counsel seeking a quick settlement shortly after filing suit.

Hence, the posture of this case at the time the settlement was agreed to also supports preliminary approval.

3. The Extent and Sufficiency of Discovery Conducted Supports Preliminary Approval

As summarized above in §II.C, there was extensive discovery conducted in this case. Class Counsel served numerous discovery requests and reviewed over 114,000 pages of documents produced by Defendants, as well as Defendants' responses to Plaintiffs' interrogatories and requests for admission. There was also discovery-related motion practice, with Plaintiffs filing multiple motions to compel, and Defendants one. Class Counsel deposed ten fact witnesses, and Defense Counsel deposed six Class Representatives; Plaintiffs submitted initial and reply reports from each of their three experts; Defendants submitted a rebuttal report from each of their three experts; and each side deposed the other side's three experts. At scheduling conferences and through their motions to compel, Plaintiffs sought even more extensive discovery, though this Court and Magistrate Judge Coulson decided it was not warranted. (*See, e.g.*, Dkt. Nos. 76, 111, 128).

The extent and sufficiency of discovery, including extensive expert reports, thus also supports preliminary approval.

4. Class Counsel's Experience with Similar Litigation and Their Qualifications Supports Preliminary Approval

Class Counsel's experience with similar litigation and their qualifications also supports preliminary approval. Class Counsel are unaware of any group of attorneys with more years of experience advocating on behalf of plan participants in ERISA class actions than themselves. (*See* firm resumes at Dkt. Nos. 77-6, 77-7). Each of the named Class Counsel has been practicing in this field for more than 20 years. *Id.* McTigue Law LLP ("McTigue Law") has been a pioneer in the field, being among the first law firms to bring an ERISA class action on behalf of 401(k) plan participants in 1997 (Blyler v. Agee, et al., D-Id., 97-cv-0332- (BLW) (D. Idaho) and Presley v. CHH, et al., 97-cv-04316 (SC) (N.D. Cal.)), and bringing some of the first cases challenging high investment fees and the use of proprietary funds in 401(k) plans in 2005 and 2006.[9] The employee benefits litigation group of Cohen Milstein Sellers & Toll LLP ("Cohen Milstein") was recognized as "Benefits Group of the Year" for 2019 by the legal publication *Law360*.[10]

Furthermore, there is likely no group of attorneys with more experience in the particular

[9] For the record, the statement by a court in this district that "no attorney or law firm ever filed an excessive fee ERISA case before [Schlichter, Bogard & Denton LLP]," Kelly v. Johns Hopkins Univ., No. 1:16-CV-2835-GLR, 2020 WL 434473, at *6, 2020 U.S. Dist. LEXIS 14772, at *18 (D. Md. Jan. 28, 2020), is not correct. This incorrect claim was adopted from statements in that same law firm's filings seeking approval of the settlement. The Schlichter, Bogard & Denton LLP firm filed its first such action on September 11, 2006, but both the instant Class Counsel firms were involved in such cases before then. Cohen Milstein Sellers & Toll LLP was among the firms representing the plaintiffs in an ERISA case filed in 1999 that sought to recoup "overpaid investment management costs." Mehling v. N.Y. Life Ins. Co., 413 F. Supp. 2d 476, 479 (E.D. Pa. 2005). Further, both the 2005 and 2006 McTigue Law cases referenced in the text above complaining of excessive investment management fees were filed by McTigue Law (or its predecessor firms) before September 11, 2006. *See* McCullough v. Aegon USA, Inc., 2:05-cv-07215 (C. D. Cal. Oct. 5, 2005) (brought on behalf of participants in Transamerica 401(k) Plan); David v. Alphin, 3:06-cv-04763 C-06-04763-WHA (N. D. Cal. Aug. 7, 2006) (brought on behalf of participants in Bank of America 401(k) Plan).

[10] https://www.law360.com/articles/1232627/benefits-group-of-the-year-cohen-milstein

type of ERISA class action at issue here, referred to in the field as a proprietary fund case. McTigue Law is a pioneer in this field, and was the first firm to have filed two such cases on behalf of participants. (*See* n. 9, *supra*). This is the sixth such case McTigue Law has litigated; and the sixth case litigated by Cohen Milstein. Prior to this case, both firms litigated In re SunTrust Banks, Inc. 401(k) Plan Affiliated Funds ERISA Litig., Case No. 1:11-cv-784 (N. D. Ga.), which settled for $29 million, (see Dkt. No. 302 of that case (July 20, 2020)), one of the largest settlements ever for a proprietary fund case.[11] Class Counsel's experience litigating and settling cases with similar issues weighs in favor of preliminary approval of this settlement. *See* In re Jiffy Lube Sec. Litig., No. Y-89-1939, 1990 WL 39127, at *7 (D. Md. Jan. 2, 1990) (finding co-lead counsel were "eminently well-qualified and experienced" in the area of law at issue, resulting in the informed and realistic assessment of the benefits of settlement).

C. The Settlement Satisfies the Adequacy Prong for Preliminary Approval

The court considers the following factors in assessing the substantive adequacy of the proposed settlement:

> [1] the relative strength [and weaknesses] of the plaintiffs' case on the merits…; [2] the cost of additional litigation; [3] defendants' ability to pay a judgment; and [4] any opposition to the settlement

In re Am. Capital S'holder Derivative Litig., No. 11-2424-PJM, 2013 WL 3322294, at *3, U.S. Dist. LEXIS 90973, at *10 (D. Md. June 28, 2013) (internal quotation marks and citations omitted). These factors support preliminary approval.

1. The Strengths and Weaknesses of Plaintiffs' Case on the Merits Supports Preliminary Approval

While Class Counsel believe they have a strong case that Defendants breached their

[11] A June 2019 compilation of information regarding 59 suits involving proprietary fund claims only noted two (slightly) higher value settlements. See https://www.groom.com/wp-content/uploads/2019/10/Proprietary-Funds-Litigation-Chart-updated-June-2019.pdf

ERISA fiduciary duties and committed self-dealing transactions prohibited by ERISA, the most important opinion for assessing the settlement value of a case is, of course, the opinion of the Court. As noted above, both sides filed summary judgment motions in this case that were supported by hundreds of exhibits as well as expert reports. While the Court denied in large part the Parties' motions for summary judgment, the Court indicated that on the record before it at that time, it believed it "likely" that a fact-finder would find facts favorable to Defendants' position that would likely result in judgment in their favor. (Dkt. No. 200 at 17).

Furthermore, this case involves an issue of first impression regarding the significance of a provision in the Plan Document, which Defendants referred to as the "hardwiring" amendment, that required all and only T. Rowe Price funds be offered as investment options in the Plan. (*See* Dkt. No. 213-1). Plaintiffs have argued that this provision is void under ERISA, but the Court rejected that position and delayed until trial a further decision regarding the provision's significance. (Dkt. No. 209 at 5).

In its summary judgment opinion, the Court also reversed itself on a key legal issue regarding Plaintiffs' claims that Defendants engaged in self-dealing transactions prohibited by ERISA, which significantly limited the scope of those claims. (Dkt. No. 200 at 24 ("…having now had the benefit of extensive briefing on the issue, the Court concludes that the §1108(b)(8) exemption can apply to the §1106(b) prohibitions")). Further, it found that those claims would also likely be significantly limited by ERISA's statute of repose. *Id.* at 29 (the Fourth Circuit's decision in "*Alphin* provides strong support for Defendants' position").

All these findings have an obvious and substantial adverse impact on the settlement value of Plaintiffs' case. Despite this adverse impact, Plaintiffs would achieve, through the litigation and its proposed Settlement, a financial benefit of over $18 million for the Class as

well as significant non-monetary relief. (*See supra* §II.D).

Consideration of the strengths and weaknesses of Plaintiffs' case in comparison to the settlement achieved, including the risk that not settling might have resulted in no relief to the Class, supports preliminary approval.

2. The Cost of Additional Litigation Supports Preliminary Approval

As noted above, the initial agreement to settle the case occurred on the brink of trial. Trial had been projected to last approximately two weeks and would have been expensive. Costs include weeks of preparation and trial time for multiple attorneys and their staff, preparation of evidentiary exhibits, creation of demonstrative exhibits, and preparation, travel, and trial time for the three experts on each side.

Moreover, considering the novel issues involved in the case, it is likely that there would have been an appeal by the losing side. This would mean more delay and expense.

Avoiding the cost and expense of a lengthy trial and a likely appeal – which might well have resulted in a judgment adverse to, and with no relief awarded to, the Class – also supports preliminary approval.

3. Other Factors

Other factors noted by courts are not material in this case and/or at this stage. Defendant is a large corporation and is obviously able to pay any judgment. Class Notice has not yet been issued, so it is not known whether there will be objections to the proposed settlement.

IV. THE PROPOSED NOTICE PLAN SHOULD BE APPROVED

Rule 23 only requires that the court "direct notice in a reasonable manner to all class members who would be bound by" the proposed settlement. Fed. R. Civ. P. 23(e)(1)(B). Due process does not require that each person affected by judicial action actually receive notice of a proposed settlement, but does require that "a serious effort" be made to inform interested parties.

See Snider Int'l v. Town of Forest Heights, Md., 739 F.3d 140, 146 (4th Cir. 2014) (citation omitted). Notice to class members must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306, 314 (1950). "Individual notice must be provided to those class members who are identifiable through reasonable effort." Eisen v. Carlisle and Jacquelin, 417 U.S. 156, 175 (1974).

The proposed Class Notice, submitted as Exhibit 4, meets this standard. The Notice Plan includes multiple components designed to reach the largest number of Class members reasonably possible.

First, the Class Notice will be sent at least 60 days prior to the Fairness Hearing either (i) by first-class mail to the Class members' last known address, or (ii) via an email address the Plan uses for Plan communications to each Class member. Because each Class member currently has or had during the Class Period a Plan account, and the Plan has a social security number and a last-known address for each such person, there is usually a relatively high rate of success in reaching class members in such circumstances. For any Notices returned as undeliverable, reasonable efforts will be made to identify current addresses.

Additionally, by that same date, the Class Notice, along with other documents and information related to the litigation, will be posted on a dedicated Settlement Website. The Settlement Administrator will also establish and monitor a dedicated, toll-free Settlement telephone number that will include an Interactive Voice Response ("IVR") system with answers to frequently asked questions and contact information for Class Counsel should Class members have other questions.

The proposed Class Notice describes in plain English all key features of the Settlement

and approval process, including: (i) the key Settlement terms and plan of allocation; (ii) the nature and extent of the release of claims; (iii) the maximum attorneys' fees, litigation expenses, and Class Representative Service Awards that may be sought; (iv) the procedure and timing for objecting to the Settlement; and (v) the date and place of the Fairness Hearing.

In sum, the proposed Notice Plan satisfies the requirements of due process and should be approved. *See* 4 Newberg on Class Actions § 11:53 (4th ed. 2010) ("The notice need not be unduly specific. The notice of the Proposed Settlement, to satisfy both Rule 23(e) requirements and constitutional due process protections, need only be reasonably calculated, under all of the circumstances, to apprise interested parties of the pendency of the settlement proposed and to afford them an opportunity to present their objections.") Similar notice plans have been approved by courts within this district in ERISA class actions involving defined contribution plans. *See, e.g.*, Kelly v. Johns Hopkins Univ., No. 1:16-cv-2835-GLR, Dkt. No. 87 at 11-13 (D. Md. Aug. 16, 2019).

V. FOR PRACTICAL REASONS, TWO MINOR CHANGES TO THE CLASS DEFINITION ARE NECESSARY

For purposes of this settlement, Plaintiffs are requesting two minor changes to the Class definition.

First, the current definition extends the Class Period through "the date of judgment," but entry of judgment would typically not occur until the settlement is finally approved. That would mean Plaintiffs could not know precisely who was in or out of the Class until that date. However, Plaintiffs need to have a determinate group of Class members in order to send out the Class Notice. Accordingly, Plaintiffs are requesting that the Class definition be changed so the Class Period extends through the date of the entry of an order preliminarily approving the settlement.

Second, the Parties are in agreement that beneficiaries with an account balance should also

be included in the Class and be eligible for a distribution from the Settlement Fund.

The proposed changes are indicated below (underlined text is being added and text with strikethrough is being deleted):

> All participants and beneficiaries in the T. Rowe Price U.S. Retirement Program who had a balance in their plan account at any time from February 14, 2011 through the date of ~~judgment~~ entry of an order preliminarily approving a settlement. Any individual Defendants, any members of the T. Rowe Price Board of Directors, the Management Committee, the Management Compensation Committee, and their beneficiaries and immediate families are excluded from the class.

VI. AS ONE OF THE ORIGINAL NAMED CLASS COUNSEL HAS RECENTLY WITHDRAWN FROM THE CASE, PLAINTIFFS REQUEST APPROVAL FOR SUBSTITUTION OF ANOTHER ATTORNEY FROM THE SAME FIRM AS CLASS COUNSEL

One of the four original named Class Counsel in this action, Karen Handorf of Cohen Milstein Sellers & Toll, LLP, has withdrawn from this case and left that firm. (Dkt. No. 232). Plaintiffs ask the Court to approve another partner from the same firm, Mary J. Bortscheller, as substitute Class Counsel. Ms. Bortscheller's professional biography is attached as Exhibit 5.

VII. CONCLUSION

Plaintiffs respectfully move the Court to grant their Motion for Preliminary Approval of Class Action Settlement, Approval of Form and Manner of Class Notice, Request for Modification of Class Definition, Request for Substitution of Class Counsel, and Scheduling of Fairness Hearing.

Respectfully submitted,

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