UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Stuart Krohnengold, Wayne Antoine, Lee Webber, Anthony Medici, Joseph Bendrihem, Larry Gilbert, Rafael Musni, Thomas Lantz, Sandra Scanni, and Claudia Gonzalez, as representatives of a class of similarly situated persons, and on behalf of the New York Life Insurance Employee Progress Sharing Investment Plan, and the New York Life Insurance Company Agents Progress Sharing Plan, Plaintiffs, v. New York Life Insurance Company; the Fiduciary Investment Committee; the Board of Trustees; Katherine O'Brien; Anthony R. Malloy; Yie-Hsin Hung; Arthur A. Seter; Scott L. Lenz; Robert J. Hynes; and John and Jane Does 1-20, Defendants.	Case No. 1:21-cv-01778 - JMF

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

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INTRODUCTION

On March 5, 2024, this Court preliminarily approved the Parties' Class Action Settlement Agreement, which resolves Plaintiffs' claims against Defendants under the Employee Retirement Income Security Act ("ERISA") relating to the New York Life Insurance Company Employee Progress-Sharing Investment Plan ("Employee Plan") and the New York Life Insurance Company Agents Progress-Sharing Investment Plan ("Agent Plan") (collectively, the "Plans").[1] ECF 188. The Court found on a preliminary basis that the Settlement is "fair, reasonable, and adequate" and that "the Court will likely be able to grant final approval of Settlement Agreement based on the factors set forth in Rule 23(e)(2)," and approved the distribution of the Notice of Settlement as specified in the Settlement Agreement. *Id.* ¶¶ 2, 11. Since that time, an Independent Fiduciary has confirmed that the Settlement terms are reasonable. *See* Declaration of Kai Richter in Support of Motion for Final Approval ("Third Richter Decl.") Ex. A. Moreover, no objections to the Settlement have been received. See Third Richter Decl. ¶ 3. Accordingly, Plaintiffs respectfully request that the Court grant final approval of the Settlement. Defendants do not oppose this motion as parties to the Settlement, and there have been no objections to the Settlement from the Class.

BACKGROUND[2]

I. Procedural History

Plaintiff Stuart Krohnengold[3] filed this Action as a putative class action on March 2, 2021, *see* ECF 1, and an Amended Complaint was subsequently filed on June 15, 2021 adding several additional Plaintiffs, *see* ECF 38. In summary, Plaintiffs alleged that (1) the fiduciary Committee

[1] Unless otherwise specified, all capitalized terms have the meaning assigned to them in Article 1 of the Parties' Settlement Agreement, which appears on the docket at ECF 176-1.

[2] Parts I – III of this Background section were previously recounted in Plaintiffs' briefing in support of their motion for preliminary approval of the Settlement (ECF 175) and/or their pending motion for attorneys' fees, expenses, and class representative service awards (ECF 190). For ease of reference, those parts are recounted again here.

[3] Amy Laurence was substituted for her late husband Stuart Krohnengold following his passing. *See* ECF 173.

for each of the Plans (and its predecessor Board of Trustees)[4] breached its fiduciary duties by retaining certain MainStay mutual funds affiliated with New York Life as investment options in the Plans; (2) the Committee also breached its fiduciary duties by retaining a Fixed Dollar Account ("FDA"), affiliated with New York Life, as the Plans' default investment; (3) Defendants committed prohibited transactions with respect to the Plans' investment in these proprietary funds affiliated with New York Life; (4) New York Life was liable as a monitoring co-fiduciary for the alleged fiduciary breaches of the Committee; and (5) Defendants violated ERISA's anti-inurement rule with respect to the at-issue proprietary investments. *Id*., Counts I-V.

Defendants moved to dismiss the Amended Complaint on July 16, 2021. *See* ECF 41. On August 10, 2022, the Court granted in part and denied in part Defendants' motion to dismiss. ECF 58. The Court (1) dismissed the claims of four Plaintiffs regarding the FDA on standing grounds; (2) dismissed the breach of fiduciary duty claims (but not prohibited transaction claims) of the other Plaintiffs regarding the FDA on statute of limitations grounds; (3) dismissed all Plaintiffs' breach of fiduciary duty claims based on the MainStay MacKay International Equity Fund; and (4) dismissed Plaintiffs' anti-inurement claim. *Id.* at 26. The Court otherwise denied the motion to dismiss, and granted Plaintiffs leave to re-plead the claims that were dismissed. *Id.* at 26-27.

Plaintiffs then re-pleaded their FDA claim in the operative Second Amended Complaint, and added three new Plaintiffs from the Agent Plan who were defaulted into the Fixed Dollar Account. *See* ECF 63. Defendants brought another (partial) motion to dismiss, ECF 66, and the Court denied that motion in full on March 28, 2023. *See* ECF 93.

On June 26, 2023, Plaintiffs moved for class certification. ECF 115. When this case settled, Plaintiffs' motion for class certification was pending.

[4] The Committee for each of the Plans and its predecessor Board of Trustees (and the individual members of the same) are collectively referred to herein as the "Committee."

II. Discovery and Mediation

The Parties developed a substantial record during discovery. Defendants produced over 179,000 pages of documents in response to Plaintiffs' discovery requests, and the Plans' investment consultants produced over 100,000 additional pages in response to subpoenas. ECF 176 ("First Richter Decl.") ¶ 13.

Deposition discovery was also extensive. *Id.* ¶ *14.* Plaintiffs took the depositions of eight defense witnesses, deposed three third-party witnesses, and defended ten named Plaintiff depositions. In connection with discovery, the parties also engaged in letter motion practice before the Court. *See* ECF 106, 109, 147-148.

Following fact discovery, the Parties exchanged multiple rounds of expert reports: Plaintiffs served two initial expert reports, Defendants served two expert rebuttal reports, and Plaintiffs served two expert reply reports. First Richter Decl. ¶ 15. The parties then completed expert depositions of both Plaintiffs' and Defendants' experts. *Id*.

After fact and expert discovery were complete, the Parties engaged in private mediation with Robert Meyer of JAMS on January 18, 2024. *Id.* ¶ 17. Mr. Meyer is an experienced mediator who has substantial experience mediating ERISA cases and other class action cases. *Id.* Following extensive arms'-length negotiations (which lasted approximately ten hours), the Parties reached a settlement-in-principle, and then prepared the comprehensive Settlement Agreement that is the subject of this motion. *Id*.

III. Overview of Settlement Terms

A. The Settlement Class

In granting preliminary approval of the Settlement Agreement, the Court preliminarily certified the following Settlement Class:

> All participants and beneficiaries of the New York Life Insurance Company Employee Progress-Sharing Investment Plan or the New York Life Insurance Company Agents Progress-Sharing Investment Plan (the "Plans") who held assets in the MainStay Epoch U.S. All Cap Fund, MainStay Epoch U.S. Small Cap Fund, MainStay Income Builder Fund, any MainStay Retirement Fund, or the Fixed Dollar Account in the Plans at any time from March 2, 2015 to the Effective Date of Settlement, excluding Defendants, any of their directors, and any members of the Committees during the Class Period.

ECF 188 ¶ 3. Based on information from the Plans' recordkeeper, there are 46,593 Class Members. Declaration of Jeffrey Mitchell ("Mitchell Decl.") ¶ 9.

B. Monetary Relief and Plan of Allocation

Under the Settlement, New York Life or its insurers will pay a Gross Settlement Amount of $19,000,000 into a Qualified Settlement Fund. *Settlement* §§ 1.33, 4.2. After accounting for any Attorneys' Fees and Expenses, Administrative Expenses, and Class Representative Service Awards approved by the Court, the Net Settlement Amount will be distributed to eligible Class Members in accordance with the Plan of Allocation in the Settlement. *Id.* §§ 5.1–5.4.

The Plan of Allocation provides for calculation of a Settlement Allocation Score for each Class Member based on the sum of his or her underlying Fund Allocation Scores in connection with the Disputed Investments in the Plans, as follows:

(i) MainStay U.S. Epoch All Cap Fund: (average personal month-end balance[5] in the fund from March 2015 to December 2020), *divided by* (average aggregate month-end balance in the fund from March 2015 to December 2020 for all Class Members), *multiplied by* (54,989,635)

(ii) MainStay U.S. Epoch Small Cap Fund: (average personal month-end balance in the fund from March 2015 to February 2019), *divided by* (average aggregate month-end balance in the fund from March 2015 to February 2019 for all Class Members), *multiplied by* (9,568,683)

(iii) MainStay Retirement Funds: (average personal month-end balance in all such funds from March 2015 to February 2019), *divided by* (average aggregate month-end

[5] Neither the Company, the Plans, nor the Recordkeeper have end-of-month participant balance data as of the end of May, September, and November 2015, or July and August 2016. The calculations will therefore omit those months. *Id.* § 5.1(a), n.2.

balance in all such funds from March 2015 to February 2019 for all Class Members), multiplied by (3,490,229)

(iv) MainStay Income Builder Fund: (average personal month-end balance in the fund from March 2015 to November 2022), *divided by* (average aggregate month-end balance in the fund from March 2015 to November 2022 for all Class Members), *multiplied by* (4,647,776)

(v) Fixed Dollar Account (FDA): (average personal month-end balance in the FDA from March 2015 to December 2023), *divided by* (average aggregate month-end balance in the FDA from March 2015 to December 2023 for all Class Members), *multiplied by* (8,265,491). For any Class Member identified as enrolled in the FDA by default during the Class Period, their Fund Allocation Score for the FDA shall be further multiplied by 1.5.[6]

Id. § 5.1(a). In summary, the Fund Allocation Score for each Disputed Investment is calculated based on the Class Member's level of investment in such Disputed Investment relative other Class Members, and the amount of estimated losses (or profits, in the case of the FDA) that Plaintiffs' expert calculated for each such Disputed Investment during the Class Period. First Richter Decl. ¶ 8*; see also id.* ¶ 5. To account for the estimated losses specific to Class Members who were defaulted into the FDA, any Class Members who were identified as defaulted by Plaintiffs' expert for purposes of his loss analysis (based on the data provided to him) will have their Fund Allocation Score specific to the FDA multiplied by 1.5. First Richter Decl. ¶ 8. This 50% enhancement reflects the fact that approximately $4.1 million in losses were calculated for FDA defaultees in addition to the approximately $8.2 million in profits from all FDA investors (a ratio of 50%), based on the most conservative estimates of Plaintiffs' expert. *Id.*

Once these calculations are completed, the Settlement Administrator will then determine the Entitlement Amount of each Class Member (the amount they will be paid) by calculating each

[6] The Parties agree that, for purposes of this calculation only, the Class Members identified as enrolled in the FDA by default will be those Class Members identified as having been defaulted into the FDA by Plaintiffs' expert Dr. Pomerantz in connection with his October 13, 2023 expert report (based on data provided by Defendants and the Recordkeeper), and that neither the Parties nor the Recordkeeper will conduct any further or supplemental analysis of defaulted Class Members. *Id.* § 5.1(a)(v).

such Class Member's pro rata share of the Net Settlement Amount based on his or her Settlement Allocation Score compared to the sum of the Settlement Allocation Scores for all Class Members. *Settlement* § 5.1(b). If the dollar amount of the settlement payment to a Class Member is calculated by the Settlement Administrator to be less than $2.00, then that Class Member's pro rata share shall be zero (to minimize administrative expenses associated with any *de minimis* payments), and shall be reallocated among the remaining Class Members on a pro rata basis. *Id.*

Active and Inactive Participants (those with a Plan account balance greater than $0) will automatically receive their share of the Settlement via a deposit to their Plan account. *Id*. § 5.2. Former Participants will automatically receive their payment by check, unless they elect to have their distribution rolled over to an individual retirement account or other eligible employer plan. *Id*. § 5.3. The Settlement Agreement also provides for automatic payments to Beneficiaries and Alternate Payees under a Qualified Domestic Relations Order. *Id.* § 5.4. Participants are not required to submit a claim form to receive payment. First Richter Decl. ¶ 10.

C. Release of Claims

In exchange for the relief provided by the Settlement, the Settlement Class and the Plans will release Defendants and affiliated parties (the "Released Defendant Parties") from all claims:

- That were asserted in the Action or that arise out of, relate to, are based on, or have any connection with any of the allegations, acts, omissions, purported conflicts, representations, misrepresentations, facts, events, matters, transactions or occurrences that were asserted in the Action or could have been asserted based on the same factual predicate;[7]
- That would be barred by *res judicata* based on the Court's entry of the Final Approval Order;
- That arise from or relate to the direction to calculate, the calculation of, and/or the method or manner of the allocation of the Net Settlement Amount pursuant to the Plan of Allocation; or

[7] The release language goes on to provide certain examples that are not repeated here due to space limitations. The full release language, incorporated by reference, appears in Section 1.40 of the Settlement Agreement.

- That arise from or relate to the approval by the Independent Fiduciary of the Settlement Agreement, unless brought against the Independent Fiduciary alone.

Settlement § 1.40. The Released Claims do not include claims to enforce the Settlement Agreement or claims for denial of benefits from the Plans. *Id.* §§ 1.40, 7.1(c).

IV. Class Notice and Reaction to Settlement

Pursuant to the Court's Preliminary Approval Order, Analytics Consulting LLC ("Analytics"), the Court-appointed Settlement Administrator, mailed Notices of Settlement to each of the Class members identified by the Plan's recordkeeper. *See* Mitchell Decl. ¶ 9. In total, 46,593 Settlement Notices were mailed, *id.*, and Analytics also included a Former Participant Rollover Form for those Class Members identified as Former Participants. *Id.* ¶ 10.

Prior to sending these Notices, Analytics cross-referenced the addresses on the class list with the United States Postal Service National Change of Address Database and updated addresses as appropriate. *Id.* ¶ 8. In the event that any Notices were returned, Analytics re-mailed the Notice to any forwarding address that was provided, and performed a skip trace in an attempt to ascertain a valid address for the Class Member in the absence of a forwarding address. *Id.* ¶¶ 11-12. As a result, the notice program was very effective. Out of 46,593 Settlement Notices that were mailed, only 1.03% were ultimately undeliverable despite these efforts. *Id.* ¶ 13.

The Notice provided fulsome 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) Class Members' right to object to the Settlement and the deadline for doing so; (5) the class release; (6) the identity of Class Counsel and the amount of compensation they would seek in connection with the Settlement; (7) the amount of the proposed Class Representative Service Awards; (8) the date, time, and location of the final approval hearing; and (9) Class Members' right to appear at the final approval hearing. *See* Mitchell Decl. Ex. 1.

If any Class Members desired further information, Analytics established a settlement website at www.NYLifeERISAsettlement.com. Mitchell Decl. ¶ 14. Among other things, the Settlement Website includes: (1) a "Frequently Asked Questions" page containing a clear summary of essential case information; (2) a "Home" page and "Important Dates" page, each containing clear notice of applicable deadlines; (3) a "Court Documents" page, which includes case and settlement documents for download (including, among other things, the Settlement Agreement, Notice of Settlement, Former Participant Rollover Form, Second Amended Complaint, Plaintiff's preliminary approval motion papers, the Court's Preliminary Approval Order, and Plaintiffs' Motion for Attorneys' Fees, Expenses, and Class Representative Service Awards and supporting documents); and (4) contact information for Analytics and the Parties' respective counsel. *Id*. In addition, Analytics created and maintained a toll-free telephone support line (1-855-731-5599) as a resource for Class Members seeking information about the Settlement. *Id*. This telephone number was referenced in the Notices, and also appears on the Settlement Website. *Id.* ¶ 15.

The deadline to submit objections to the Settlement was June 20, 2024. ECF 188 ¶ 14. Class Counsel and Analytics are not aware of any objections to the Settlement. Third Richter Decl. ¶ 3; Mitchell Decl. ¶ 16.

V. Independent Fiduciary Review

Pursuant to Section 2.2 of the Settlement and applicable ERISA regulations,[8] the Settlement was submitted to an independent fiduciary (Newport Trust Company, LLC) for review following the Court's Preliminary Approval Order. *See* Third Richter Decl., Ex. A. After reviewing the Settlement and other case documents, and interviewing counsel for each of the

[8] *See* Prohibited Transaction Exemption 2003-39, 68 Fed. Reg. 75,632 (Dec. 31, 2003), as amended, 75 Fed. Reg. 33,830 (June 15, 2010).

Parties, the Independent Fiduciary concluded that: "(i) the terms of the Settlement, including the scope of the release of claims; the amount of cash and the value of any non-cash assets and other consideration received by the Plans and the amount of the attorneys' fees and other amounts paid from the recovery, are reasonable in light of the Plans' likelihood of full recovery, the risks and costs of litigation, and the value of claims foregone; (ii) the terms and conditions of the transaction are no less favorable to the Plans than comparable arms-length terms and conditions that would have been agreed to by unrelated parties under similar circumstances; and (iii) the transaction is not part of an agreement, arrangement, or understanding designed to benefit a party in interest." *Id.* at 1-2.

ARGUMENT

VI. The Settlement Meets the Standard for Final Approval

Rule 23(e) of the Federal Rules of Civil Procedure requires judicial approval of any settlement that will bind absent class members. Fed. R. Civ. P. 23(e)(2). After notice to class members and a hearing, a court may approve a class action settlement if it is "fair, adequate, and reasonable, and not a product of collusion." *Joel A. v. Giuliani*, 218 F.3d 132, 138-39 (2d Cir. 2000).

The decision whether to approve a proposed class action settlement is a matter of judicial discretion. *See Maywalt v. Parker & Parsley Petroleum Co.*, 67 F.3d 1072, 1079 (2d Cir. 1995). However, there is a "strong judicial policy in favor of settlements, particularly in the class action context." *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 116 (2d Cir. 2005) (quoting *In re PaineWebber Ltd. P'ships Litig.*, 147 F.3d 132, 138 (2d Cir. 1998)); 4 NEWBERG ON CLASS ACTIONS § 11:41 (4th ed. 2002). As a result, "Courts should give proper deference to the private consensual decision of the parties . . . [and] should keep in mind the unique ability of class and

defense counsel to assess the potential risks and rewards of litigation . . . .” *Clark v. Ecolab Inc.*, 2009 WL 6615729, at *3 (S.D.N.Y. Nov. 27, 2009) (internal quotation marks and citation omitted).

A court “must stop short of the detailed and thorough investigation that it would undertake if it were actually trying the case” because “[s]uch procedure would emasculate the very purpose for which settlements are made.” *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 462 (2d Cir. 1974), *abrogated on other grounds*, *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43 (2d Cir. 2000). “The determination whether a settlement is reasonable does not involve the use of a mathematical equation yielding a particularized sum.” *Frank v. Eastman Kodak Co.*, 228 F.R.D. 174, 186 (W.D.N.Y. 2005) (internal quotation marks and citations omitted). “Instead, there is a range of reasonableness with respect to a settlement – a range which recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion.” *Id.*

To approve a settlement under Rule 23(e)(2), the Court must consider four factors: (1) adequacy of representation; (2) existence of arm’s-length negotiations; (3) adequacy of relief; and (4) equitableness of treatment of class members. Fed. R. Civ. P. 23(e)(2). Each of these factors support preliminary approval of the Settlement here.[9]

A. The Class Is Adequately Represented

Rule 23(e)(2)(A) requires a Court to find that “the class representatives and class counsel have adequately represented the class.” This adequacy standard is more than met here.

[9] The Rule 23(e) factors “supplement rather than displace the[] ‘*Grinnell*’ factors” previously applied in this circuit. *In re GSE Bonds Antitrust Litig.*, 2019 WL 6842332, at *1 (S.D.N.Y. Dec. 16, 2019). The nine *Grinnell* factors are (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation. *Grinnell Corp.*, 495 F.2d at 463 (2d Cir. 1974). Consistent with the intent of the 2018 amendments, only those *Grinnell* factors that are relevant to this Settlement are addressed here.

The named Plaintiffs have adequately represented the Settlement Class. At the outset of the case, Plaintiffs signed written acknowledgements of their duties as class representatives, and each of them has sought to fulfill those duties throughout the course of this case. *See* Plaintiff Declarations[10] ¶¶ 5-6. Among other things, Plaintiffs (1) reviewed the allegations in the Complaints bearing their names; (2) communicated with Class Counsel; (3) provided information in response to interrogatories; (4) produced documents in response to document requests; (5) testified at their depositions; and (6) discussed the proposed Settlement with counsel and reviewed the terms of the Settlement Agreement. *Id.* ¶¶ 4, 7. Plaintiffs fall within the proposed Settlement Class and are not aware of any conflicts between themselves and any other class members. *Id.* ¶¶ 2-3, 6.

Class Counsel is also more than adequate. Counsel from Cohen Milstein Sellers & Toll PLLC ("Cohen Milstein") are seasoned class action practitioners who have successfully litigated numerous ERISA class actions involving similar claims, including recent cases against Wells Fargo, T. Rowe Price, and BlackRock arising from use of proprietary funds in their 401(k) plans. *See* First Richter Decl. ¶ 32. Undersigned counsel Kai Richter also previously served as counsel of record (at his former law firm) in four ERISA class cases in this District, including the *Andrus* case involving New York Life and in *Beach v. JPMorgan Chase Bank, N.A.*, No. 1:17-cv-00563 before this Court. *Id.* ¶ 22. In recognition of its work, Cohen Milstein's Employee Benefits/ERISA Group was named Practice Group of the Year in 2022 by Law360. *Id.* ¶ 31. Plaintiffs' counsel thoroughly investigated the claims, successfully litigated two motions to dismiss, vigorously sought discovery from both Defendants and third parties, consulted with experts, and skillfully

[10] "Plaintiff Declarations" refers to the Declarations of Amy Laurence, Wayne Antoine, Lee Webber, Anthony Medici, Joseph Bendrihem, Larry Gilbert, Rafael Musni, Thomas Lantz, Sandra Scanni, and Claudia Gonzalez, filed as ECFs 177-186.

negotiated the present settlement based on their experience and the record that was developed. *See supra* at 1-3; First Richter Decl. ¶¶ 12-16.

B. The Settlement Was Negotiated at Arm's Length After Extensive Discovery

The second Rule 23(e) factor examines whether "the proposal was negotiated at arm's length." Fed. R. Civ. P. 23(e)(2)(B). A class action settlement "will enjoy a presumption of fairness" where the settlement "is the product of arm's length negotiations conducted by experienced counsel knowledgeable in complex class litigation[.]" *In re Excess Value Ins. Coverage Litig.*, 2004 WL 1724980, at *10 (S.D.N.Y. July 30, 2004) (citation omitted); see also *Wal-Mart*, 396 F.3d at 116. That is exactly the situation here. Class Counsel and Defendants' counsel (Goodwin Procter LLP) are knowledgeable and experienced in complex class actions such as this. Their negotiations were conducted at arm's length, and were facilitated by a seasoned mediator. First Richter Decl. ¶ 17.

"[T]he stage of the proceedings and the amount of discovery completed" are also pertinent to the Court's review. *Kemp-DeLisser v. Saint Francis Hosp. & Med. Ctr.*, 2016 WL 6542707, at *8 (D. Conn. Nov. 3, 2016) (citation omitted). As noted above, this case was settled only after significant discovery, including production and review of over a quarter million pages of documents, eight defense witness depositions, three third-party depositions, ten plaintiff depositions, an exchange of expert reports, and four expert depositions. *See supra* at 3. These circumstances further favor approval of the Settlement. *See Godson v. Eltman, Eltman, & Cooper, P.C.*, 328 F.R.D. 35, 56 (W.D.N.Y. 2018) (approving settlement where the parties engaged in "robust" discovery that was "scheduled to conclude near the time the parties reached a settlement").

C. The Settlement Provides Significant Relief to Class Members that Is Fair and Adequate Based on All Relevant Considerations

The Parties' negotiations resulted in a Settlement that provides substantial relief to the Settlement Class. The $19 million settlement amount is a robust monetary recovery that represents a significant portion of the alleged losses sustained by the Plans. Specifically, Plaintiffs' expert estimated that the total losses associated with Plaintiffs' breach of fiduciary duty claims were between $76.8 - $93.4 million. First Richter Decl. ¶ 5. Based on this estimate, the $19 million recovery represents approximately 20–25% of the total estimated losses. *Id.* Plaintiffs' expert also estimated the profits to New York Life on *all* monies invested in the FDA (not just defaulted assets) because Plaintiffs' prohibited transaction claims involving the FDA were not limited to monies invested in the FDA by default. *Id.* ¶ 6. Based on his analysis, these profits totaled between $8,265,491 and $9,512,443. *Id.* If these amounts are added to the estimated losses above for purposes of analyzing the recovery, the $19 million Gross Settlement Amount represents a recovery rate of approximately 18–22%. *Id*. Under either calculation, Plaintiffs' percentage of recovery is on par with numerous other ERISA class action settlements across the country, including in this District. *See e.g.*, *Kohari v. MetLife Group, Inc.*, No. 1:21-cv-06146, ECF 110 at 11 (S.D.N.Y. Nov. 20, 2023) (ERISA settlement involving proprietary funds represented 19% of plaintiffs' highest measure and 27% of lowest measure of damages); *Jacobs v. Verizon Commc'ns. Inc.*, No. 1:16-cv-01082, ECF 234 at 20 (July 7, 2023) (settlement represented approximately 13% - 29.2% of alleged losses to plan), *approved* ECF 247 (S.D.N.Y. Nov. 21, 2023); *Bhatia v. McKinsey & Co.*, No. 1:19-cv-01466, ECF 101 at 15 (Feb. 3, 2021) (settlement represented 21-22% of disputed fees paid to McKinsey affiliate), *approved* ECF 110 (S.D.N.Y. Feb. 17, 2021).[11] The recovery in this

[11] *See also Toomey v. DeMoulas Super Mkts., Inc.*, No. 1:19-cv-11633, ECF 95 at 10 (Mar. 24, 2021), *approved* ECF 100 (D. Mass. Apr. 7, 2021) (approving settlement that represented approximately 15–20% of alleged losses); *Price*

case also exceeds the 16% recovery that this Court approved in *Beach*. *See* Mem. in Supp. of Pls.' Mot. for Prelim. Approval of Settlement, *Beach*, No. 1:17-cv-00563, ECF 211 at 21 (S.D.N.Y. May 22, 2020), *approved* 2020 WL 6114545 (S.D.N.Y. Oct. 7, 2020) (Furman, J.).

The specific subfactors enumerated in Rule 23(e)(2)(C) further support approval of the Settlement. Those factors include:

> (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).

Fed. R. Civ. P. 23(e)(2)(C). Each of these factors are briefly discussed below.

1. The Risks, Costs, and Delay of Further Litigation Were Significant

In the absence of a settlement, Plaintiffs would have faced potential litigation risks. *See In re WorldCom, Inc. ERISA Litig.*, 2004 WL 2338151, at *6 (S.D.N.Y. Oct. 18, 2004) (noting that there is a "general risk inherent in litigating complex claims such as these to their conclusion"); *In re PaineWebber Ltd. Partnerships Litig.*, 171 F.R.D. 104, 126 (S.D.N.Y. 1997) ("Litigation inherently involves risks."), *aff'd sub nom. In re PaineWebber Inc. Ltd. Partnerships Litig.*, 117 F.3d 721 (2d Cir. 1997). First, Plaintiffs' class certification motion was still pending. Second, in the event that class certification was granted, Defendants likely would have sought leave to file a summary judgment motion based on a recent Second Circuit decision affirming summary judgment in favor of the defendants in another ERISA proprietary funds case in the Southern

v. Eaton Vance Corp., No. 18-12098, ECF 32 at 12 (D. Mass. May 6, 2019), *approved* ECF 57 (D. Mass. Sept. 24, 2019) (23% of alleged losses); *Sims v. BB&T Corp.*, 2019 WL 1995314, at *5 (M.D.N.C. May 6, 2019) (19% of estimated losses); *Urakhchin v. Allianz Asset Mgmt. of Am., L.P.*, 2018 WL 8334858, at *4 (C.D. Cal. July 30, 2018) (approximately 17.7% of losses under plaintiffs' highest model); *Johnson v. Fujitsu Tech. & Bus. of Am., Inc.*, 2018 WL 2183253, at *5 (N.D. Cal. May 11, 2018) (approximately 10% of losses under plaintiffs' highest model).

District of New York. *See Falberg v. Goldman Sachs Grp., Inc.*, 2024 WL 619297 (2d Cir. Feb. 14, 2024). Although Plaintiffs believe *Falberg* is distinguishable on its facts, the decision highlights the risks of a case such as this. Third, if the case proceeded to trial, Defendants still might have prevailed. *See, e.g., Sacerdote v. New York Univ.*, 328 F. Supp. 3d 273 (S.D.N.Y. 2018) (bench trial ruling in favor of defendants), *aff'd in part*, *vacated in part,* 9 F.4th 95 (2d Cir. 2021); *Vellali v. Yale Univ.*, No. 3:16-cv-1345, ECF 622 (D. Conn. July 13, 2023) (jury verdict in favor of defendants). And even if Plaintiffs prevailed on liability, issues regarding proof of loss would have remained. *See* Restatement (Third) of Trusts, § 100 cmt. b(1) (2012) (determination of losses in breach of fiduciary duty cases is "difficult"); *Sacerdote*, 328 F. Supp. 3d at 280 (finding that "while there were deficiencies in the Committee's [fiduciary] 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").

While Plaintiffs strongly believed in merits of their claims, continuing the litigation would have, at a minimum, resulted in complex and costly proceedings that would have delayed relief to the class. ERISA 401(k) cases such as this "often lead[] to lengthy litigation." *Krueger v. Ameriprise Fin., Inc.*, 2015 WL 4246879, at *1 (D. Minn. July 13, 2015). Indeed, ERISA class cases can extend for a decade before final resolution, sometimes going through multiple appeals. *See, e.g., Tussey v. ABB, Inc.*, 850 F.3d 951, 954–56 (8th Cir. 2017) (recounting lengthy procedural history of case that was initially filed in 2006, and remanding to district court 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 in 2007). The duration of these cases is, in part, a function of their complexity, which further weighs in favor of the Settlement. *See In re Marsh ERISA Litig.,* 265 F.R.D. 128, 138 (S.D.N.Y. 2010) ("Many courts have recognized the complexity of ERISA breach

of fiduciary duty" cases). Given the risks, costs, 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."); *accord Strougo ex rel. Brazilian Equity Fund, Inc. v. Bassini*, 258 F. Supp. 2d 254, 261 (S.D.N.Y. 2003) ("[E]ven if a shareholder or Class Member was willing to assume all the risks of pursuing the actions through further litigation . . . the passage of time would introduce yet more risks in terms of appeals and possible changes in the law and would, in light of the time value of money, make future recoveries less valuable than in this current recovery.").

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

The proposed method of distributing the Settlement proceeds is fair and reasonable. Current Plan participants will have their Plan accounts automatically credited with their share of the Settlement, and Former Participants will automatically receive their distribution via check unless they elect a tax-qualified rollover of their distribution to an individual retirement account or other eligible employer plan. *See supra* at 6. This method of distribution is both effective and efficient, and was approved by this Court in *Beach*. *See Beach*, No. 1:17-cv-00563, ECF 211 at 17 (May 22, 2020), *approved* 2020 WL 6114545 (S.D.N.Y. Oct. 7, 2020). Any uncashed checks will be paid to the Plans for the purpose of defraying administrative fees and expenses of the Plans, *see Settlement* § 5.6, and will not revert to New York Life or its insurers.

3. The Settlement Terms Regarding Attorneys' Fees Are Reasonable

As set forth more fully in connection with Plaintiffs' pending Motion for Attorneys' Fees, *see* ECF 190, the Settlement terms relating to attorneys' fees are also fair and reasonable. The Settlement does not provide for the award of a specific amount of attorneys' fees and is not conditioned on the award of any such fees. *See Settlement* § 6.1. For purposes of the present case,

Class Counsel have voluntarily limited their request for attorneys' fees to 33% of the Gross Settlement Amount, *see* ECF 189, consistent with the amounts approved in *Beach* and other ERISA cases in this District. *See Beach*, No. 1:17-cv-00563, ECF 232 (S.D.N.Y. Oct. 7, 2020) (approving 33% attorneys' fee award); *Jacobs v. Verizon Commc'ns. Inc.*, No. 1:16-cv-01082, ECF 247 at 7 (S.D.N.Y. Nov. 21, 2023) (approving one-third fee in ERISA case); *In re J.P.Morgan Stable Value Fund ERISA Litig.*, 2019 WL 4734396, at *4 (S.D.N.Y. Sept. 23, 2019) (same); *Carver v. Bank of New York Mellon*, No. 17-10231, ECF 11 at 1 (S.D.N.Y. May 23, 2019) (same); *In re Marsh ERISA Litig.*, 265 F.R.D. at 149 (same); *Leber v. The Citigroup 401(k) Pension Plan Inv. Comm.*, No. 07-9329, ECF 294 (S.D.N.Y. Jan. 3, 2019) (same); *Osberg v. Foot Locker, Inc.*, No. 07-1358, ECF 423 at 3 (S.D.N.Y. June 8, 2018) (same); *Andrus v. New York Life Ins. Co.*, No. 1:16-cv-05698, ECF 83 (S.D.N.Y. June 15, 2017) (same); *accord Kruger*, 2016 WL 6769066, at *2 ("[C]ourts have found that '[a] one-third fee is consistent with the market rate' in a complex ERISA 401(k) fee case such as this matter.") (citing cases); *see also* ECF 190 at 2 (citing additional cases).

4. There Are No Separate Agreements

As the Settlement states, "[t]his Settlement Agreement and all of the exhibits appended hereto constitute the entire agreement of the Parties with respect to their subject matter" and "[n]o representations or inducements have been made by any Party hereto concerning the Settlement Agreement or its exhibits other than those contained and memorialized in such documents." *Settlement* § 11.5. Accordingly, there are no separate agreements bearing on the proposed Settlement. *See* Fed. R. Civ. P. 23(e)(2)(C)(iv).

5. The Settlement Treats Class Members Equitably

Finally, the Settlement treats Class Members equitably. A uniform formula is used to calculate settlement payments for all Class Members, and that formula is designed to allocate the

Net Settlement Amount to Class Members on a pro rata basis relative to their share of the alleged losses or profits associated with each of the Disputed Investments. *See supra* at 4-6. This is equitable, and consistent with the manner of allocation that this Court approved in *Beach*. *See Beach*, No. 1:17-cv-00563, ECF 211 at 22 (S.D.N.Y. May 22, 2020) ("Based on the loss calculations of Plaintiffs' damages expert, the Net Settlement Amount will be allocated among all eligible Class Members on a pro rata basis in proportion to their respective portion of damages based on their holdings in each of the Disputed Investments."), *approved* 2020 WL 6114545 (S.D.N.Y. Oct. 7, 2020).[12] Moreover, these payments will be efficiently distributed to Class Members, without requiring them to submit a claim form. *See supra* at 6. Class Members only need to submit paperwork if they no longer have an account in the Plan and wish to request a rollover of their Settlement payment instead of a check made out to them.

D. The Independent Fiduciary and Class Members Support the Settlement.

The positive responses from the Independent Fiduciary and the Class further support the Settlement. After completing the review required by the Section 2.2 of the Settlement and applicable law (*see supra* at n.8), the Independent Fiduciary approved "the terms of the Settlement, including the scope of the release of claims; the amount of cash and the value of any non-cash assets and other consideration received by the Plans and the amount of the attorneys' fees and other amounts paid from the recovery," finding them to be reasonable. *See* Third Richter Decl. Ex. A at 1-2. Moreover, the Settlement has received unanimous approval from the Class – all ten class representatives submitted declarations in support of the Settlement, *see* Plaintiffs' Declarations, and no objections were submitted. *See supra* at 8. The Court may infer from this that the overwhelming majority of Class Members believe the Settlement is fair, reasonable, and adequate.

[12] The $2.00 cutoff for Settlement payments is also consistent with the Court-approved Settlement in *Beach*. *See Beach*, No. 1:17-cv-00563, ECF 212-1 at § 5.1(b).

See Belton v. GE Cap. Consumer Lending, Inc., 2022 WL 407404, at *4 (S.D.N.Y. Feb. 10, 2022) ("[T]he lack of objections from such a large settlement class attests to the fairness of the proposed settlement."); *EB v. New York City Dep't of Educ.*, 2015 WL 13707092, at *2 (E.D.N.Y. July 24, 2015) ("No class member has objected, which demonstrates that the class approves of the settlement and supports its final approval."); *Maley v. Del Glob. Techs. Corp.*, 186 F. Supp. 2d 358, 362 (S.D.N.Y. 2002) ("[T]he lack of objections may well evidence the fairness of the Settlement."). As the Second Circuit has noted, "the absence of substantial opposition is indicative of class approval[.]" *Wal-Mart Stores,* 396 F.3d at 118.[13]

VII. The Class Notice Plan Was Reasonable

The class notice program in this case also was reasonable and satisfied the requirements of Due Process and Rule 23. *See* Fed. R. Civ. P. 23(e)(1)(B). The "best notice" practicable under the circumstances includes individual notice via United States mail 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 here. *See Settlement* ¶ 2.1(b).

As noted above, the Settlement Administrator mailed the Court-approved Settlement Notices to Class Members via U.S. Mail. *See supra* at 7. This type of notice is presumptively reasonable. *See* Fed. R. Civ. P. 23(c)(2)(B); *Phillips Petroleum Co. v. Shutts,* 472 U.S. 797, 812 (1985); *accord Langford v. Devitt*, 127 F.R.D. 41, 45 (S.D.N.Y. 1989) ("[N]otice mailed by first class mail has been approved repeatedly as sufficient notice of a proposed settlement.").[14]

[13] *See also Charron v. Pinnacle Grp. N.Y. LLC*, 874 F. Supp. 2d 179, 198 (S.D.N.Y. 2012) ("The Court cannot help but conclude that the silence and acquiescence of 99% of the Class Members speaks more loudly in favor of approval than the strident objections of the 1% against it."), *aff'd sub nom. Charron v. Wiener*, 731 F.3d 241 (2d Cir. 2013); *In re Merrill Lynch & Co., Inc. Research Reports Sec. Litig.*, 246 F.R.D. 156, 167–68 (S.D.N.Y. 2007) ("[T]he relatively small number of objections . . . militate in favor of approving the settlement as be fair, adequate, and reasonable.").

[14] The record reflects that approximately 99% of Notices were successfully delivered. Mitchell Decl. ¶ 13. This confirms the effectiveness of the notice program in this case.

The content of the Notice was also reasonable. The Notice includes all relevant information, *see supra* at 7-8, and "fairly apprise[s] the prospective members of the class of the terms of the proposed settlement and of the options that are open to them in connection with the proceedings." *Lomeli v. Sec. & Inv. Co. Bahrain*, 546 Fed. App'x 37, 41 (2d Cir. 2013) (quotation omitted); *see also In re Michael Milken & Assocs. Sec. Litig.*, 150 F.R.D. 57, 60 (S.D.N.Y. 1993) (notice "need only describe the terms of the settlement generally"). To the extent that Class Members desired further information, the Notice was supplemented through the Settlement Website and telephone support line. *See supra* at 8. This further supports the reasonableness of the notice program.

VIII. The Court Should Certify the Class for Final Approval

In its Preliminary Approval Order, the Court preliminarily certified the following Settlement Class:

> All participants and beneficiaries of the New York Life Insurance Company Employee Progress-Sharing Investment Plan or the New York Life Insurance Company Agents Progress-Sharing Investment Plan (the "Plans") who held assets in the MainStay Epoch U.S. All Cap Fund, MainStay Epoch U.S. Small Cap Fund, MainStay Income Builder Fund, any MainStay Retirement Fund, or the Fixed Dollar Account in the Plans at any time from March 2, 2015 to the Effective Date of Settlement, excluding Defendants, any of their directors, and any members of the Committees during the Class Period.

ECF 188 ¶ 3.

In support of preliminary approval, Plaintiffs established that: (1) the class was sufficiently numerous; (2) Plaintiffs raised common issues in the Second Amended Class Action Complaint; (3) Plaintiffs' claims are typical of other class members' claims; (4) Plaintiffs are adequate class representatives; (5) Class Counsel is experienced and competent; (6) class certification is appropriate under Fed. R. Civ. P. 23(b)(1)(A) due to the risk of inconsistent adjudications; and (7) class certification is appropriate under Fed. R. Civ. P. 23(b)(1)(B) because any individual adjudication would be dispositive of the interests of other class members. *See* ECF 175 at 19-25. Nothing has changed since the Court preliminarily certified the class for preliminary approval.

Accordingly, the Court should reaffirm its certification of Settlement Class for purposes of final approval.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court enter an order granting final approval of the Settlement in the form submitted herewith.

Respectfully Submitted,

Dated: June 25, 2024

/s/ Kai Richter

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