UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ARKANSAS TEACHER RETIREMENT SYSTEM, on behalf of itself and all others similarly situated, Plaintiffs, v. STATE STREET BANK AND TRUST COMPANY, Defendant.	No. 11-cv-10230 MLW
ARNOLD HENRIQUEZ, MICHAEL T. COHN, WILLIAM R. TAYLOR, RICHARD A. SUTHERLAND, and those similarly situated, Plaintiffs, v. STATE STREET BANK AND TRUST COMPANY, STATE STREET GLOBAL MARKETS, LLC and DOES 1-20, Defendants.	No. 11-cv-12049 MLW
THE ANDOVER COMPANIES EMPLOYEE SAVINGS AND PROFIT SHARING PLAN, on behalf of itself, and JAMES PEHOUSHEK-STANGELAND, and all others similarly situated, Plaintiffs, v. STATE STREET BANK AND TRUST COMPANY, Defendant.	No. 12-cv-11698 MLW

[PROPOSED] MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' ASSENTED-TO MOTION FOR FINAL APPROVAL OF PROPOSED CLASS SETTLEMENT AND PLAN OF ALLOCATION AND FINAL CERTIFICATION OF SETTLEMENT CLASS

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Plaintiff Arkansas Teacher Retirement System ("ARTRS"), as well as Plaintiffs Arnold Henriquez, Michael T. Cohn, William R. Taylor, Richard A. Sutherland, The Andover Companies Employee Savings and Profit Sharing Plan, and James Pehoushek-Stangeland (collectively, the "ERISA Plaintiffs," and together with ARTRS, "Plaintiffs"), individually and on behalf of the Settlement Class,[1] respectfully submit this memorandum of law in support of their assented-to motion, pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, for final approval of the proposed Class Settlement, approval of the Plan of Allocation of the Net Class Settlement Fund, and final certification of the Settlement Class.

Preliminary Statement

This $300 million Class Settlement is the product of an innovative, Court-endorsed process involving exchanges of millions of pages of documents and other information tantamount to formal discovery, as well as protracted, arm's-length negotiations facilitated by an experienced, respected mediator. The Settlement represents a robust estimated 20% of State Street's aggregate overcharges on Indirect FX Transactions with custody clients during the Class Period, with an average gross recovery of $200,000 per Class Member.[2] The Settlement is by far the largest common fund settlement in any case brought under Chapter 93A, and is the third-largest common fund settlement, excluding federal securities actions, to be filed within the First Circuit. This is an outstanding result achieved by Plaintiffs and their counsel. It is fair, reasonable, and adequate—and therefore merits final approval.

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[1] Unless otherwise indicated, capitalized terms have the same meanings as in the Stipulation and Agreement of Settlement, dated as of July 26, 2016 (the "Settlement Agreement," ECF No. 89).

[2] As used with respect to this Settlement, "gross" means before adding accrued interest and deducting attorneys' fees, Litigation Expenses, Service Awards, Notice and Administration Expenses, Taxes and Tax Expenses, as specified in the Settlement Agreement and the Notice.

From the beginning, Defendant State Street Bank and Trust Company ("State Street" or the "Bank") has contested nearly every aspect of these Class Actions.[3] During many of their ***16*** in-person mediation sessions, the parties battled over issues bearing on class certification, liability, and damages. Those discussions were informed by, among other things, (1) Plaintiffs' review and close analysis of more than ***nine million pages*** of documents produced by State Street in response to Plaintiffs' Counsel's requests, including e-mails, presentation decks and other internal communications concerning Indirect FX pricing strategy and policy, documents concerning State Street's revenue derived from Indirect FX, FX pricing summaries and breakdowns for custodial clients, Investment Manager Guides, Product and Services Manuals, marketing presentations to prospective custodial clients, State Street's responses to Requests for Proposals from prospective custodial clients, and inquiries from custodial clients and their representatives concerning Indirect FX, as well as the Bank's responses; (2) the more than 73,000 pages of documents produced by ARTRS in response to State Street's requests; (3) the more than 3,600 pages of documents produced by the ERISA Plaintiffs in response to State Street's requests; (4) a detailed presentation regarding Indirect FX Methods by an expert consultant to State Street; and (5) presentations by both sides concerning the relevant facts and law. Those meetings were supplemented by numerous discussions by phone and e-mail.

The challenges to resolving these cases were intensified by State Street's position that any settlement with private plaintiffs must occur simultaneously with settlements between the Bank and the DOJ, SEC and DOL, each of which was investigating the Bank's Indirect FX

[3] *See*, *e.g.*, Mar. 18, 2011 Letter from State Street's counsel to ARTRS's counsel rejecting ARTRS's demand letter under Mass. Gen. Laws ch. 93A ("Chapter 93A"), Exhibit 2 to the accompanying Declaration of Lawrence A. Sucharow in Support of (A) Plaintiffs' Assented-to Motion for Final Approval of Proposed Class Settlement and Plan of Allocation and Final Certification of Settlement Class and (B) Lead Counsel's Motion for an Award of Attorneys' Fees, Payment of Litigation Expenses, and Payment of Service Awards to Plaintiffs ("Counsel Declaration" or "Counsel Decl."). Throughout this brief, citations to "Ex. ___" refer to exhibits to the Counsel Declaration.

Methods. Negotiations nearly broke down as a result, but the mediator brokered continued discussions that ultimately propelled the Parties across the finish line.

This was also not "piggy-back" litigation: The DOJ, SEC, and DOL entered the picture after Plaintiffs initiated their cases and their investigations yielded no roadmap for Plaintiffs to follow. Plaintiffs bore significant risk in taking on a well-funded, aggressive adversary without the benefit of preexisting government actions.

Nor was this "copycat" litigation: Plaintiff ARTRS investigated and filed its claims before the commencement of the similar indirect FX class action against The Bank of New York Mellon ("*BNYM FX*"), a major custody bank and State Street's primary competitor, which recently settled for $335 million in customer class recovery. This resolution was, in short, far from preordained.

While immersing themselves in the facts and law necessary to further prosecute their claims (which was also critical to their ability to negotiate a favorable resolution), Plaintiffs avoided the full "war of attrition"—with its attendant costs and delays—that likely awaited the parties had the litigation continued. The significant relief this Settlement affords the Class is even more impressive in light of the serious threat of a drawn-out contest that would have drained the Parties' and the Court's resources and potentially rendered a later settlement or post-trial judgment less valuable to Class Members. Class Members' anticipated recovery—on average, $200,000—is far greater than the pennies-on-the-dollar often received in large class settlements, and is comparable, in terms of percentage of estimated damages, to class members' recovery in the *BNYM FX* customer class cases.

Plaintiffs therefore respectfully request that the Court grant final approval to the Settlement and final certification to the Settlement Class, approve the Plan of Allocation, and grant other accompanying relief as set forth in the proposed Order and Final Judgment.

ARGUMENT[4]

I. THE PROPOSED SETTLEMENT IS FAIR, REASONABLE, AND ADEQUATE AND SHOULD BE APPROVED

A. Standards for Final Approval

To merit final approval, the proposed Settlement must be "fair, reasonable, and adequate" as prescribed by Rule 23(e). While the case law in this Circuit "offers 'laundry lists of factors' pertaining to reasonableness," a court's evaluation ultimately involves "balancing the advantages and disadvantages of the proposed settlement as against the consequences of going to trial or other possible but perhaps unattainable variations on the proffered settlement." *Bezdek v. Vibram USA, Inc.*, 809 F.3d 78, 82 (1st Cir. 2015) (quoting *National Ass'n of Chain Drug Stores v. New England Carpenters Health Benefits Fund*, 582 F.3d 30, 44 (1st Cir. 2009)).

While courts enjoy wide discretion in evaluating proposed settlements, *see City P'ship Co. v. Atlantic Acquisition Ltd. P'ship*, 100 F.3d 1041, 1043-44 (1st Cir. 1996), courts nonetheless should account for the "important concern" of "facilitating a settlement in a hard-fought, complex class action." *In re Pharmaceutical Indus. Average Wholesale Price Litig.*, 588 F.3d 24, 36 (1st Cir. 2009). Further, where "the parties negotiated at arm's length and conducted sufficient discovery, the district court must presume the settlement is reasonable." *Bezdek*, 809 F.3d at 82 (quoting *Pharmaceutical Indus.*, 588 F.3d at 32-33).

In assessing final approval, courts within this District "have frequently used" the factors articulated in *City of Detroit v. Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974):

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[4] The procedural history of the litigation and facts surrounding the settlement negotiations are set forth in the Counsel Declaration, at Paragraphs 39-106.

> (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; [and] (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

E.g., *Gulbankian v. MW Mfrs., Inc.*, No. 10-10392-RWZ, 2014 WL 7384075, at *2 (D. Mass. Dec. 29, 2014).[5] Both the settlement negotiation process and the substantive terms of the Settlement satisfy Rule 23(e).

B. The Settlement Is Presumptively Fair Because it Is the Product of Arm's-Length Negotiations Among Well-Informed and Sophisticated Parties and Counsel, Overseen By an Experienced Mediator

This Settlement resulted from arm's-length, protracted negotiations among experienced counsel that were facilitated by Jonathan B. Marks, Esq. of MarksADR, LLC—a nationally respected mediator with substantial experience in the resolution of complex financial litigation—and often with the active participation of the Executive Director of ARTRS and the Chief Legal Officer of State Street Corporation. During their 16 in-person mediation sessions in Boston, New York, and Washington, D.C., which were supplemented by discussions by phone and e-mail, the parties presented their respective arguments bearing on class certification, liability, and damages, and ultimately formulated a settlement. *See* Counsel Decl. ¶¶ 88-95, 100-103; Declaration of Jonathan B. Marks ("Marks Decl."), Ex. 5, ¶¶ 11-14, 16-24.

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[5] This Court has looked to a similar set of factors. *See M. Berenson Co. v. Faneuil Hall Marketplace, Inc.*, 671 F. Supp. 819, 822-23 (D. Mass. 1987) (Wolf, J.). Some courts within this Circuit have employed modified versions of the *Grinnell* analysis tailored to the circumstances of the particular case and settlement. *See*, *e.g.*, *Bezdek v. Vibram USA, Inc.*, 79 F. Supp. 3d 324, 344 (D. Mass.) (observing that "[v]ariations on and abbreviations of [*Grinnell*'s] list can also be found," court determined it would "employ . . . my own evaluation of the key considerations as I see them in reviewing the proposed settlement in this case"), *aff'd*, 809 F.3d 78 (1st Cir. 2015). Because a number of the *Grinnell* factors are related, Plaintiffs analyze them together in Part I.C below.

Those discussions were informed by, among other things, the Parties' analysis of numerous complex factual and legal issues and the more than nine million pages of documents exchanged between the parties. *See* Counsel Decl. ¶¶ 96-99. The Court can be assured that Class Members' interests were protected throughout the negotiations leading to this resolution. *See City P'ship*, 100 F.3d at 1043 ("When sufficient discovery has been provided and the parties have bargained at arms-length, there is a presumption in favor of the settlement."); *Disability Law Ctr. v. Massachusetts Dep't of Corr.*, 960 F. Supp. 2d 271, 280-81 (D. Mass. 2012) (Wolf, J.) (presumption of reasonableness applied to settlement agreement that "was reached after the plaintiff received substantial formal and informal discovery, and was the result of years of arduous, arm's length negotiations by energetic and experienced counsel"); *see also Hamilton v. SunTrust Mortg. Inc.*, No. 13-60749-CIV, 2014 WL 5419507, at *2 (S.D. Fla. Oct. 24, 2014) (granting final approval where, *inter alia*, "the settlement occurred only after the parties mediated over a period of months with a nationally recognized and well respected mediator (Mr. Jonathan Marks), and after the exchange and production of considerable discovery, including a substantial volume of electronic data").

C. The Settlement Is Reasonable in Light of the Complexities, Risks, and Delay Further Litigation Would Have Entailed

1. The Settlement is Reasonable in Light of Potential Recoveries Measured Against the Attendant Risks of Litigation

In assessing the reasonableness of a class action settlement, the pertinent question "is not whether the settlement represents the best possible recovery, but how the settlement relates to the strengths and weaknesses of the case." *Hill v. State Street Corp.*, Civ. No. 09-12146-GAO, 2015 WL 127728, at *10 (D. Mass. Jan. 8, 2015). The Court should "consider and weigh the nature of the claim, the possible defenses, the situation of the parties, and the exercise of business judgment." *Id.* (quoting *Grinnell*, 495 F.2d at 462) (alterations omitted). The Second Circuit

explained in *Grinnell* that "the fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved." 495 F.2d at 455. Indeed, "there is no reason, at least in theory, why a satisfactory settlement could not amount to a hundredth or even a thousandth part of a single percent of the potential recovery." *Id.* at 455 n.2.

This Settlement falls well above that threshold. Class Members stand to recover, on average, approximately ***20%*** of the margins State Street earned from Indirect FX Transactions with its custody clients during the Class Period, with an average gross recovery of $200,000 per Class Member. Counsel Decl. ¶¶ 109, 122-125. This result adequately reflects the strengths and challenges of Plaintiffs' cases, as discussed herein. It is also comparable, in terms of percentage of estimated damages, to customer class members' recovery in *BNYM FX*. Counsel Decl. ¶ 110 & n.5.

Further, because amounts to be paid to Class Members under the settlements between State Street and the SEC and the DOL will flow through this Settlement, those accords are conditioned upon final approval of this Settlement.[6] Counsel Decl. ¶¶ 8, 134-141. The Court's determination will therefore have direct and significant implications on those regulators' recoveries from State Street.

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[6] *See* Press Release, "U.S. Sec. & Exch. Comm'n, SEC: State Street Misled Custody Clients About Prices for Foreign Currency Exchange Trades" (July 26, 2016), *available at* https://www.sec.gov/news/pressrelease/2016-152.html ("Under the terms of the agreement [between State Street and the SEC], the SEC will issue its order instituting the settled administrative proceeding only after a federal court approves State Street's proposed settlement with private plaintiffs in pending securities class action lawsuits concerning its pricing of foreign currency exchange trades."); Press Release, "U.S. Dep't of Justice, State Street Bank to Pay $382 Million to Settle Allegations of Fraudulent Foreign Currency Exchange Practices" (July 26, 2016), *available at* https://www.justice.gov/opa/pr/state-street-bank-pay-382-million-settle-allegations-fraudulent-foreign-currency-exchange (stating that, in addition to State Street's settlements with the DOJ and the SEC, the Bank was "simultaneously resolving DOL's claims under the Employee Retirement Income Security Act (ERISA) by agreeing to pay at least $60 million to State Street's ERISA plan customers who, DOL found, sustained losses in connection with the conduct alleged," which "will be distributed to ERISA plan customers in conjunction with the settlement of certain private class action lawsuits").

While Plaintiffs believed their claims were supported in fact and law, they recognized proceeding with litigation would entail significant risk and likely take years to reach judgment following a trial, and perhaps an appeal. Both the risks and costs of continued litigation favor final approval of this Settlement.

In determining whether litigation risks favor approving the Settlement, the Court "is not required to decide the merits of the case or resolve unsettled legal questions, or to foresee with absolute certainty the outcome of the case," but rather "need only assess the risks of litigation against the certainty of recovery under the proposed settlement." *Shapiro v. JPMorgan Chase & Co.*, No. 11 Civ. 8331 (CM) (MHD), 2014 WL 1224666, at *10 (S.D.N.Y. Mar. 24, 2014).

Plaintiffs confronted hurdles to proving liability with respect to each of their claims. Indeed, while this litigation was pending, a district judge in New York dismissed a similar action challenging JPMorgan's automated FX practices. *See Louisiana Mun. Police Emps. Ret. Sys. v. JPMorgan Chase & Co.*, No. 12 Civ. 6659 (DLC), 2013 WL 3357173, at *17 (S.D.N.Y. July 3, 2013) ("It distorts the [New York consumer-protection] law beyond recognition . . . to suggest that an ancillary service that is provided in connection with a contract for custodial banking services offered to institutional investors and that explicitly gives clients the option to negotiate specific rates or to issue 'Standing Instructions' for automated FX transactions is a 'consumer-oriented' service."). Accordingly, while Plaintiffs were confident in the strength of their claims, there was a real chance this Court, a jury, or the court of appeals would disagree.

Violation of Massachusetts Consumer Protection Act. Plaintiffs faced a risk that Chapter 93A did not reach the conduct at issue, and that the Court would thus grant summary judgment or judgment as a matter of law at trial to State Street. State Street would also argue that the facts do not show that Plaintiffs or other Class Members were deceived by the alleged

misconduct, and would point to, among other things, the fact that ARTRS and other Class Members continued to engage in Indirect FX Transactions with the Bank after its Indirect FX Methods were revealed. *See* Counsel Decl. ¶ 112.

Further, in ruling on State Street's motion to dismiss, the Court reserved judgment as to whether ARTRS's Chapter 93A claims could proceed under Section 9 or Section 11 pending development of a factual record as to whether ARTRS was a "consumer" or a "business" for purposes of the statute. Section 11 likely requires a greater showing to establish a violation. *See* May 8, 2012 Hearing Tr., Ex. 3, at 97:3-99:6; *In re Pharmaceutical Indus. Average Wholesale Price Litig.*, 491 F. Supp. 2d 20, 80 (D. Mass. 2007), *aff'd*, 582 F.3d 156 (1st Cir. 2009); Counsel Decl. ¶ 113.

Breach of Fiduciary Duty. Plaintiffs' common law fiduciary-duty claim, arising from an agent's duty of trust or obligation to provide full disclosure to its beneficiaries, also raised challenging questions of law. Plaintiffs had to prove both that State Street served as a fiduciary to its custody clients and that in its fiduciary capacity the Bank had a duty to fully disclose its Indirect FX practices to them. Those prerequisites to liability carried risk for Plaintiffs and other Class Members. *See* Counsel Decl. ¶ 114.

Negligent Misrepresentation. State Street would no doubt assert that Plaintiffs could not prove that (1) the Bank made any actionable misrepresentations, (2) they relied on any alleged misrepresentations, or (3) the alleged misrepresentations were material. State Street would likely further contend that Plaintiffs could not prove they suffered any injury, because (in the Bank's view) they could have used information readily available to them to determine at any time during the Class Period how much they were allegedly being overcharged for Indirect FX Transactions. State Street also would have advanced that argument in challenging Plaintiffs'

negligent misrepresentation and other claims on statute of limitations grounds. *See* Counsel Decl. ¶ 115.

ERISA. Likewise, litigation of Plaintiffs' ERISA claims presented certain risks. State Street does business using numerous wholly owned subsidiaries and operating entities, allowing it to argue that even if one State Street entity is an ERISA fiduciary, other State Street entities are not. Even within a single entity, State Street sometimes offers different products and services, allowing it to argue that even if it acts as a fiduciary for certain purposes, it is not a fiduciary for other purposes. This "shell game" can lead to confusion and litigation risk. In addition, State Street's liability depends on a number of fairly technical liability theories, including prohibited transactions under ERISA § 406(b), 29 U.S.C. § 1106(b), prohibited party-in-interest transactions under ERISA § 406(a), 29 U.S.C. § 1106(a), exceptions to the prohibited transaction rules under ERISA § 408(18), 29 U.S.C. § 1108(18), Prohibited Transaction Exemptions 94-20 and 98-54, and basic fiduciary obligations of loyalty, care, prudence, diligence, and monitoring under ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1). *See* Counsel Decl. ¶ 116.

Class Certification. Class certification also presented complexities, which would have entailed a more extensive Rule 23 inquiry—and thus greater uncertainty and risk—than cases brought, for example, under the federal securities laws. In mediation, State Street contended that Plaintiffs would face insuperable hurdles to class certification because, in the Bank's view, among other things, (1) Massachusetts law, in particular Chapter 93A, could not be applied to a nationwide class; and (2) State Street would demonstrate that Class Members possessed varying levels of knowledge with respect to the Indirect FX Methods, precluding a showing of predominance under Rule 23(b)(3). *See* Counsel Decl. ¶ 117.

Regarding the first point, Plaintiffs would have to show either that (i) Massachusetts law should generally apply to Class Members' claims, or (ii) if the laws of various states were to apply, a trial would be manageable. Presenting sufficient evidence to demonstrate the manageability of a trial under the laws of several states could have required Plaintiffs to detail the relevant states' laws, including any material differences among them, and prepare a trial plan. *See*, *e.g.*, *In re Pharmaceutical Indus. Average Wholesale Price Litig.*, 230 F.R.D. 61, 84 (D. Mass. 2005) (where plaintiffs ask the court to "group[] the claims of class members from states with similar laws for trial," they must "demonstrate through an extensive analysis that grouping is feasible"). While Plaintiffs believed a multistate class or subclasses could have been certified, obtaining certification could have been challenging and time-consuming. *See*, *e.g.*, *Rossi v. Procter & Gamble Co.*, No. 11-7238 (JLL), 2013 WL 5523098, at *8 (D.N.J. Oct. 3, 2013) (approving settlement where, *inter alia*, plaintiffs confronted "the risk that the Court would not find this action suitable for certification or not find it suitable for litigation on a multi-state basis," and "[e]ven if class certification were granted, Plaintiffs face[d] the added challenge of maintaining class certification through trial"); Counsel Decl. ¶ 118.

Additionally, Plaintiffs would have devoted significant time and resources to refuting State Street's argument that individual issues predominated because (in the Bank's view) Class Members had disparate levels of knowledge regarding the Indirect FX Methods. State Street likely would have sought to depose numerous Class Members and their agents, as The Bank of New York Mellon did in the *BNYM FX* customer class cases. The parties also likely would present conflicting expert analysis on customer expectations within the FX market, heightening the costs and risks of litigation. Class certification is often granted in ERISA litigation, but State Street certainly would have waged a vigorous opposition. Success can never be assumed, and

certification of the ERISA claims alone would have provided no relief to a majority of Class Members. *See* Counsel Decl. ¶ 119.

Even were Plaintiffs to obtain class certification in whole or in part, the class might have been decertified before or during trial, or on appeal. *See*, *e.g.*, *In re Sinus Buster Prods. Consumer Litig.*, No. 12-CV-2429 (ADS) (AKT), 2014 WL 5819921, at *10 (E.D.N.Y. Nov. 10, 2014) ("Were the Court to reject the settlement, the parties would likely contest certification, which would present a possibility of decertification. A settlement therefore avoids the risk of decertification and thus weighs in favor of approval."). The risk of decertification is real where, as here, the Court might need to assess the manageability of a trial involving the laws of at least several states. *See* Counsel Decl. ¶ 120. The Settlement "permits the parties to ensure that class status will not be lost." *Shapiro*, 2014 WL 1224666, at *11.

Damages. Further contributing to the risks Plaintiffs faced, the appropriate measure of damages was contested during the Parties' lengthy mediation process and would have been a focus of the litigation. Plaintiffs thus faced the risk that the damages now forming the basis of Class Members' recovery through this Settlement could never be proven at trial or would be greatly offset. *See* Counsel Decl. ¶ 121. In light of that risk and the others discussed above, Class Members' expected recovery, representing (on average) 20% of the margins State Street earned from Indirect FX Transactions with those custody clients during the Class Period, is an excellent result. *See* Counsel Decl. ¶¶ 122-125.

In any event, the complexities relating to class certification, liability, and damages, as well as the sheer volume of evidence, virtually ensured that continuing to litigate would have entailed millions more dollars in lodestar and expenses for Plaintiffs' Counsel, with an uncertain outcome. *See* Counsel Decl. ¶ 127. This factor weighs strongly in favor of final approval of the

Settlement, which provides significant, and certain, relief to Class Members. *See Bezdek*, 79 F. Supp. 3d at 344 ("[T]he plaintiffs have identified meaningful concerns with class certification and would need to litigate these issues more fully in order to proceed to trial. Both parties would conduct further discovery, including extensive expert discovery, followed very likely by a motion for summary judgment and renewed settlement discussions. All of these efforts would extend the litigation and associated costs further, decreasing the net benefit of any damages award obtained at trial.").

Finally, both sides' commitment to the Court-approved mediation and discovery process conserved the Parties' resources, potentially resulting in greater relief than Class Members might otherwise have received, and promoted judicial efficiency. The path leading to this Settlement was thus forged by the parties' and the Court's creativity, hard work, persistence, and patience. Those are exemplary underpinnings of a fine resolution.[7] *See* Marks Decl. ¶ 30.

2. Plaintiffs Entered Into the Settlement With a Thorough Understanding of the Facts and Applicable Law

Courts consider the stage of the proceedings and amount of discovery completed to ensure the parties possessed information sufficient "to make an intelligent judgment about settlement." *Bezdek*, 79 F. Supp. 3d at 348. This inquiry "is only incidentally answered quantitatively by the number of pages in the documents that were produced or witnesses who were deposed"; the determination "must ultimately be a qualitative one." *Id.*; *see also Hochstadt v. Boston Sci. Corp.*, 708 F. Supp. 2d 95, 107 (D. Mass. 2010) (the standard "does not require

[7] State Street could withstand a greater judgment than the amount it will pay for this Settlement, but "a defendant is not required to empty its coffers before a settlement can be found adequate." *Hill*, 2015 WL 127728, at *10. Because State Street's financial wherewithal, "standing alone, is not sufficient to preclude a finding that a settlement is fair, reasonable and adequate where other factors weigh in favor of approving the settlement," this factor is "neutral." *Id.* (citation omitted).

that discovery be completed, but rather than sufficient discovery be conducted to make an intelligent judgment about settlement").

The Settlement followed intensive litigation with respect to Plaintiffs' pleadings; exchanges of significant document discovery in accordance with the parties' Court-approved discovery and mediation protocol, which resulted in Plaintiffs reviewing and analyzing more than nine million pages of documents provided by State Street; and 16 in-person meetings (in addition to numerous discussions by phone or e-mail), many of which involved presentations by one or both sides regarding their arguments with respect to class certification, liability, or damages. Preparation for mediation and settlement negotiations was coupled with preparation "behind the scenes" for litigation in the event the mediation process broke down. Plaintiffs accordingly were well-positioned to assess the Settlement's merits. Counsel Decl. ¶¶ 96-99; Marks Decl. ¶¶ 23-27.

This Settlement followed a procedural path similar to others approved by courts within this Circuit. In *Bezdek v. Vibram USA Inc.*, for example, the first action was filed in March 2012 and the parties first discussed settlement in September of that year. 79 F. Supp. 3d at 347. Following an unsuccessful mediation session in January 2013, the court ruled on defendants' motion to dismiss and the parties then "began meaningful discovery efforts," including defendants' production of more than 40,000 documents. *Id.* Plaintiffs also received information from third parties "regarding the defendants' print and online advertising and media plans." *Id.*

Following those productions, defendants served document requests to which plaintiffs provided written responses, and the parties served deposition notices in November and December 2013. *Id.* The parties then resumed settlement discussions and, after nearly a week,

reached an agreement. *Id.* The parties "thereafter successfully sought to stay further discovery, although they had not yet completed written discovery or conducted any depositions." *Id.*

Noting the discovery period was "less exhaustive than that in a number of class action settlements that have been approved in this district," Judge Woodlock observed that lead class counsel recognized the court's ruling on defendants' motion to dismiss, as well as defendants' production of discovery in the months following the ruling, "made clear that the plaintiffs faced significant hurdles in pursuing the litigation to trial." *Id.* at 348. Judge Woodlock thus found that "the parties had a sufficient understanding of the merits of the case in order to engage in informed negotiations, particularly where plaintiffs' counsel are skilled and experienced in consumer class action litigation," adding that "[a]lthough a significant amount of the attorneys' time . . . was spent on negotiations, the parties engaged in meaningful discovery efforts and motion to dismiss practice in all three underlying actions that afforded greater insight into the merits of the litigation for purposes of those negotiations." *Id.*; *see also In re Puerto Rican Cabotage Antitrust Litig.*, 815 F. Supp. 2d 448, 471 (D.P.R. 2011) (granting final approval where, *inter alia*, "the settlement agreements were negotiated at arm's length as the negotiations were long and arduous, spanning a considerable time-period" and "the parties were sufficiently informed by the informal discovery that occurred").

As in *Bezdek*, Plaintiffs here, through their review of millions of pages of documents provided by State Street, gained a deep understanding of State Street's Indirect FX Methods, which informed Plaintiffs' determination that the Settlement appropriately balances the benefits to Class Members against the risks of further litigation. The decision by Plaintiffs' Counsel, who are highly experienced in financial and consumer litigation, to enter into this Settlement following an intensive factual and legal analysis strongly favors final approval.

Plaintiffs' Counsel were particularly well able to measure the relative risks and rewards of this Settlement given both Lieff Cabraser's and TLF's intimate familiarity with the *BNYM FX* litigation. Their experience afforded insight when balancing the certainty of this recovery against both the prospect of massive additional discovery and the risks attendant to trying these cases.[8] *See* Counsel Decl. ¶ 128. In sum, the Settlement should be approved.[9]

II. THE PLAN OF ALLOCATION OF THE NET CLASS SETTLEMENT FUND IS FAIR, REASONABLE, AND ADEQUATE

A plan for allocating settlement proceeds "should be approved if it is fair, reasonable and adequate," and need only have "a reasonable, rational basis." *Hill*, 2015 WL 127728, at *11 (quoting *In re IMAX Sec. Litig.*, 283 F.R.D. 178, 192 (S.D.N.Y. 2012)). Courts assessing proposed plans "give great weight to the opinion of experienced counsel." *Id.* The Plan of Allocation for this Settlement reflects the considered judgment of Plaintiffs' Counsel, and has been reviewed and approved by the SEC and DOL. Plaintiffs respectfully submit that it should likewise be accepted by the Court.

The Plan is based on transaction data maintained by State Street with respect to custodial clients that engaged in Indirect FX Transactions with the Bank during the Class Period. The Net Class Settlement Fund will be allocated to each participating Class Member based primarily on

[8] To be sure, all Plaintiffs support the Settlement. *See* Declaration of George Hopkins, Executive Director of ARTRS ("Hopkins Decl."), Ex. 1, ¶¶ 17-18, 21; Declaration of Michael T. Cohn ("Cohn Decl."), Ex. 7, ¶ 10; Declaration of Arnold Henriquez ("Henriquez Decl."), Ex. 8, ¶ 10; Declaration of James Pehoushek-Stangeland ("Pehoushek-Stangeland Decl."), Ex. 9, ¶¶ 4, 6; Declaration of Richard A. Sutherland ("Sutherland Decl."), Ex. 10, ¶ 10; Declaration of William R. Taylor ("Taylor Decl."), Ex. 11, ¶ 10; Declaration of Janet A. Wallace, Trustee of The Andover Companies Employee Savings and Profit Sharing Plan ("Wallace Decl."), Ex. 12, ¶¶ 5,7.

[9] The Court can gauge the Class's opinion of the Settlement "by comparing the number of objectors and opt outs with the number of claimants, and by assessing the extent to which notice effectively reached absent class members." *In re Lupron Mktg. & Sales Practices Litig.*, 228 F.R.D. 75, 96 (D. Mass. 2005). As of the date hereof, no objections have been filed, and the Claims Administrator has received no requests for exclusion. Declaration of Eric J. Miller of A.B. Data, Ltd. ("Miller Decl."), Ex. 13, ¶¶ 12-13. *See also Bezdek*, 79 F. Supp. 3d at 347 (submission of 154,927 claims based on 279,570 pairs of shoes sold, with only 23 opt-outs and three objections, reflected class's "overwhelmingly positive" reaction); *In re Relafen Antitrust Litig.*, 231 F.R.D. 52, 72 (D. Mass. 2005) (5,489 claims submitted, 140 opt-outs, and 10 objections reflected class's "positive" reaction). To the extent any objections or exclusion requests are timely submitted, Plaintiffs will file a reply brief addressing them on October 21, 2016.

the Class Member's volume of Indirect FX Transactions during the Class Period and whether the Class Member is (1) an ERISA Plan; (2) a Group Trust, *i.e.*, an entity that has or had both ERISA-governed and non-ERISA assets; (3) an RIC (Registered Investment Company), most of which are mutual funds; or (4) entities not falling within those categories, including ARTRS and other public pension funds as well as private customers ("Public and Other"). The parties have relied on Indirect FX Trading Volume information provided by State Street to develop this Plan of Allocation. *See* Counsel Decl. ¶¶ 132-133. The respective allocations to each group of Class Members are summarized below.

ERISA Plans and Eligible Group Trusts. ERISA Plan and certain Group Trust Class Members will be allocated $60 million (the "ERISA Settlement Allocation"), on a gross basis, from the Class Settlement Fund, (i) plus 20% of any interest accrued on the Class Settlement Fund; (ii) minus 20% of any Taxes and Tax Expenses, Notice and Administration Expenses, Service Awards, and Litigation Expenses; and (iii) minus attorneys' fees, if awarded by the Court, in an amount not to exceed $10,900,000.[10] Counsel Decl. ¶ 134.

This allocation was negotiated directly between Lead Counsel, ERISA Counsel, and DOL representatives and, in light of claims available under ERISA, provides a premium per dollar of Indirect FX Trading Volume for ERISA Plans and eligible Group Trusts in comparison to allocations to other Settlement Class Members. The disparity between the recovery to ERISA Plans/eligible Group Trusts and other Settlement Class Members reasonably derives from differences in the remedies available to those respective entities. *See Hill*, 2015 WL 127728, at *11 ("A reasonable plan of allocation need not necessarily treat all class members equally, but

[10] The ERISA Settlement Allocation was set based on the Indirect FX Trading Volume provided by State Street, including information concerning the total amount of Indirect FX Trading Volume executed during the Class Period by ERISA Plans and Group Trusts. In the course of administering the Settlement, A.B. Data will request information from Group Trusts concerning their ERISA Volume during the Class Period. *See* Counsel Decl. ¶ 137.

may allocate funds based on the extent of class members' injuries and consider the relative strengths and values of different categories of claims"); Counsel Decl. ¶ 138.

RICs. Based on information provided by State Street, after the ERISA Settlement Allocation, the allocation to RICs will be approximately $142 million, on a gross basis. This amount, unlike the ERISA Settlement Allocation, does not reflect any premium and is derived solely from the RICs' percentage of total Indirect FX Trading Volume (taking into account the ERISA Settlement Allocation). The RIC Settlement Allocation (assuming payment of a certain amount of attorneys' fees, Litigation Expenses, Service Awards, and Notice and Administration Expenses) will meet the required Registered Investment Company Minimum Distribution of $92,369,416.51, which is an essential condition of State Street's settlement with the SEC. *See* Counsel Decl. ¶ 140.

That minimum distribution to RICs, like the ERISA Settlement Allocation, is also an essential condition of this Settlement, which State Street can terminate if those allocations are not made. *See* Counsel Decl. ¶ 141.

Public and Other. The Public and Other Settlement Allocation will be approximately $98 million, on a gross basis. The Public and Other Settlement Allocation, like the RIC Settlement Allocation, is derived solely from the Public and Other percentage of total Indirect FX Trading Volume (taking into account the ERISA Settlement Allocation). *See* Counsel Decl. ¶ 142.

Using information provided by State Street about each Class Member's Indirect FX Trading Volume(s) during the Class Period, A.B. Data will calculate the Class Member's Recognized Claim, and use those calculations to make the Settlement Allocations in accordance with the Settlement Agreement. To facilitate that process, State Street has provided A.B. Data

with (1) the total Indirect FX Trading Volume for each Class Member during the Class Period; and (2) information concerning whether each Class Member was an ERISA Plan, RIC, or Group Trust during the Class Period. *See* Counsel Decl. ¶ 143.

Under the allocation methodology described above, determining each Settlement Class Member's Recognized Claim will involve a two-step analysis:

First, A.B. Data will divide the Class Member's total Indirect FX Trading Volume during the Class Period into (i) RIC Volume, (ii) ERISA Volume, and (iii) Public and Other Volume, depending on whether the Class Member falls into the RIC, ERISA Plan, or Public and Other category. A.B. Data will then determine, based on the records provided by State Street, the respective amounts of each Class Member's RIC Volume, ERISA Volume, and Public and Other Volume.

For RICs, ERISA Plans, or entities falling into the Public and Other category, those Class Members' total Indirect FX Trading Volume during the Class Period will simply equal its RIC Volume, ERISA Volume, or Public and Other Volume, respectively. Because Group Trusts, on the other hand, may fall within more than one of the above categories, further scrutiny of their Indirect FX Transactions will be required. *See* Counsel Decl. ¶¶ 144-146.

Specifically, each Group Trust must provide A.B. Data with a certification (as set forth in the Notice) reporting the average proportion of the Group Trust's State Street-custodied assets held by an ERISA Plan or Plans during the Class Period or the average volume of Indirect FX Trades made by the ERISA Plan(s) during the Class Period, and identifying by name each ERISA Plan within the Group Trust. If the Group Trust does not have that information for each year of the Class Period but reasonably believes it held ERISA assets during the Class Period, it should report the years for which data is available and the results will be averaged by applying

the average proportion of the years with known ERISA assets or Indirect FX Trading Volume to the years with unknown ERISA assets or Indirect FX Trading Volume.

Using the information provided by the Group Trust, its ERISA Volume will equal the volume of Indirect FX Trades made by the ERISA Plan(s) in the Group Trust, or, if the information concerning the volume of Indirect FX Trades is insufficient, the proportion of assets held by the ERISA Plan(s) in a particular Group Trust. A.B. Data will categorize any non-ERISA Volume as Public and Other Volume (and its RIC Volume will be zero).[11] *See* Counsel Decl. ¶¶ 147-148.

Second, after calculating each Settlement Class Member's ERISA Volume, RIC Volume, and Public and Other Volume, A.B. Data will calculate the ERISA, RIC, and Public and Other Volumes for the entire Settlement Class. A Class Member's ERISA Recognized Claim will equal the Class Member's ERISA Volume divided by the Classwide ERISA Volume, multiplied by the amount of the ERISA Settlement Allocation. The same calculations will follow to determine the Class Member's RIC Recognized Claim and Public and Other Recognized Claim. Again, with the exception of Group Trusts, a Class Member will have only an ERISA Recognized Claim, an RIC Recognized Claim, or a Public and Other Recognized Claim, corresponding to the category into which that Class Member falls. *See* Counsel Decl. ¶ 150.

The Net Class Settlement Fund will be allocated among Class Members whose prorated distributions would be $10.00 or greater, given the fees and expenses associated with printing and mailing payments. *See Hill*, 2015 WL 127728, at *12 (explaining that "[m]inimum

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[11] Any Group Trust that does not provide the required certification by December 20, 2016 will be treated for allocation purposes as if it held no ERISA Plan assets and will not be entitled to a recovery from the ERISA Settlement Allocation. Rather, its total Indirect FX Trading Volume during the Class Period will be categorized as Public and Other Volume (and its RIC Volume will be zero). The Plan of Allocation provides for an exception with respect to Group Trusts that do not provide certifications but are known by the parties to have ERISA assets based on previous consultations with the DOL, as set forth in the Notice. *See* Counsel Decl. ¶ 149.

distribution thresholds . . . benefit the class as a whole by reducing the claims administration costs associated with monitoring, printing and mailing checks for relatively small amounts" and observing that "a $10.00 minimum is common") (collecting cases). Plaintiffs and State Street will use their best efforts to cause an initial distribution of the Net Class Settlement Fund, including the RIC Settlement Allocation, within one year after the Settlement's Effective Date, including by seeking the Court's authorization. *See* Counsel Decl. ¶ 151.

Class Members are not required to submit claims. In developing the Plan of Allocation, Plaintiffs took reasonable steps to ensure that State Street identified every custodial client of State Street, based on the Bank's records, that had a U.S. tax address and entered into an Indirect FX Transaction with the Bank during the Class Period. Upon final approval of the Settlement, each Class Member that does not opt out will simply receive a check or wire transfer in the amount of the Class Member's net recovery. *See* Counsel Decl. ¶ 152.

The Plan of Allocation thus has a "reasonable, rational basis," and is the product of extensive consideration by Plaintiffs' counsel, who are experienced and sophisticated in managing and resolving complex class actions. *See* Counsel Decl. ¶ 153. The Plan of Allocation should be approved.

III. THE COURT SHOULD GRANT FINAL CLASS CERTIFICATION FOR SETTLEMENT PURPOSES

In the Preliminary Approval Order, this Court granted preliminary certification to the Settlement Class for purposes of the Settlement under Rule 23(a) and (b)(3). Preliminary Approval Order (ECF No. 97) ¶¶ 3-4.

Nothing has occurred since then to cast doubt on this determination, and Plaintiffs respectfully submit that final class certification for settlement purposes is warranted.[12] Plaintiffs will not burden the Court by repeating the arguments made in their preliminary approval brief, as further addressed during the August 8, 2016 hearing. Plaintiffs will respond to any timely filed objections by October 21, 2016, in accordance with the Preliminary Approval Order.

IV. NOTICE TO THE SETTLEMENT CLASS COMPORTED WITH RULE 23 AND DUE PROCESS

For any class certified under Rule 23(b)(3), "the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2). Rule 23 further requires that the court "direct notice in a reasonable manner to all class members who would be bound by the proposal" (Fed. R. Civ. P. 23(e)(1)), and that notice of class counsel's motion for attorneys' fees and expenses be provided to class members (Fed. R. Civ. P. 23(h)).

The Court already has determined the Notice includes all the information Rule 23 prescribes, and thus "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." *Hill*, 2015 WL 127728, at *16 (quoting *Greenspun v. Bogan*, 492 F.2d 375, 382 (1st Cir. 1974)). This is particularly so given that the Class consists of a relatively small number of Class Members (compared to, for example, large securities class actions), and they are identifiable through State Street's records.

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[12] *See Bezdek*, 79 F. Supp. 3d at 339-40 & n.13 (explaining that "[t]he core questions in this case—whether [defendant]'s advertising was false or misleading, whether its conduct violated the causes of action identified in [plaintiff]'s amended complaint, and whether the class members suffered injury and are entitled to damages as a result of this conduct—are common to all class members," and that Chapter 93A "provides a serviceable and appropriate cause of action common to all class members"); *In re M3 Power Razor Sys. Mktg. & Sales Practice Litig.*, 270 F.R.D. 45, 56 n.20 (D. Mass. 2010) ("The dominant common questions include whether [defendant]'s advertising was false or misleading, whether the company's conduct violated the statutory and/or common law causes of action delineated in the Amended Complaint, and whether the class members suffered damages as a result of this conduct. Even if state consumer statutes or other state causes of action differ in arguably material ways, common questions, not individual ones, predominate among and within each state's legal regimes. Indeed, Chapter 93A . . . provides a cause of action common to all class members against the defendant.").

The process for notifying Class Members of their rights with respect to the Settlement, which has been effectuated in accordance with the Preliminary Approval Order, comports with Rule 23(c) and due process. As an initial matter, because this Settlement does not require Class Members to do anything to receive their share of the Net Class Settlement Fund, each Class Member that does not opt out will receive a recovery, based on transaction data furnished by State Street (so long as its address and payment information are current). The notice process has therefore primarily entailed apprising the approximately 1,300 Class Members of this Settlement and advising them of their right to object or opt out. As set forth below, Plaintiffs' Counsel and A.B. Data have taken all reasonable steps to apprise Class Members of their rights.

As noted above and detailed in the Miller Declaration, since August 22, 2016, A.B. Data has mailed 1,970 Notice Packets to Class Members, some of whom represent multiple funds or had multiple addresses, and caused the Summary Notice to be published in *The Wall Street Journal* and transmitted on *PR Newswire*. *See* Miller Decl., Ex. 13, ¶¶ 2-8, Exs. A-C thereto. Further, A.B. Data established a settlement website (www.StateStreetIndirectFXClass Settlement.com), which contains links to the Notice, Settlement Agreement, Court documents, and contact information relating to the Settlement. *Id.* ¶ 11. As of September 14, 2016, there have been 435 visitors to the website. *Id.*

A.B. Data also maintains a toll-free telephone number (877-240-3540), accessible 24 hours a day, seven days a week, to accommodate Class Members that have questions about the Settlement and to provide a convenient venue for requesting copies of the Notice Packet. Operators are available during business hours. As of September 14, 2016, A.B. Data has received 51 calls to this number. *Id.* ¶¶ 9-10.

The notice campaign has been thorough and evidences Lead Counsel's commitment to protecting Class Members' rights. Rule 23's requirements and due process are well satisfied. *See also* Counsel Decl. ¶¶ 154-158.

Conclusion

For the foregoing reasons, Plaintiff ARTRS and the ERISA Plaintiffs respectfully request that this Court issue the proposed Order and Final Judgment finding that the proposed Settlement is fair, reasonable, and adequate; approving the Plan of Allocation as fair, reasonable, and adequate; finding that the notice procedure comported with Rule 23 and due process; granting final class certification of the Settlement Class; retaining ongoing jurisdiction over the administration and effectuation of the Settlement for the benefit of Class Members; and granting other specified relief.

Dated: September 15, 2016

Respectfully submitted,

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