

1 Mark P. Kindall, Cal. Bar No. 138703  
2 mkindall@ikrlaw.com  
3 Robert A. IZARD, *pro hac vice*  
4 rizard@ikrlaw.com  
5 IZARD KINDALL & RAABE LLP  
6 29 South Main Street, Suite 305  
7 West Hartford, CT 06107  
8 Telephone: (860) 493-6292

6 Gregory Y. Porter, *pro hac vice*  
7 gporter@baileyglasser.com  
8 Mark G. Boyko, *pro hac vice*  
9 mboyko@baileyglasser.com  
10 BAILEY & GLASSER LLP  
11 1055 Thomas Jefferson Street, NW Suite 540  
12 Washington, DC 20007  
13 Telephone: (202) 463-2101

11 Joseph A. Creitz, Cal. Bar. No. 169552  
12 joe@creitzserebin.com  
13 CREITZ & SEREBIN LLP  
14 100 Pine Street, Suite 1250  
15 San Francisco, CA 94111  
16 Telephone: (415) 466-3090

15 *Attorneys for the Plaintiffs*

16 **UNITED STATES DISTRICT COURT**  
17 **NORTHERN DISTRICT OF CALIFORNIA**  
18 **OAKLAND DIVISION**

19 MARLON H. CRYER, individually and on  
20 behalf of a class of all others similarly situated,  
21 and on behalf of the Franklin Templeton 401(k)  
22 Retirement Plan,

22 Plaintiffs,

24 v.

25 FRANKLIN RESOURCES, INC., the Franklin  
26 Templeton 401(k) Retirement Plan Investment  
27 Committee, and DOES 1-25,

28 Defendants.

**Lead Case No. 4:16-cv-04265-CW**  
[Consolidated with Case No. 4:17-cv-  
06409-CW]

**PLAINTIFFS' MOTION FOR  
ATTORNEYS' FEES,  
REIMBURSEMENT OF EXPENSES  
AND NAMED PLAINTIFF INCENTIVE  
AWARDS**

Judge: Hon. Claudia Wilken  
Hearing: Sept. 24, 2019 at 2:30 p.m.

**NOTICE OF MOTION**

**TO ALL PARTIES AND THEIR COUNSEL OF RECORD:**

**PLEASE TAKE NOTICE THAT** on September 24, 2019, at 2:30 p.m. or as soon thereafter as the matter may be heard in Courtroom 6 of this Court, located at 1301 Clay Street, Oakland, California 94612, Plaintiffs Marlon Cryer and Nelly Fernandez, will and hereby does move under Federal Rule 23, for Court of their Motion for Attorneys' Fees, Reimbursement of Expenses and Incentive Awards.

Plaintiffs' Motion is based on this Notice of Motion and Motion, Memorandum of Points and Authorities, the pleadings in this action, and such other materials and evidence as may be presented to the Court.

Dated: July 30, 2019

Respectfully submitted,

/s/ Mark G. Boyko

Mark G. Boyko (*pro hac vice*)  
Gregory Y. Porter (*pro hac vice*)  
BAILEY & GLASSER LLP  
1055 Thomas Jefferson St. NW, Suite 540  
Washington, DC 20007  
Telephone: (202) 463-2101  
*mboyko@baileyglasser.com*  
*gporter@baileyglasser.com*

Mark P. Kindall (138703)  
Robert A. Izard  
IZARD KINDALL & RAABE, LLP  
29 South Main St., Suite 305  
West Hartford, CT 06107  
Telephone: (860) 493-6295  
*mkindall@ikrlaw.com*  
*rizard@ikrlaw.com*

Joseph A. Creitz (169552)  
Lisa S. Serebin (146312)  
CREITZ & SEREBIN, LLP  
100 Pine Street, Suite 1250  
San Francisco, CA 94111  
Telephone: (415) 466-3090  
*joe@creitzserebin.com*  
*lisa@creitzserebin.com*

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**MEMORANDUM AND POINTS OF AUTHORITY**

**TABLE OF CONTENTS**

**Page(s)**

I. INTRODUCTION ..... 1

II. ARGUMENT ..... 3

    A. The Requested Fee is Reasonable Under the Circumstances..... 3

        1. The Court Should Award Attorneys’ Fees Based on a Percentage of the Settlement..... 3

        2. A Fee Equal to 28 Percent of the Cash Portion of the Settlement and Below 25 Percent of the Present Value of the Overall Class Benefit is Appropriate For this Extraordinary Recovery..... 4

        3. The Results Achieved ..... 5

        4. Litigation Risk..... 6

        5. Non-Monetary Relief ..... 7

        6. Percentage Rate Relative to Market Rate..... 7

        7. Contingent Nature of Representation and Opportunity Cost ..... 8

        8. Class Reaction ..... 9

        9. Lodestar Cross-Check ..... 9

    B. The Court Should Award Reimbursement of Class Counsel’s Costs. .... 11

    C. The Court Should Approve Incentive Awards to the Class Representatives. .... 11

III. CONCLUSION ..... 12

**TABLE OF AUTHORITIES**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**Page(s)**

**Cases**

*In re Activision Sec. Litig.*,  
723 F. Supp. 1373 (N.D. Cal. 1989) .....4

*Alberto v. GMRI, Inc.*,  
No. CIV 07-1895 WBS DAD, 2008 WL 4891201 (E.D. Cal. Nov. 12, 2008).....4

*In re Biolase, Inc. Sec. Litig.*,  
No. 13-1300, 2015 WL 12720318 (C.D. Cal. Oct. 13, 2015).....6

*Blum v. Stenson*,  
465 U.S. 886 (1984).....3

*Bouman v. Block*,  
940 F. 2d 1211 (9th Cir. 1991).....10

*Brotherston v. Putnam Investments*,  
No. 15-13825, 2017 WL 2634361 (D. Mass. June 19, 2017).....2

*Dorman v. Charles Schwab Corp.*,  
No. 17-cv-285 (N.D. Cal.) .....2

*Epic Systems Corp. v. Lewis*,  
138 S. Ct. 1612 (2018).....7

*Gordan v. Mass. Mutual Life Ins.*,  
No. 13-cv-30184, 2016 WL 11272044 (D. Mass. Nov. 3, 2016) .....8, 9, 10

*Gudimetla v. Ambow Educ. Holding*,  
No. 12-5062, 2015 WL 12752443 (C.D. Cal. Mar. 16, 2015).....6

*Hensley v. Eckerhart*,  
461 U.S. 424 (1983).....5

*Johnson v. Fujitsu Technology and Business of American, Inc.*,  
No. 16-cv-3698, 2018 WL 2183253 (N.D. Cal. May 11, 2018).....11

*Kanawi v. Bechtel Corp.*,  
2011 WL 782244 (N.D. Cal. Mar. 1, 2011)..... *passim*

*Kirchoff v. Flynn*,  
786 F.2d 320 (7th Cir. 1986).....4

1 *Krueger v. Ameriprise Fin., Inc.*,  
 2 No. 11-cv-2781, 2015 WL 4246879 (D. Minn. July 13, 2015) .....8

3 *Kruger v. Novant Health, Inc.*,  
 4 No. 1:14CV208, 2016 WL 6769066 (M.D.N.C. Sept. 29, 2016) .....9, 10, 12

5 *Lee v. JP Morgan Chase & Co.*,  
 6 No. 13-cv-511, 2015 WL 12711659 (C.D. Cal. Apr. 28, 2015) .....8

7 *In re LJ Int’l Inc. Sec. Litig.*,  
 8 No. 07-6076, 2009 WL 10669955 (C.D. Cal. Oct. 19, 2009).....6

9 *Main v. American Airlines, Inc.*,  
 10 No. 16-cv-473, Dkt. 138 (N.D. Tex. Feb. 21, 2018).....8

11 *Meiners v. Wells Fargo & Co.*,  
 12 No. 16-3981, 2017 WL 2303968 (D. Minn. May 25, 2017).....2

13 *Mogck v. Unum Life Ins. Co. of Am.*,  
 14 289 F. Supp. 2d 1181 (S.D. Cal. 2003) .....9

15 *Moreno v. City of Sacramento*,  
 16 534 F.3d 1106 (9th Cir. 2008).....9

17 *Munro v. Univ. of Southern Cal.*,  
 18 896 F.3d 1088 (9th Cir. 2018).....7

19 *Nolte v. CIGNA*,  
 20 2013 WL 12242015 (C.D. Ill. Oct. 15, 2013) .....8

21 *In re Northrop Grumman ERISA Litig.*,  
 22 No. 06-cv-6213 (C.D. Cal. Oct. 24, 2017).....10, 11, 12

23 *In re Omnivision Techs., Inc.*,  
 24 559 F. Supp. 2d 1036 (N.D. Cal. 2008) .....4, 6

25 *In re Online DVD-Rental Antitrust Litig.*,  
 26 779 F.3d 934 (9th Cir. 2015).....3, 5, 11, 12

27 *Paul, Johnson, Alston & Hunt v. Graulty*,  
 28 886 F.2d 268 (9th Cir. 1989).....3, 4

*Price v. Eaton Vance Corp.*,  
 18-cv-12098 (D. Mass. May 6, 2019) .....5

*Radcliffe v. Experian Info. Solutions*,  
 715 F.3d 1157 (9th Cir. 2013).....11

1 *Rodriguez v. Disner*,  
 2 688 F.3d 645 (9th Cir. 2012).....5  
 3 *Rodriguez v. W. Publ’g Corp.*,  
 4 563 F.3d 948 (9th Cir. 2009).....6, 11, 12  
 5 *Sims v. BB&T Corp.*,  
 6 No. 15-cv-732, 2019 WL 1993519 (M.D.N.C. May 6, 2019) .....8  
 7 *Syed v. M-I LLC*,  
 8 No. 14-cv-742, 2016 WL 310135 (E.D. Cal. Jan. 26, 2016) .....4  
 9 *Urakchin v. Allianz Asset Mgmt. of Amer., L.P.*,  
 10 No. 15-cv-1614, 2018 WL 3000490 (C.D. Cal. Feb. 6, 2018) .....5  
 11 *Vasquez v. Coast Valley Roofing, Inc.*,  
 12 266 F.R.D. 482 (E.D. Cal. 2010) .....11  
 13 *Velazquez v. Massachusetts Fin. Services Co.*,  
 14 No. 17-cv-11249 (D. Mass) .....5, 6  
 15 *Vizcaino v. Microsoft Corp.*,  
 16 290 F.3d 1043 (9th Cir. 2002).....4, 5, 8, 9  
 17 *Wade v. Minatta Transp. Co.*,  
 18 No. C10-2796 BZ, 2012 WL 300397 (N.D. Cal. Feb. 1, 2012) .....5  
 19 *Waldbuesser v. Northrop Grumman Corp.*,  
 20 2017 WL 9614818 .....8  
 21 *In re Wash. Pub. Power Supply Sys. Sec. Litig.*,  
 22 19 F.3d 1291 (9th Cir. 1994).....3, 8  
 23 *Wildman v. Am. Century Servs., LLC*,  
 24 No. 16-737, 2019 WL 283382 (W.D. Mo. Jan. 23, 2019) .....2  
 25 **Statutes**  
 26 29 U.S.C. § 1001, *et seq.*..... *passim*  
 27 29 U.S.C. § 1104(a) ..... 1  
 28 29 U.S.C. § 1106.....1  
**Other Authorities**  
 ALBA CONTE, 1 ATTORNEY FEE AWARDS §2:19 (3d. ed.) ..... 11  
 MANUAL FOR COMPLEX LITIG. (Fourth) § 14.121 (2004) .....4

## I. INTRODUCTION

1  
2 Plaintiffs brought this case alleging that Defendants' decisions to maintain underperforming  
3 proprietary investments in the 401(k) plan (the "Plan") offered to qualified employees of Franklin  
4 Resources, Inc. ("Franklin"), violated Defendants' duties of prudence and loyalty under Section  
5 404(a) of ERISA, 29 U.S.C. § 1104(a), and constituted prohibited transaction under ERISA Section  
6 406, 29 U.S.C. § 1106.<sup>1</sup> Because Class Counsel zealously and successfully litigated this case for  
7 three years, up to the eve of trial, they were able to negotiate one of the largest monetary settlements  
8 in absolute terms and *the largest ever* when measured on a per class member basis.

9 Under the proposed Settlement, approximately 8,600 class members will receive their portion  
10 of a collective \$26.75 million settlement without the need to complete a claim form or take any  
11 other affirmative act. As an added benefit, many of these participants will receive their recovery  
12 directly as a contribution into their tax-deferred 401(k) accounts.<sup>2</sup> Defendants have also agreed to  
13 add a non-proprietary suite of target date funds: starting August 1, 2019, the Plan will offer a series  
14 of target date options managed by State Street, which charge fees less than one-fifth as high as the  
15 Franklin Target Date Funds. (Brown decl. ¶ 5). In addition, after this case was filed but prior to  
16 Settlement, Defendants removed the Franklin Money Market Fund which Plaintiffs had challenged  
17 and replaced it with a non-proprietary capital preservation fund that provides the Plan with over  
18 \$600,000 per year in additional interest compared to the Franklin Money Market Fund. (Brown  
19 decl. ¶3). The capital preservation fund and target date fund changes offer a present value to the  
20 Plan of over \$3 million over the next three years, assuming half of the target date fund participants  
21 move to the non-proprietary funds. When these considerations are valued over the entire settlement  
22 period, the total monetary benefit to the class exceeds \$35.4 million. Brown decl. ¶6.

23  
24 <sup>1</sup> Consistent with this Court's Procedural Guidance for Class Action Settlements, the factual and  
25 procedural background set out in the Memorandum of Law in Support of Plaintiffs' Motion for  
26 Final Approval of Class Action Settlement is incorporated herein by reference.

27 <sup>2</sup> As described in the Settlement Agreement, the Class will receive upfront monetary compensation  
28 in the form of a \$13.85 million cash payment, plus an additional Plan benefit consisting of an  
increase in Franklin's existing matching contributions from 75% to 85% for a period of three years,  
a benefit that would, based on past contribution levels, add \$10.9 million (\$4.3 annually) to the  
Plan through higher payments by Franklin.

1           The proposed Settlement is an outstanding result for the Class, particularly because ERISA  
2 class actions challenging the inclusion of proprietary funds in an employers' 401(k) plans are rare,  
3 complex, uncertain, expensive, and risky. While this Court also has before it a case brought by  
4 participants in the Charles Schwab 401(k) plan alleging similar ERISA violations, (*Dorman v.*  
5 *Charles Schwab Corp.*, No. 17-cv-285 (N.D. Cal.)), nationwide, only nineteen other such cases  
6 have settled since the passage of ERISA in 1974. *See*, Exhibit A to Declaration of Gregory Porter.  
7 Only one of these, brought against Bechtel Corporation, was venued in the Northern District of  
8 California. *Kanawi v. Bechtel Corp.*, 2011 WL 782244 (N.D. Cal. Mar. 1, 2011) (Breyer, J.). *Id.*  
9 Only two have gone to trial; both resulted in defense verdicts. *Wildman v. Am. Century Servs., LLC*,  
10 No. 16-737, 2019 WL 283382 (W.D. Mo. Jan. 23, 2019); *Brotherston v. Putnam Investments*, No.  
11 15-13825, 2017 WL 2634361 (D. Mass. June 19, 2017), *aff'd* with respect to fiduciary breach  
12 allegations but vacated and remanded with respect to alleged prohibited transactions, 907 F.3d 17  
13 (1st Cir. 2018). At least one other case was dismissed. *Meiners v. Wells Fargo & Co.*, No. 16-3981,  
14 2017 WL 2303968 (D. Minn. May 25, 2017), *aff'd*, 898 F.3d 820 (8th Cir. 2018).

15           Class Counsel have substantial experience in this narrow area of law, having collectively  
16 represented plan participants in over half of the proprietary fund 401(k) settlements ever reached.  
17 Ex. A to Porter Decl. The experience was essential to the successful prosecution and settlement of  
18 the case. In light of their experience, their three years of effort, the high degree of risk and  
19 uncertainty that these cases represent and, most importantly, the results that have been achieved,  
20 Class Counsel are requesting \$7,490,000 in attorneys' fees, which represents 28% of the \$26.75  
21 million cash portion of the settlement. Moreover, the fee request represents only 21.1% of the  
22 monetary benefits when taking into account the present value of the plan reforms achieved through  
23 the litigation and this settlement, even without factoring in the value of any such reforms after the  
24 three-year settlement period. This fee request does not seek any monies for interest earned on the  
25 settlement fund or for additional work to be done in the future, including: (1) three years of  
26 monitoring Defendants' compliance with the settlement; (2) communication and facilitation of  
27  
28



1 contingency payments at the close of the three-year period; or (3) the risk, burden and expense of  
2 contested arbitration over compliance issues.

3 Class Counsel's requested fee is less than the one-third fee that was agreed to by the Named  
4 Plaintiffs in their contingency fee agreements with Class Counsel (Porter Decl. ¶ 19), less than  
5 market rates in other similar cases, and less than the thirty percent contingent fee awarded by Judge  
6 Breyer in *Kanawi v. Bechtel*, 2011 WL 782244 at \*2. Even without considering any of the benefits  
7 other than the \$26.75 million monetary portion of the Settlement, the fee request is only slightly  
8 above the 25 percent baseline for class litigation in the Ninth Circuit, and when the entire value of  
9 the Settlement is considered, the requested fee is significantly lower than the 25 percent benchmark.  
10 The requested fee is fair and reasonable regardless of whether benefits beyond the monetary portion  
11 are considered, because (as discussed below), many of the factors that courts have determined  
12 justify a percentage award above the benchmark are present here.

## 13 **II. ARGUMENT**

### 14 **A. The Requested Fee is Reasonable Under the Circumstances.**

15 Awards in class actions are most often made in reference to the common fund doctrine,  
16 pursuant to which the Supreme Court has observed that "a reasonable fee is based on a percentage  
17 of the fund bestowed on the class." *Blum v. Stenson*, 465 U.S. 886, 900 n.16 (1984); *Paul, Johnson,*  
18 *Alston & Hunt v. Grauldy*, 886 F.2d 268, 271 (9th Cir. 1989). The guiding principle for determining  
19 the amount of a fee award in a common-fund case is that the fee should be "reasonable under the  
20 circumstances." *In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1296 (9th Cir. 1994)  
21 ("WPPSS") (citation omitted).

#### 22 **1. The Court Should Award Attorneys' Fees Based on a Percentage of the 23 Settlement**

24 Courts in the Ninth Circuit may award attorneys' fees in common fund cases based on either  
25 the lodestar method or the percentage-of-recovery method. *In re Online DVD-Rental Antitrust*  
26 *Litig.*, 779 F.3d 934, 949 (9th Cir. 2015). However, most courts use the percentage-of-the-fund  
27  
28

1 method.<sup>3</sup> This method is particularly appropriate “where, as here, ‘the benefit to the class is easily  
2 quantified.’” *Syed v. M-I LLC*, No. 14-cv-742, 2016 WL 310135, at \* 9 (E.D. Cal. Jan. 26, 2016)  
3 (quoting *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 942 (9th Cir. 2011)).

4 The Court should use the percentage-of-the-fund method here. Percentage approaches are  
5 the standard contingent-fee arrangements in non-class action cases. Thus, the percentage  
6 approach best emulates the real-world market value of attorney’s services that are provided on a  
7 contingent basis, and properly align the interests of the attorney and the client in achieving the  
8 maximum recovery in shortest possible time. *See Kirchoff v. Flynn*, 786 F.2d 320, 325–26 and  
9 328 (7th Cir. 1986). Moreover, the “lodestar method is difficult to apply, time-consuming to  
10 administer, inconsistent in result, and capable of manipulation” and “creates inherent incentive to  
11 prolong the litigation until sufficient hours have been expended.” *MANUAL FOR COMPLEX LITIG.*  
12 (Fourth) § 14.121 (2004); *see also Vizcaino*, 290 F.3d at 1050 n.5 (“[I]t is widely recognized that  
13 the lodestar method creates incentives for counsel to expend more hours than may be necessary  
14 on litigating a case so as to recover a reasonable fee . . . .”); *Syed*, 2016 WL 310135, at \* 9 (use of  
15 the percentage method avoids “the often more time-consuming task of calculating the lodestar”)  
16 (quoting *Bluetooth*, 654 F.3d at 942).

17 **2. A Fee Equal to 28 Percent of the Cash Portion of the Settlement and**  
18 **Below 25 Percent of the Present Value of the Overall Class Benefit is**  
19 **Appropriate For this Extraordinary Recovery**

20 In the Ninth Circuit, the “usual range” for a percentage award of attorneys’ fees in a  
21 common fund case is 20–30 percent. *Vizcaino*, 290 F.3d at 1047. The midpoint of the range is the  
22 “benchmark” (*id.*), which can be adjusted upwards or downwards “to account for any unusual  
23 circumstances involved in [the] case.” *Alberto v. GMRI, Inc.*, No. CIV 07-1895 WBS DAD, 2008  
24 WL 4891201, at \*11 (E.D. Cal. Nov. 12, 2008) (quoting *Paul, Johnson, Alston & Hunt v. Gaulty*,

25 <sup>3</sup> *See In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1046 (N.D. Cal. 2008) (stating “use of  
26 the percentage method in common fund cases appears to be dominant” and its “advantages ... have  
27 been described thoroughly by other courts.”); *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1050  
28 (9th Cir. 2002) (approving use of percentage method); *In re Activision Sec. Litig.*, 723 F. Supp.  
1373, 1378 (N.D. Cal. 1989) (“[T]his court concludes that in class action common fund cases the  
better practice is to set a percentage fee.”).

1 886 F.2d 268, 272 (9th Cir. 1989)); *see also Rodriguez v. Disner*, 688 F.3d 645, 653 (9th Cir. 2012);  
2 *Online DVD-Rental Antitrust Litig.*, 779 F.3d at 949; *Wade v. Minatta Transp. Co.*, No. C10-2796  
3 BZ, 2012 WL 300397, at \*1 (N.D. Cal. Feb. 1, 2012).

4 Within the Ninth Circuit, courts look at the following factors when considering a proper  
5 percentage “for an award of attorneys’ fees: (1) the results achieved; (2) the risks of litigation; (3)  
6 whether there are benefits to the class beyond the immediate generation of a cash fund; (4) whether  
7 the percentage rate is above or below the market rate; (5) the contingent nature of the representation  
8 and the opportunity cost of bringing the suit; (6) reactions from the class; and (7) a lodestar cross-  
9 check.” *Kanawi v. Bechtel Corp.*, 2011 WL 782244 at \*1, citing *Vizcaino*, 290 F.3d at 1048–52;  
10 *see also In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 954–55 (9th Cir. 2015). Evaluation  
11 of these factors supports the requested fee in this case. Indeed, Judge Breyer in *Kanawi* assessed  
12 these same factors in determining “that an upward adjustment of the benchmark to 30% is  
13 warranted.” *Id.*

### 14 3. The Results Achieved

15 One of the most important factors in determining the reasonableness of a fee is the result  
16 achieved for the class. *See Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983) (“[The] most critical  
17 factor is the degree of success obtained.”); *Vizcaino*, 290 F.3d at 1048. Here, the combination of  
18 these benefits is just under one-third of the Class’s potential damages. Dkt. 157 at ECF 16. This  
19 percentage, in and of itself, is a very good result for a proprietary fund 401(k) case. *See, e.g.*,  
20 *Urakchin v. Allianz Asset Mgmt. of Amer., L.P.*, No. 15-cv-1614, 2018 WL 3000490, at \*4 (C.D.  
21 Cal. Feb. 6, 2018) (granting preliminary approval to settlement of proprietary fund 401k ERISA  
22 case that represented between 25.5% of plaintiffs’ losses) and Docket Entries 185 and 186 (final  
23 approval order and judgment of that settlement); *Price v. Eaton Vance Corp.*, 18-cv-12098, Dkt.  
24 32 (D. Mass. May 6, 2019) (\$3.45 million settlement constituted 23% of the potential damages);  
25 *Velazquez v. Massachusetts Financial Services Co.*, No. 17-cv-11249 (D. Mass) (\$6,975,000  
26 settlement constituted 29% of possible damages). This recovery is substantially higher than  
27  
28

1 percentage recoveries approved by other courts in this circuit,<sup>4</sup> and represents a good recovery for  
2 the Class.

3 On a per-individual basis, the settlement sets a new high for proprietary fund 401(k) cases.  
4 On a gross basis (before accounting for attorneys' fees and settlement expenses) the per participant  
5 recovery is \$3,100. This is a record high among all proprietary fund 401(k) cases. Porter Decl. Ex.  
6 A. The average class member across all other proprietary fund 401(k) settlements has received a  
7 gross recovery of less than \$200 — and this excludes the dismissed cases in which class members  
8 received nothing. Only five other settlements achieved gross per-participant recoveries above \$500  
9 and the highest after this settlement was under \$2,300 per class member. *Velazquez v.*  
10 *Massachusetts Financial Services Co.*, 17-cv-11249, Dkt. 90 at ECF 7 and 10 (D. Mass)  
11 (Memorandum in Support of Preliminary Approval explaining that class of approximately 3,000  
12 individuals will be eligible to participate in \$6,875,000 common fund).

13 In addition, the Plan is already benefitting from a non-proprietary stable value fund for a low-  
14 risk capital preservation option. Starting next month, the Plan will benefit from a less expensive  
15 and non-proprietary target date fund alternative. These benefits are not included in the per  
16 participant recoveries above, representing an additionally successful result achieved for the Class.

#### 17 **4. Litigation Risk**

18 Risk in ERISA proprietary fund litigation is extreme. This evidenced by the trial court  
19 losses, as well as the substantial risk of intermediate dispositive rulings. Indeed, in *Kanawi*, Judge  
20 Breyer granted Bechtel's motion for summary judgment on Plaintiffs' fiduciary breach claim while  
21 finding that:

---

22  
23 <sup>4</sup> See *Rodriguez v. W. Publ. Corp.*, 563 F.3d 948, 964-65 (9th Cir. 2009) (approving a 10% recovery  
24 in an antitrust case); *In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1042 (N.D. Cal. 2008)  
25 (“just over 9% of the maximum potential recovery” was “reasonable”); *In re Biolase, Inc. Sec.*  
26 *Litig.*, No. 13-1300, 2015 WL 12720318, at \*4 (C.D. Cal. Oct. 13, 2015) (concluding 8% recovery  
27 was fair, reasonable, and adequate”); *Gudimetla v. Ambow Educ. Holding*, No. 12-5062, 2015 WL  
28 12752443, at \*5 (C.D. Cal. Mar. 16, 2015) (approving class action settlement where recovery was  
only 5.6% of estimated damages); *In re LJ Int'l Inc. Sec. Litig.*, No. 07-6076, 2009 WL 10669955,  
at \*4 (C.D. Cal. Oct. 19, 2009) (approving class action settlement where recovery was only 4.5%  
of maximum possible recovery).

1 Plaintiffs have not demonstrated that Defendants' conduct fell outside of their obligations  
2 to the Plan participants. It is easy to opine in retrospect that the Plan's managers should  
3 have made different decisions, but such 20/20 hindsight musings are not sufficient to  
maintain a cause of action alleging a breach of fiduciary duty.

4 *Kanawi*, No. 06-cv-5566, Dkt. 686 at 17. There, as here, "the Committee met regularly to discuss  
5 the Plan's investments and sought the advice of Callan Associates to ensure that it was making  
6 proper decisions." *Id.* Plaintiffs faced the risk of a similar finding at any point, including after trial.

7 In addition, Plaintiffs here faced risks associated with the severance and other agreements  
8 signed by the named plaintiffs, which Defendants alleged waived their right to pursue class  
9 litigation on behalf of the Plan. While this argument ultimately proved unsuccessful, the merits of  
10 this argument hung on cases pending before the Ninth Circuit and United State Supreme Court  
11 during the pendency of this litigation. *Munro v. Univ. of Southern Cal.*, 896 F.3d 1088 (9th Cir.  
12 2018); *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018). These alternative basis for striking  
13 down Plan-wide relief rendered this litigation particularly risky, even among its peers.

#### 14 **5. Non-Monetary Relief**

15 Plaintiffs brought this litigation alleging, among other things, that the Franklin Money Market  
16 Fund was imprudent and should have been replaced by a non-proprietary capital preservation  
17 option. After the litigation commenced, Defendants removed the Franklin Money Market Fund and  
18 replaced it with a non-proprietary stable value fund, which is providing the Plan with over \$600,000  
19 per year in additional interest compared to the Franklin Money Market Fund. (Brown decl. ¶ 3). As  
20 part of the settlement, Defendants have also agreed to add a non-proprietary suite of target date  
21 funds, which offers a potential fee-savings of over \$1 million over the course of the next three  
22 years. (Brown decl. ¶¶ 5). The capital preservation fund and target date fund changes offer a present  
23 value to the Plan of over \$3 million over the next three years, assuming half of the target date fund  
24 participants move to the non-proprietary funds. These plan benefits weigh in favor of awarding the  
25 requested fee.

#### 26 **6. Percentage Rate Relative to Market Rate**

27 In *Kanawi*, Judge Breyer recognized that a twenty-five percent fee award "is below the  
28 market rate for similar cases" and that this factor "favors an increase in the benchmark rate."

1 *Kanawai* at \*2. Since then, 5 settlements of proprietary fund 401(k) class actions have created  
2 common funds within \$10 million of the settlement at issue (\$16.75 million to \$36.75 million). In  
3 four of those cases, the Court awarded one-third fees, while in the fifth the fee award was thirty  
4 percent. *Krueger v. Ameriprise Financial, Inc.*, No. 11-cv-2781, 2015 WL 4246879, at \*5–6 (D.  
5 Minn. July 13, 2015) (one-third fee award in \$27.5 million settlement); *Nolte v. CIGNA*, 2013 WL  
6 12242015, at \*2 (C.D. Ill. Oct. 15, 2013) (one-third fee award in \$35 million settlement); *Sims v.*  
7 *BB&T Corp.*, No. 15-cv-732, 2019 WL 1993519 (M.D.N.C. May 6, 2019) (one-third fee award in  
8 \$24 million settlement); *Gordan v. Mass. Mutual Life Ins.*, No. 13-cv-30184, 2016 WL 11272044  
9 (D. Mass. Nov. 3, 2016) (awarding one-third fee in \$30.9 million settlement); *Main v. American*  
10 *Airlines, Inc.*, No. 16-cv-473, Dkt. 138 (N.D. Tex. Feb. 21, 2018) (approving 30% fee in \$22 million  
11 settlement). In addition, the Central District of California approved a one-third fee award in an  
12 ERISA fiduciary breach case outside of the proprietary fund context. *Waldbuesser v. Northrop*  
13 *Grumman Corp.*, 2017 WL 9614818 (increasing 25 percent benchmark to award one-third fee in  
14 \$16.75 million settlement of claims concerning fiduciary breach related to plan administration).  
15 Since the twenty-five percent benchmark remains below market rates for similar cases, this factor  
16 supports an increase here.

### 17 **7. Contingent Nature of Representation and Opportunity Cost**

18 Another relevant consideration is that Class Counsel agreed to undertake this action against  
19 a prominent asset manager on a purely contingent basis, and all costs of litigating the matters, and  
20 the attendant financial risks, were borne by Class Counsel for more than three years. “Courts have  
21 recognized that the public interest is served by rewarding attorneys who assume representation on  
22 a contingent basis with an enhanced fee to compensate them for the risk that they might be paid  
23 nothing for their work.” *Lee v. JP Morgan Chase & Co*, No. 13-cv-511, 2015 WL 12711659, at \*8  
24 (C.D. Cal. Apr. 28, 2015) (citing *In re Washington Public Power Supply Sys. Sec. Litig.*, 19 F.3d  
25 1291, 1299 (9th Cir. 1994); *Vizcaino*, 290 F.3d at 1050). Moreover, “Class Counsel had to turn  
26 down opportunities to work on other cases to devote the appropriate amount of time, resources, and  
27  
28

1 energy necessary to handle this relatively complex case.” *Kanawi*, 2011 WL 782244 at \*2. “This  
2 factor supports an increase in the benchmark rate.” *Id.*

### 3 8. Class Reaction

4 The Class has received their court-approved notices, but the deadline for objections has not  
5 passed. Currently, Class Counsel are not aware of any objections or other negative reaction from  
6 the Class. Porter Decl. ¶ 22.

### 7 9. Lodestar Cross-Check

8 A lodestar calculation “measures the lawyers’ investment of time in the litigation” and  
9 “provides a check on the reasonableness of the percentage award.” *Vizcaino*, 290 F.3d at 1050.  
10 Under the lodestar method, the Court “must start by determining how many hours were reasonably  
11 expended on the litigation, and then multiply those hours by the prevailing local rate for an attorney  
12 of the skill required to perform the litigation.” *Moreno v. City of Sacramento*, 534 F.3d 1106, 1111  
13 (9th Cir. 2008). In ERISA class action litigation, a national rate is appropriate because “ERISA  
14 cases involve a national standard, and attorneys practicing ERISA law in the Ninth Circuit tend to  
15 practice in different districts.” *Mogck v. Unum Life Ins. Co. of Am.*, 289 F. Supp. 2d 1181, 1191  
16 (S.D. Cal. 2003).

17 Class Counsel have spent nearly 6,000 hours litigating this case, with a lodestar of \$3,019,025.  
18 Decl. of Porter at ¶¶ 10; Decl. of Izard at ¶ 8. Thus, the lodestar multiplier of Class Counsel’s \$7.49  
19 million request will be approximately 2.48. *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043 (9th Cir.  
20 2002) (upholding approval of 28% fee where lodestar cross-check resulted in a multiplier of 3.65).  
21 Courts in other 401(k) proprietary fund cases have also approved lodestar multipliers greater than  
22 3. See *Gordan*, No. 13-30184, Dkt. 144 at 6 (3.66 multiplier was “imminently reasonable”);  
23 *Kruger*, No. 14-208, Dkt. 61 at 14–15 (M.D. N.C. Sept. 17, 2015) (3.69 multiplier was “within the  
24 range of reasonableness”). Class Counsel’s ordinary hourly rates are provided for in the attached  
25 Declarations of Mr. Porter and Mr. Izard. The lodestar multiplier will be even less by the end of  
26 this litigation in light of Class Counsel’s additional communications with Class Members, oversight  
27  
28

1 of the settlement administrator, cooperation with the Independent Fiduciary, and oversight of  
2 Franklin's compliance with the Settlement Agreement.

3 Class Counsel have been extraordinarily efficient. In *Kanawi*, class counsel spent over 21,000  
4 attorney hours. *Kanawi v. Bechtel Corp.*, No. 06-cv-5566, 2011 WL 782244 (N.D. Cal. Mar. 1,  
5 2011) (awarding 30% fee and \$1,571,102.56 in costs).<sup>5</sup> In *In re Northrop Grumman ERISA Litig.*,  
6 class counsel spent over 23,000 hours. *In re Northrop Grumman ERISA Litig.*, No. 06-cv-6213,  
7 Dkt. 803 at 5 (C.D. Cal. Oct. 24, 2017) (awarding 33% fee and \$1,159,114 in costs).

8 Class Counsel's hourly rates used to calculate the lodestar are less than the rates used by the  
9 few other firms who practice in this narrow area of law. As early as 2016, several courts across the  
10 country approved hourly rates for attorneys bringing class actions alleging fiduciary violation with  
11 respect to 401(k) plans that were far higher than the hourly rates claimed here three years later.<sup>6</sup>  
12 *Kruger*, No. 14-208, Doc. 61 at 12–13 (approving hourly rates of \$998 for attorneys with at least  
13 25 years of experience; \$850 for attorneys with 15–24 years of experience; \$612 for attorneys with  
14 5–14 years of experience \$460 for attorneys with 2–4 years of experience; and \$309 for paralegals  
15 and clerks); *Gordan*, No. 13-30184, Doc. 120 at 29–30 (Br. 24–25) (same); *Spano*, Doc. 587, at 6–  
16 7 (same). If these 2016 rates were used here instead of the rates Class Counsel assert, the lodestar  
17 multiple would drop further, from 2.48 to 1.47. More recently, Magistrate Judge Cousins approved  
18 a fee petition in this district in an ERISA 401(k) fiduciary breach class settlement which the lodestar  
19 multiplier was 4.375 and the hourly rates were \$600 to \$875 per hour for attorneys with more than  
20 10 years of experience, \$325 to \$575 per hour for attorneys with 10 years or less experience, and  
21

---

22 <sup>5</sup> Judge Breyer awarded thirty percent of the *net* settlement after deducting named plaintiff awards,  
23 the cost of settlement administration, and the costs and expenses reimbursed to class counsel. Based  
24 on the \$40,000 requested in total for named plaintiff awards, \$50,000 estimated cost of  
administration, and \$430,000 in requested expense reimbursement, the net amount here would be  
\$26,230,000 and the requested fee is 28.56% of that amount.

25 <sup>6</sup> A proper lodestar calculation uses an attorney's rates at the time of the fee award, rather than rates  
26 at the time the case was initiated. "Full compensation requires charging current rates for all work  
27 done during the litigation, or by using historical rates enhanced by an interest factor." *W.P.P.S.*, 19  
F.3d at 1305 (using historical rates "inadequately compensate[s] [a] firm for the delay in receiving  
its fees"); see also *Bouman v. Block*, 940 F. 2d 1211, 1235 (9th Cir. 1991) (affirming use of current  
28 hourly rate "to compensate for the delay in receiving payment").



1 \$250 per hour for paralegals and clerks. *Johnson v. Fujitsu Technology and Business of American,*  
 2 *Inc.*, No. 16-cv-3698, 2018 WL 2183253, \*7 (N.D. Cal. May 11, 2018).

3 **B. The Court Should Award Reimbursement of Class Counsel’s Costs.**

4 Class Counsel have incurred \$473,882.01 in expenses in litigating this case for the past three  
 5 years, and carried them for the duration of the case. Attorneys who have created a common fund  
 6 for the benefit of the class are entitled to reimbursement of reasonable litigation expenses from that  
 7 fund. *Vasquez v. Coast Valley Roofing, Inc.*, 266 F.R.D. 482 at 483 (E.D. Cal. 2010); ALBA CONTE,  
 8 1 ATTORNEY FEE AWARDS §2:19 (3d. ed.). Expenses reimbursable from a common fund include  
 9 expert fees, travel, long-distance and conference telephone, postage, delivery services, and  
 10 computerized legal research. *Id.* These expenses are identified in the attached declarations of Mr.  
 11 Porter and Mr. Izard. Itemized records are also available if the Court requests to review them.

12 Counsel brought this case without guarantee of reimbursement or recovery, and thus had a  
 13 strong incentive to limit costs. They did so. The total costs in this matter, \$473,882.01, are less than  
 14 half of the total costs approved in similar litigation in California that has gone past summary  
 15 judgment. *E.g., Kanawi*, 2011 WL 782244 at \*2 (approving over \$1.5 million in expenses); *In re*  
 16 *Northrop Grumman ERISA Litig.*, Dkt. 803 at 5 (approving over \$1.1 million in expenses). Each of  
 17 these expenses were actually incurred and were necessary to the successful prosecution of the  
 18 actions.<sup>7</sup>

19 **C. The Court Should Approve Incentive Awards to the Class Representatives.**

20 “Incentive awards that are intended to compensate class representatives for work undertaken  
 21 on behalf of a class ‘are fairly typical in class action cases.’” *In re Online DVD*, 779 F.3d at 943  
 22 (quoting *Rodriguez v. West Publishing Corp.*, 563 F.3d 948, 958 (9th Cir. 2009)). Incentive awards  
 23 are generally approved so long as the awards are reasonable and do not undermine the adequacy of  
 24 the class representatives. *See Radcliffe v. Experian Info. Solutions*, 715 F.3d 1157, 1164 (9th Cir.  
 25 2013) (finding incentive award must not “corrupt the settlement by undermining the adequacy of  
 26

27 \_\_\_\_\_  
 28 <sup>7</sup> The request includes \$5,000 in anticipated travel expenses to the fairness hearing.

1 the class representatives and class counsel”). Such awards recognize class representatives’  
2 “willingness to act as a private attorney general.” *Rodriguez*, 563 F.3d at 959.

3 Here, Mr. Cryer and Ms. Fernandez have represented the Class through years of litigation and  
4 have taken the risks associated with having their names associated with this high-profile class case.  
5 The Plaintiffs braved arguments that they were in breach of their severance agreement with Franklin  
6 by virtue of their role in the case. They came forward to initiate their respective actions and  
7 remained in contact with Class Counsel throughout the litigation. They responded to document  
8 requests and interrogatories, reviewed and approved pleadings, assisted with discovery, and Mr.  
9 Cryer sat for deposition. Porter Decl. ¶ 20. After Mr. Cryer was denied leave to amend, Ms.  
10 Fernandez was integral to asserting prohibited transaction claims, which ultimately benefit the  
11 entire Class. Moreover, the amounts that Plaintiffs intend to request — \$25,000 for Plaintiff Cryer,  
12 and \$15,000 for Plaintiff Fernandez — are consistent with awards in other cases. *See, e.g., Kruger*  
13 *v. Novant Health, Inc.*, No. 1:14CV208, 2016 WL 6769066, at \*6 (M.D.N.C. Sept. 29, 2016)  
14 (awarding class representatives \$25,000 each for their contributions); *In re Northrop Grumman*  
15 *ERISA Litig.*, No. 06-cv-6213, Dkt. 803 at 16 (C.D. Cal. Oct. 24, 2017) (awarding class  
16 representatives \$25,000 each from \$16.75 million settlement concerning allegedly improper 401(k)  
17 fees and investments).

18 The total amount requested, \$40,000, represents only 0.15% of the monetary settlement. The  
19 Ninth Circuit recently approved similar incentive awards. *Online DVD-Rental*, 779 F.3d at 948  
20 (approving incentive awards that were “a mere .17% of the total settlement.”).

### 21 **III. CONCLUSION**

22 For the foregoing reasons, Plaintiffs request that the Court approve a fee award of \$7,490,000  
23 and a cost award of \$473,882.01 to Class Counsel, and incentive awards of \$25,000 to Class  
24 Representative Cryer and \$15,000 to Class Representative Fernandez.

25  
26 Dated: July 30, 2019

Respectfully submitted,

27 /s/ Mark G. Boyko

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

Mark G. Boyko, *pro hac vice*  
Gregory Y. Porter, *pro hac vice*  
Bailey & Glasser LLP  
1055 Thomas Jefferson Street, NW Suite 540  
Washington, DC 20007  
Telephone: (202) 463-2101  
Facsimile: (202) 463-2103  
gporter@baileyglasser.com  
mboyko@baileyglasser.com

Mark P. Kindall, Cal. Bar No. 138703  
Robert A. Izard, *pro hac vice*  
IZARD KINDALL & RAABE LLP  
29 South Main Street, Suite 305  
West Hartford, CT 06107  
Telephone: (860) 493-6292  
Facsimile: (860) 493-6290  
rizard@ikrlaw.com  
mkindall@ikrlaw.com

Joseph A. Creitz, Cal. Bar No. 169552  
Lisa S. Serebin, Cal Bar No. 146312  
CREITZ & SEREBIN LLP  
100 Pine Street, Suite 1250  
San Francisco, CA 94111  
Telephone: (415) 466-3090  
Facsimile: (415) 513-4475  
joe@creitzserebin.com  
lisa@creitzserebin.com

*Attorneys for Plaintiffs*

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on this 30<sup>th</sup> day of July 2019, a true and correct copy of the foregoing was filed with the Court using the CM/ECF system and service upon all participants in this case who are CM/ECF users will be accomplished by operation of that system.

/s/ Mark G. Boyko \_\_\_\_\_