COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPERIOR COURT DEPT
OF THE TRIAL COURT

ANNE S. CUTLER,

Plaintiff,

v.

KENNETT F. BURNES, PATRICK DE SAINT-AIGNAN, LYNN A. DUGLE, AMELIA FAWCETT, WILLIAM C. FREDA, LINDA A. HILL, JOSEPH L. HOOLEY, RICHARD P. SERGEL, GREGORY L. SUMME,

Defendants,

- and -

STATE STREET CORPORATION,

Nominal Defendant.

E-FILED 6/28/21 (LAW)

C.A. No. SUCV2017-2359-BLS1

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF DERIVATIVE SETTLEMENT

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Pursuant to Rule 23.1 of the Massachusetts Rules of Civil Procedure, Corey Cutler and David Shaev ("Plaintiffs") respectfully submit this memorandum in support of their unopposed motion for preliminary approval of the Settlement[1] of the above-captioned shareholder derivative action (the "Action") brought on behalf of nominal defendant State Street Corporation ("State Street" or the "Company") on the terms set forth in the Stipulation filed concurrently with this memorandum.

I. INTRODUCTION

This Action was filed in the wake of numerous high-profile overbilling problems which led to significant regulatory and civil settlements at State Street concerning (i) out-of-pocket expense invoicing errors; (ii) a pay-to-play settlement; (iii) a foreign exchange overbilling matter; and (iv) a securities overbilling issue. The disclosure of these issues harmed the Company's reputation and caused the Company to pay over $1 billion to resolve the matters. Plaintiffs initiated this Action to require the State Street Board of Directors (the "Board") to address the root causes of the issues underlying the settlements by strengthening the Company's internal controls and overhauling the Company's corporate culture.

As a result of the filing, prosecution, and proposed Settlement of the Action, State Street and its current shareholders will receive extraordinary benefits. As part of the Settlement, Plaintiffs and Defendants agreed to a comprehensive collection of corporate governance and internal control reforms (the "Reforms"), which present a coordinated effort at improving State Street's corporate

[1] Capitalized terms are defined in the Stipulation and Agreement of Settlement ("Stipulation" or "Stip.") attached as Exhibit 1 to the Declaration of Gustavo F. Bruckner in Support of Plaintiffs' Unopposed Motion for Preliminary Approval of Derivative Settlement ("Bruckner Decl."). Citations are omitted and emphasis added. Without adopting or agreeing with the characterizations or arguments made by Plaintiffs herein, Defendants join in Plaintiffs' request that the Court grant preliminary approval of the Settlement.

governance and preventing future issues similar to those that led to the significant regulatory and associated civil settlements at the Company. After the material terms of the Settlement were agreed upon, the parties separately negotiated in good faith a reasonable award of attorneys' fees and expenses which Defendants have agreed to pay to Plaintiffs' Counsel, subject to Court approval (the "Fee and Expense Amount").[2]

At the preliminary approval stage, the Court need only determine that the proposed Settlement is within the range of what might be found to be fair, reasonable, and adequate, such that notice of the Settlement should be provided to current State Street shareholders and a hearing scheduled for consideration of final settlement approval. The proposed Settlement meets this standard. In addition, the proposed schedule and notice are suited to apprise shareholders of the Settlement's terms and afford them a fair opportunity to submit objections, if any. Accordingly, Plaintiffs respectfully request that the Court: (i) preliminarily approve the Settlement set forth in the Stipulation; (ii) approve the form of the Notice of Proposed Settlement ("Notice") and Summary Notice, and direct that they be published and posted in the time and manner described in the Stipulation; and (iii) schedule a hearing to consider final approval of the Settlement.

II. SUMMARY OF ALLEGATIONS AND PROCEDURAL HISTORY

The allegations are detailed in Plaintiffs' Complaint and Demand Letters. By way of background, on December 17, 2015, State Street filed a Current Report on Form 8-K with the Securities & Exchange Commission ("SEC") disclosing that the Company "believes that it has incorrectly invoiced certain expenses to asset servicing clients, primarily in the United States," and that the overbilling occurred during "the 18-year period for which it has accessible records." The

[2] The Stipulation further provides that Plaintiffs' Counsel may apply to the Court for reasonable service awards for each Plaintiff, to be paid upon Court approval.

Company estimated that "approximately $200 million or more of expenses may have been incorrectly invoiced." The expenses included Society for Worldwide Interbank Financial Telecommunication ("SWIFT") messages. On January 14, 2016, State Street announced a settlement with the SEC to resolve pay-to-play allegations wherein State Street agreed to pay $12 million.

On February 17, 2016, State Street shareholder Anne S. Cutler ("Ms. Cutler") sent a letter to State Street's Board demanding that it undertake an independent internal investigation concerning (i) State Street's out-of-pocket expense overbilling over an 18-year period; and (ii) the pay-to-play allegations which resulted in a $12 million settlement with the SEC (the "Cutler Demand"). Bruckner Decl. Ex. 2. Importantly, Ms. Cutler also demanded that the Board take action to improve its corporate governance and internal procedures and commence a civil action against its officers and directors. Stip., Sec. II, (A)(2). After receiving the Cutler Demand, State Street's Board appointed a committee comprised of outside directors to investigate and make a recommendation to the Board (the "Special Committee"). *Id.*

In April 2016, two former State Street executives were charged with defrauding clients of the Company by allegedly applying undisclosed commissions to billions of dollars in securities trades. On April 14, 2016, Ms. Cutler sent a supplemental demand letter to the Board demanding the Board also investigate the indictments and allegations related to undisclosed commissions (the "Supplemental Demand Letter"). Bruckner Decl. Ex. 3. The Special Committee determined it appropriate under its existing authority to investigate the issues raised by Ms. Cutler's Supplemental Demand Letter. Stip., Sec. II, (A)(2). The Board ratified the Special Committee's determination by a resolution adopted in July 2016. *Id.*

On July 26, 2016, State Street announced that it would pay a total of $530 million to resolve claims brought by regulators and private plaintiffs, alleging that it overcharged customers for foreign exchange transactions.[3] On August 16, 2016, Ms. Cutler sent another letter to the Board, this time drawing the Board's attention to State Street's $530 million settlement payment. Bruckner Decl. Ex. 4.

On July 27, 2017, Ms. Cutler, represented by the undersigned counsel, filed a derivative complaint (the "Complaint") against Kennett F. Burnes, Patrick de Saint-Aignan, Lynn A. Dugle, Amelia Fawcett, William C. Freda, Linda A. Hill, Joseph L. Hooley, Richard P. Sergel and Gregory Summe on behalf of nominal defendant State Street. Dkt. 1. The Complaint alleged that "State Street ha[d] failed to take any meaningful action towards clawing back compensation, otherwise punish any officer, director, or employee, or recover any damages" with regards to the issues noted in her demand letters and concluded that State Street had "constructively rejected Plaintiff's Demand." On November 16, 2017, the Court stayed the Action to allow the Special Committee to complete its investigation regarding the issues raised in Ms. Cutler's Complaint.

On January 11, 2019, State Street shareholder David Shaev—also represented by the undersigned counsel—sent a similar demand letter to the Company as Ms. Cutler (Bruckner Decl. Ex. 5) (the "Shaev Demand")[4] and shortly thereafter filed a motion to intervene as an additional plaintiff in this Action. Dkt. 11. In the Shaev Demand, Mr. Shaev demanded that State Street take suitable action in connection with (i) the Company's "overbilling of its clients by approximately

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[3] In total, State Street has paid over $1 billion in fines, criminal penalties, disgorgement, settlements, and reimbursements.

[4] On February 2, 2017, another State Street shareholder, Steve Silverman, represented by different counsel, made a similar demand, with allegations and demands that fell within the scope of the original Cutler demands (the "Silverman Demand" and together with the Cutler Demand, Supplemental Demand, and Silverman Demand, the "Demand Letters").

$200 million over an 18-year period;" (ii) "the payment of $12 million to settle charges by the [SEC] alleging that the Company devised a pay-to-play scheme with respect to Ohio pension funds;" (iii) "the criminal charges against State Street executives which resulted in prison sentences and a settlement of $30 million with the U.K. regulators;" and (iv) "the $530 million settlement with regulators and public pension funds to resolve foreign exchange fraud claims."

On March 20, 2019, following the passing of Ms. Cutler, her son and personal representative of the estate, Corey Cutler ("Mr. Cutler") moved to substitute himself as plaintiff in place of Ms. Cutler. Dkt. 12. On March 25, 2019, the Court granted Mr. Cutler's motion to substitute and Mr. Shaev's motion to intervene.

III. SETTLEMENT NEGOTIATIONS

Beginning in August 2020, Plaintiffs' Counsel and counsel for Defendants engaged in good faith negotiations regarding a potential resolution of the Action in the best interests of the Company and its shareholders. Stip., Sec. II, B. Between August 2020 and November 2020, Counsel for Defendants made presentations to Plaintiffs' Counsel regarding the scope and nature of the Special Committee's investigation into the matters addressed by the Demand Letters and Complaint. *Id.* Counsel for the parties met and conferred on multiple occasions to discuss the investigations and clarify the process taken by the Special Committee to ensure that the issues raised by Plaintiffs were sufficiently evaluated. *Id.*

On August 3, 2020, State Street and the Plaintiffs executed an "Agreement for the Production and Exchange of Confidential Information" pursuant to which Defendants produced non-public documents concerning the Special Committee's investigation, remediation of the expense invoicing errors, and other improvements to controls and corporate governance at State

Street. *Id.* Ultimately, Defendants produced more than 20,000 pages of documents as well as a detailed affidavit attesting to the work performed by the Special Committee. *Id.*

In November 2020, Plaintiffs' Counsel sent a confidential settlement demand to Defendants, outlining a proposed framework for settlement of the Action including, *inter alia*, comprehensive corporate governance reforms tailored to directly address the alleged wrongdoing in the Demand Letters and Complaint. Stip., Sec. II, B. In January 2021, Defendants sent a counterproposal. *Id.* In the months that followed, Counsel continued to engage in confidential settlement negotiations regarding the substantive terms of the Settlement. *Id.*

On or about April 23, 2021, Plaintiffs and Defendants executed a Confidential Memorandum of Understanding (the "MOU") that included the material substantive terms of the Settlement, including the Reforms. *Id.* As provided in the Stipulation, State Street has acknowledged that the Demand Letters and the filing, prosecution, and/or resolution of the Action are material causes of State Street's decision to implement the Reforms. *Id.* State Street has further agreed and affirmed that the Reforms have conferred and will confer a substantial benefit upon the Company and current State Street shareholders. *Id.*

IV. PLAINTIFFS' DECISION TO SETTLE

Plaintiffs' Counsel conducted an investigation relating to the claims and the underlying events alleged in the Action, including, but not limited to: (i) reviewing and evaluating confidential discovery culled from more than 20,000 pages of documents produced by State Street; (ii) reviewing and analyzing the Company's public filings with the SEC, press releases, announcements, and news articles; (iii) reviewing and analyzing the allegations contained in filings made in other litigation; (iv) researching and drafting the Complaint; (v) researching and drafting the Demand Letters; (vi) researching the applicable law with respect to the claims in the Action and

Demand Letters and the potential defenses thereto; (vii) researching corporate governance issues; (viii) preparing extensive settlement demands that included corporate governance reform proposals; and (ix) engaging in extensive settlement discussions with Defendants' Counsel.

Plaintiffs' Counsel believe that the claims asserted in the Action have merit and that their investigation supports the claims asserted. But Plaintiffs and Plaintiffs' Counsel also recognize the significant risk, expense, uncertainty, and length of continued proceedings necessary to prosecute the Action. Considering the substantial benefits the Reforms (and Settlement generally) confers upon State Street and current State Street shareholders, Plaintiffs and Plaintiffs' Counsel have agreed to settle the Action in the manner, and upon the terms and conditions, set forth in the Stipulation. Plaintiffs and Plaintiffs' Counsel believe the Settlement is in the best interests of State Street and current State Street shareholders. Stip., Sec. III.

TERMS OF THE SETTLEMENT

The Demand Letters and the filing, prosecution, and/or resolution of the Action are material causes of State Street's decision to implement the Reforms, which will be maintained for not less than two to three years (as noted below), and which are designed to improve the Company's internal controls and prevent future issues similar to those that led to the significant regulatory and civil settlements at the Company. Stip., ¶¶ 2.1-2.4. The Reforms include:

Revision to Corporate Governance Guidelines

State Street's Board has adopted Corporate Governance Guidelines (the "Guidelines") which establish a framework to assist in the Board's exercise of its duties and responsibilities. The Guidelines list the specific functions to be carried out by the Board, including through its committees. As part of the Reforms, State Street will modify the list of the Board's functions set forth in the Guidelines as follows, and which shall not be modified for a period of two years:

- "The Board, including through its committees, also attends to specific functions, including
  - …
  - **overseeing management's assessment of the adequacy and effectiveness of internal controls**;
  - …"

(emphasis added). Stip., ¶ 2.2.

Culture Training Program Overseen by Business Conduct Committee

The Business Conduct Committee ("BCC") is a State Street management committee that has been delegated responsibility by the Chief Executive Officer and the Chief Risk Officer for oversight of the management of Business Conduct, Culture and Compliance Risks at State Street. The BCC is chaired by the General Counsel and the Chief Compliance Officer. Stip., ¶ 2.3.

Among other things, the BCC oversees the development of programs that help to manage Business Conduct Risk, including training programs that seek to address those risks. At State Street, Business Conduct Risk means the risk to State Street created by behavior, acts or deliberate omissions by State Street or its employees that may reasonably be expected to result in State Street failing to treat customers fairly or failing to abide by the standards State Street sets for its business and employees. *Id.*

- For two years, the BCC's annual plan will include oversight by the BCC or one of its subcommittees of the development, implementation, and assessment of a Culture Training Program for newly hired employees (the "Program"). The objective of the Program will be to prevent recurrence of the type of employee conduct that permitted the administrative expense overcharges to occur. The Program will be designed to create awareness of State Street's core values and how they are integrated into its expectations for ethical business conduct by its employees; its strong compliance culture and standards for ethical business

conduct; and the risks of unethical business conduct to individual employees and to State Street as an institution.

Billing Risk Committee

The Company shall continue to maintain for three years a Billing Risk Committee ("BRC") staffed with appropriate senior and other management employees having oversight responsibility, among other things, for adoption and maintenance of appropriate policies and procedures providing for an effective control environment for client invoicing. Stip., ¶ 2.1. The BRC during this period must approve any changes in the policies and procedures marked in color green, as provided in Stip. Ex. C, after review of the existing policies based on the conclusion that the change does not render the control environment ineffective and that the change promotes efficiency, effectiveness, or is necessary in light of changed circumstances (including legal or regulatory change). Stip., ¶ 2.2.

Enhanced Policies and Procedures

The Board will commit to maintain for three years certain separate policies and procedures (38 in total), which will considerably strengthen State Street's internal controls, compliance with state and federal laws; promote appropriate business conduct and ethical behavior; and force cultural changes that will persist into the future. The policies and procedures, as defined in Stip. Ex. C, will specifically enhance the following:

- Billing
- RFP Responses, Contracts, and Fee Schedules
- Anti-Fraud
- Marketing and Communications
- Business Conduct, Risk Excellence, and Ethics
- Regulatory, Compliance, and Audit
- Business Risks and Controls

ANALYSIS

V. PRELIMINARY APPROVAL OF THE PROPOSED SETTLEMENT SHOULD BE GRANTED

A. Legal Standard for Preliminary Approval

Settlement and dismissal of a shareholder derivative action requires court approval. *See* Mass. R. Civ. P. 23.1. "The action shall not be dismissed or compromised without the approval of the court . . . ."; *see also Chin v. Chinese Merchants Ass'n of Massachusetts*, 1999 WL 1318958, at *2 (Mass. Super. Mar. 10, 1999) ("Under Mass. R. Civ. P. 23.1, court approval is a prerequisite to the dismissal or compromise of a derivative action."). However, "[n]o appellate court in Massachusetts appears to have established the standard for court approval under Rule 23.1." *Id.*

Federal cases interpreting the analogous federal rule 23.1, and state cases interpreting Rule 23 governing class actions, require that the proponents of a settlement "establish that it is fair and reasonable and in the best interests of those whom it will affect." *See id.* (citing *Greenspun v. Bogan*, 492 F.2d 375, 378 (1st Cir.1974); *Sniffin v. Prudential Ins. Co. of America*, 395 Mass. 415, 421, 426, 480 N.E.2d 294 (1985); James W. Smith & Hiller B. Zobel, Rules Practice § 23.1.9, at 137 (1975). These cases require that the court "exercise judgment sufficiently independent and objective to safeguard the interests of shareholders not directly involved in the action." *Bogan,* 492 F.2d at 378-79.

As a matter of public policy, settlement is a strongly favored method of resolving disputes. Courts here and in all jurisdictions favor the voluntary settlement of contested claims, especially in complex civil cases:

> Last, we should point to the overriding public interest in favor of the voluntary settlement of disputes, particularly where class actions are involved. In these days of crowded court calendars, complex disputes, and tardy results, there can be no doubt but that the voluntary resolution of litigation through settlement, constitutes the best quality of justice, and the highest service, that counsel can perform in the interest of his client and the administration of the judicial system.

Lazar v. Pierce, 757 F.2d 435, 440 (1st Cir. 1985) (Torruella, J., concurring) (footnote omitted), *reh'g and reh'g en banc denied* May 13, 1985. *See also U.S. v. Davis*, 261 F.3d 1, 27 (1st Cir. 2001) (There is a "strong public policy in favor of settlements, particularly in very complex [cases]"); *In re India Globalization Cap., Inc., Deriv. Litig.*, 2020 WL 2097641, at *4 (D. Md. May 1, 2020) ("[S]hareholder derivative litigation is notoriously difficult and unpredictable [and therefore] [shareholder derivative] settlements are favored.") (alterations in original, citation omitted).

"[A]pproval of a derivative action appears to be a two-step process, similar to that employed for approving class action settlements, in which the Court first determines whether a proposed settlement deserves preliminary approval and then, after notice of the settlement is provided to class members, determines whether final approval is warranted." *In re MRV Commc'ns, Inc. Derivative Litig.*, 2013 WL 2897874, at *2 (C.D. Cal. June 6, 2013).

The test for preliminary approval only asks whether the parties have made a "basic showing that the [proposed settlement] 'is sufficiently within the range of reasonableness so that notice … should be given.'" *In re Am. Cap. S'holder Derivative Litig.*, , 2013 WL 3322294, at *3 (D. Md. June 28, 2013) (quoting *In re Lupron Mktg. and Sales Pracs. Litig.*, 345 F. Supp.2d 135, 139 (D. Mass. 2004)); *see also India Globalization*, 2020 WL 2097641, at *2 (same). "To determine whether the Settlement is 'within the range of possible approval,' the Court must evaluate whether the Settlement is 'fair, reasonable, and adequate' and ensure that the agreement is 'not the product of fraud or overreaching by, or collusion between, the negotiating parties.'" *In re NVIDIA Corp. Derivative Litig.*, 2008 WL 5382544, at *2 (N.D. Cal. Dec. 22, 2008) (quoting *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 625 (9th Cir. 1982)). *Compact Disc Minimum Advertised Price Antitrust Litig*, 216 F.R.D. 197, 211 (D. Me. 2003) *judgment entered*, 2003 WL 21685581

(D. Me. July 18, 2003) ("As supervising judge, I am not to prejudge the merits of the case. . . and I am not to second-guess the settlement; I am only to determine if the parties' conclusion is reasonable"); *In re Lupron Mktg. & Sales Pracs. Litig.*, 228 F.R.D. 75, 97 (D. Mass. 2005) (the court should not "hypothesize about larger amounts that might have been recovered") (quoting *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 806 (3d Cir.1995)).

B. The Settlement Satisfies Applicable Standards for Preliminary Approval

The Settlement should be preliminarily approved because it provides substantial benefits to State Street and current State Street shareholders, was negotiated at arm's-length by the parties with an informed and substantial investigation, and appropriately balances the risks of litigation against the benefits of settlement. Accordingly, the Settlement falls within the range of possible approval.

1. The Settlement Confers Substantial Benefits

In negotiating the Settlement, the Settling Parties negotiated certain Reforms which provide not only the Company, but current State Street shareholders, with substantial benefits. As the United States Supreme Court has determined, corporate governance changes provide ample support for settlement approval. The benefit conferred need not be pecuniary in nature in order to be deemed substantial. *See Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375, 396 (1970); *see also Bell Atlantic Corp. v. Bolger*, 2 F.3d 1304, 1311 (3rd Cir. 1993) (approving derivative settlement mandating structural changes in corporate governance and stating "nonpecuniary benefits to the corporation may support a settlement."); *Granada Invest., Inc. v. DWG Corp.*, 962 F.2d. 1203, 1207 (6th Cir. 1992) (settlement of derivative action approved where defendants agreed to changes in corporate governance); *Maher v. Zapata Corp.*, 714 F.2d 436, 466 (5th Cir. 1983) ("Parties to

the settlement of a shareholders' derivative action are, however, permitted great freedom in shaping the form of the settlement consideration . . . a settlement may fairly, reasonably, and adequately serve the best interest of a corporation, on whose behalf the derivative action is brought, even though no direct monetary benefits are paid by the defendants to the corporation.").

The Reforms – a significant and comprehensive collection of corporate governance and internal control improvements – are designed to mitigate the risk of issues, such as those alleged within the Complaint and Demand Letters and which resulted in over $1 billion in fines, criminal penalties, disgorgement, settlements, and reimbursements. Tailored to bring value to the Company, the Reforms far outweigh the speculative potential of any monetary recovery. *See In re Intel Corp. Derivative Litig.*, 2010 WL 2955178, at *2 (D. Del. July 22, 2010) ("the Court finds that the corporate governance reforms initiated by Intel as a result of the parties' negotiations and this Settlement have value to both the Company and its shareholders both currently and in the long-term, and that these benefits outweigh the speculative potential of any monetary payment from the relevant insurance policies").

Overall, the Settlement is an exceptional resolution for State Street in place of litigation of substantial complexity and cost, and it positions State Street to reap the long-term benefits of strong corporate governance. Thus, the Settlement is within the range of possible approval and should be preliminarily approved.

2. The Settlement is the Product of Arms'-Length Negotiations Between Experienced Adversaries

A settlement enjoys a presumption of fairness if it "is recommended by . . . counsel after arm's-length bargaining." *Villanueva v. Morpho Detection, Inc.*, 2015 WL 4760464, at *6 (N.D. Cal. Aug. 12, 2015) Here, the Settlement was agreed to after extensive arm's-length negotiations between counsel for the Settling Parties. Stip., Sec. II, B. The negotiations included settlement

demands, exchanging counterproposals, and multiple follow up negotiations. This factor therefore weighs in favor of preliminary approval of the proposed Settlement. *Id. See, e.g.*, *Mehling v. N.Y. Life Ins. Co*., 246 F.R.D. 467, 473 (E.D. Pa. 2007) (settlement preliminarily approved where the parties engaged in "hard-fought and lengthy negotiation[s]"); *In re NVIDIA.*, 2008 WL 5382544, at *3 (derivative settlement preliminarily approved where the settlement "appears to be the result of good faith arm's-length bargaining."); *In re Hewlett-Packard Co. S'holder Derivative Litig.*, 2015 WL 1153864, at *5 (N.D. Cal. Mar. 13, 2015) (derivative settlement preliminarily approved where the settlement "involved extensive negotiations conducted on behalf of all parties by experienced and informed counsel").

In addition, courts traditionally give substantial deference to directors' exercise of independent business judgment. *See generally Zapata Corp. v. Maldonado*, 430 A.2d 779, 782 (Del. 1981); *see also Brooks v. Am. Exp. Indus., Inc*., 1977 U.S. Dist. LEXIS 17313, at *10 (S.D.N.Y. Feb. 17, 1977) ("The Court is of the view that in this case, the decision of the [] board to approve this settlement is appropriately afforded certain deference; it is a business judgment with presumptive validity."); *H-M Wexford LLC v. Encorp, Inc*., 832 A.2d 129, 150 (Del. Ch. 2003) (because plaintiff failed to show a majority of the board was interested in the settlement agreement, "the Board's decision on the matter is protected by the business judgment rule"). Here, State Street has approved the Settlement and acknowledged and agreed that the Settlement confers substantial benefits upon State Street and its shareholders. Stip., Sec. IV. The fact that the Settlement is the product of arm's-length negotiations by experienced counsel, supports final approval.

Moreover, as provided in the Stipulation, the parties did not begin negotiating the Fee and Expense Amount until after all the substantive terms of the Settlement were agreed upon. Stip., ¶

4.1. This factor further demonstrates the fairness of the arm's-length Settlement because "the amount of attorneys' fees could not have affected the amount of Plaintiffs' recovery." *In re Chickie's & Pete's Wage & Hour Litig.*, 2014 WL 911718, at *4 (E.D. Pa. Mar. 7, 2014).

3. Settlement Appropriately Balances the Significant Risks of Continued Litigation with the Benefits Conferred Upon State Street and Current State Street Shareholders

The uncertainties of further litigating the Action demonstrate that the proposed Settlement is within the range of approval, and that the Motion for Preliminary Approval should be granted. Although Plaintiffs believe and continue to believe that the derivative claims were meritorious, there exist significant risks in continuing to prosecute the Action, including that Plaintiffs would not be able to recover *anything* for the benefit of State Street. *See In re Pac. Enters. Sec. Litig.*, 47 F.3d 373, 378 (9th Cir. 1995) (affirming approval of derivative settlement and noting that "the odds of winning [a] derivative lawsuit [are] extremely small" because "derivative lawsuits are rarely successful"); *Maher*, 714 F.2d at 455 ("Settlements of shareholder derivative actions are particularly favored because such litigation is 'notoriously difficult and unpredictable'"). Plaintiffs' Counsel are also mindful of the inherent problems of establishing demand futility, and the possible defenses to the claims alleged in the Action.

For example, there is some risk that a motion to dismiss filed by Defendants would be granted. Even if Defendants filed a motion to dismiss and it were denied, Plaintiffs still face considerable hurdles to establish liability and damages. Continued litigation would be complex, costly, and lengthy. Document discovery would need to be completed, depositions would need to be taken, experts would need to be hired, designated, and expert discovery conducted. Defendants' expected motion to dismiss and subsequent motion for summary judgment would have to be briefed and argued, and, if they did not prevail, then a trial would have to be held. Even if liability

were established, the amount of recoverable damages would still have posed significant issues and would have been subject to further litigation. *See Bussie v. Allmerica Fin. Corp*., 50 F. Supp. 2d 59, 76 (D. Mass. May 19, 1999) *enforcement granted*, 2006 WL 8201933 (D. Mass. Sept. 19, 2006) (approving settlement where plaintiffs faced several significant, viable legal defenses "any one of which, if successful, could result in entry of a judgment *with prejudice* against the Class.") (emphasis in original); *Duhaime v. John Hancock Mut. Life Ins. Co*, 177 F.R.D. 54, 68 (D. Mass. December 31, 1997) (same).

In addition to the risks of establishing liability and damages, the Court should balance the immediacy and certainty of a substantial recovery against the "the complexity, expense, and likely duration of the litigation." *Levell v. Monsanto Rsch. Corp.*, 191 F.R.D. 543, 550 (S.D. Oh. 2020); *Williams v. Vukovich*, 720 F.2d 909, 922-24 (6th Cir. 1983).

Furthermore, even a victory at trial is no guarantee that a judgment would ultimately be sustained on appeal or by the trial court. For example, in *In re Apollo Grp., Inc. Sec. Litig.*, 2008 WL 3072731 (D. Ariz. Aug. 4, 2008) *rev'd and remanded,* 2010 WL 5927988 (9th Cir. June 23, 2010), the court, on a motion for judgment as matter of law, overturned a jury verdict of $277 million in favor of stockholders based on insufficient evidence presented at trial to establish loss causation. Add to these post-trial and appellate risks, the difficulty and unpredictability of a lengthy and complex trial – where witnesses could suddenly become unavailable or the factfinder could react to the evidence in unforeseen ways – and the benefits of the Settlement become all the more apparent. The proposed Settlement eliminates these and other risks of continued litigation, including the very real risk of no recovery after several more years of litigation, while providing State Street with substantial benefits immediately. *See, e.g.*, *Maher*, 714 F.2d at 466 (derivative settlement approved where "the parties' conclusion that any possible benefit to Zapata from

pursuing the causes of action would be more than offset by the additional cost of litigation was based on an intelligent and prudent evaluation of their case").

Thus, Plaintiffs entered into the settlement discussions "fully apprised about the legal and factual issues presented as well as the strengths and weaknesses of their cases" and are able to make "a well-informed decision to enter into the proposed Settlement agreement." *In re Broadwing, Inc. ERISA Litig.*, 252 F.R.D. 369, 374-75 (S.D. Oh. 2006). In these circumstances, the opinion of counsel is entitled to deference. *Williams*, 720 F.2d at 922-23; *Johnson v. City of Tulsa*, 2003 WL 24015151 (N.D. Okla. May 12, 2003), *aff'd sub nom*. Johnson v. Lodge #93 of Fraternal Ord. of Police, 393 F.3d 1096 (10th Cir. 2004); *Kogan v. AIMCO Fox Chase, L.P*., 193 F.R.D. 496, 501 (E.D. Mich. 2000); *Bowling v. Pfizer, Inc*., 143 F.R.D. 141, 151 n.7 (S.D. Ohio 1992).

4. The Fee and Expense Amount is Fair and Reasonable

In addition to the terms of the Settlement being fair, adequate, and reasonable, the negotiated and unopposed Fee and Expense Amount to be paid to Plaintiffs' Counsel is reasonable. As provided in the Stipulation, State Street and the Board acknowledge and affirm that the Reforms have conferred and will confer a substantial benefit upon the Company and current State Street shareholders. Stip., Sec. II.

In recognition of the substantial benefits provided to State Street and current State Street shareholders due to those Reforms (and the Settlement generally), State Street has agreed, subject to Court approval, to pay Plaintiffs' Counsel the negotiated Fee and Expense Amount, including a service award to each of the Plaintiffs. Stip., ¶ 4.1. The United States Supreme Court has endorsed this type of consensual resolution of attorneys' fees as the ideal towards which litigants should strive. *See Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983) ("A request for attorney's fees should

not result in a second major litigation. Ideally, of course, litigants will settle the amount of a fee."); *see also Ingram v. Coca-Cola Co.*, 200 F.R.D. 685, 695 (N.D. Ga. 2001) (where, as here, there is no evidence of collusion and no detriment to the parties, the court should give "substantial weight to a negotiated fee amount").

The proposed Fee and Expense Amount is reasonable because corporations (and shareholders) receive substantial benefits from changes in corporate governance or policies that result from shareholder litigation. *See In re Rambus Inc. Derivative Litig.*, 2009 WL 166689, at *3 (N.D. Cal. Jan. 20, 2009) ("Attorneys who prosecute a shareholder derivative action that confers 'substantial benefit' on the corporation are entitled to an award of attorneys' fees . . . [C]ourts consistently have approved attorneys' fees and expenses in shareholder actions where the plaintiffs' efforts resulted in significant corporate governance reforms but no monetary relief."). In addition, the Notice will advise current State Street shareholders about the Fee and Expense Amount and give them the opportunity to express their opinions as to its fairness. Stip. Exs. B-1, B-2.

VI. THE PROPOSED NOTICE IS APPROPRIATE UNDER RULE 23.1

Rule 23.1 requires that current State Street shareholders receive notice of the pending settlement. *See* Mass. R. Civ. P. 23.1. The notice should fairly describe, accurately and neutrally, the claims and the parties in the litigation and the proposed settlement. *See. Bogan*, 492 F.3d at 382. The content of a settlement notice "need only be reasonably calculated, under all of the circumstances, to apprise interested parties of the pendency of the settlement proposed and to afford them an opportunity to present their objections." *In re Prudential Ins. Co. of Am. Sales Pracs. Litig.*, 962 F. Supp. 450, 527-28 (D.N.J. 1997) 62 F. Supp. 450 (D.N.J. 1997), *aff'd sub nom. In re Prudential Ins. Co. Am. Sales Pracs. Litig. Agent Actions*, 148 F.3d 283 (3d Cir. 1998),

and enforcement granted sub nom. *In re Prudential Ins. Co. of Am*., 1999 WL 496491 (D.N.J. May 6, 1999), *and enforcement granted*, 2006 WL 1479024 (D.N.J. May 26, 2006), *aff'd*, 232 F. App'x 161 (3d Cir. 2007), *and enforcement granted*, 2007 WL 2885814 (D.N.J. Sept. 27, 2007) (citing *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950)).

Here, the Notice will be widely disseminated, and it contains all relevant information regarding the Settlement. Stip. Exs. B-1, B-2. The Settling Parties believe the content of the Notice and the manner of the notice constitute adequate and reasonable notice to current State Street shareholders pursuant to applicable law and due process. By way of reference, other courts have approved similar forms of notice and notice distribution plans in connection with settlements of other derivative actions, thus confirming that the Settling Parties' proposed notice plan is appropriate. *See, e.g.*, *Arace v. Thompson*, 2011 WL 3627716, at *4 (S.D.N.Y. Aug. 17, 2011) (approving notice of proposed derivative settlement by publication in *Investor's Business Daily* and on company's website). The form and manner of notice proposed here fulfill the requirements of Rule 23.1.

VII. PROPOSED TIMEFRAME

Plaintiffs propose the following schedule for the notice and approval process:

Event	Time
Notice published via *Investor's Business Daily*	Within 10 days of Preliminary Approval Order
Notice published on Company website	Within 10 days of Preliminary Approval Order
Filing of Proof of Notice distribution	At least 7 days before the Settlement Hearing
Deadline for objections to the Settlement	At least 14 days before the Settlement Hearing
Filing of papers in support of the Settlement, including the Fee and Expense Amount	At least 21 days before the Settlement Hearing

VIII. CONCLUSION

For the foregoing reasons, the Settlement should be preliminarily approved, and notice published in accordance with the proposed Preliminary Approval Order, attached as Exhibit B to the Stipulation.

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Dated: June 28, 2021

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above document was served electronically through the e-filing system on registered Users and by Conventional Methods on Non-Registered Participants, on June 28, 2021.

/s/ Theodore M. Hess-Mahan
Theodore M. Hess-Mahan