**UNITED STATES DISTRICT COURT
OF MASSACHUSETTS**

Johnny Cruz, on behalf of himself and all others similarly situated,

Plaintiff,

vs.

Raytheon Company, Kelly B. Lappin, in her capacity as Plan Administrator for the Raytheon Company Pension Plan for Hourly Employees, the Raytheon Company Pension Plan for Salaried Employees, the Raytheon Non-Bargaining Retirement Plan, the Raytheon Bargaining Retirement Plan, and the Raytheon Retirement Plan for Engineers & Contractors, Inc. and Aircraft Credit Employees, and John/Jane Does 1-10,

Defendants.

Case No.: 1:19-cv-11425-PBS

CLASS ACTION

MEMORANDUM OF LAW IN FURTHER SUPPORT OF PLAINTIFF'S MOTION FOR AWARD OF ATTORNEYS' FEES, EXPENSES AND A CASE CONTRIBUTION AWARD

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INTRODUCTION

The Settlement Class consists of over 10,000 people, each of whom received a detailed notice that described the amount of attorney's fees that are being requested. Only two class members (and the Defendants) have objected to Plaintiff's request for an award of attorneys' fees. The objections largely ignore the detailed analysis in the Memorandum in Support of Plaintiff's Motion for Attorneys' Fees, Expenses and a Case Contribution Award ("Pl. Fee Br.") (ECF No. 84) and in the Declaration of Professor Silver (ECF No. 85-9). The Court should overrule the objections because a fee award of 14.37% is reasonable under any standard.

As a preliminary matter, Plaintiff notes that neither Defendants nor any Class Member objected to the timing or structure of the proposed fee award, Mr. Cruz's request for a Case Contribution Award in the amount of $10,000, or Class Counsel's request for reimbursement of $388,248.23 in litigation expenses. The complete lack of objections to these requests supports Plaintiff's requests.

A. Mr. Kertis' Objection to Fees Is Based on a Mistaken Belief that the Case Was Virtually Risk-Free

In addition to objecting that Plaintiff elected to settle for less than the maximum he might have obtained at trial, Mr. Kertis also argues that the requested attorneys' fee is too high for a Settlement which — in his opinion — favors Defendants. Kertis Obj., ECF No. 91, at 2. Specifically, he argues that "[i]f I get 33% of what I should expect then they should get only 33% of their fee." *Id.* By Mr. Kertis' logic, however, attorneys would be better compensated for less risky cases than for cases which involve considerable risk, since the degree of risk generally drives the value of a settlement and higher risks result in lower percentage recoveries. However, as discussed at pages 6 and 10-12 of Plaintiff's Fee Brief, courts consider the riskiness of a case as a reason to ***increase*** the amount of an attorneys' fee. "The greater the risk of walking away empty-

handed, the higher the award must be to attract competent and energetic counsel." *Silverman v. Motorola Sols., Inc.,* 739 F.3d 956, 958 (7th Cir. 2013). Moreover, basing Class Counsel's award on a percentage of the recovery aligns their interests with those of the Class, since Class Counsel stand to earn a higher fee the more the Settlement Class recovers.

Mr. Kertis also argues that "there was a 97% chance of an out-of-court settlement and that to me does not rank high in terms of risk . . . ." ECF No. 91, at 2. While it is not clear how Mr. Kertis came up with this statistic, Class Counsel respectfully disagrees. Class actions, especially those under ERISA, are difficult cases involving complex issues and there is certainly not a 97% chance of settlement as of the date a new case is filed. Some cases are dismissed under Rule 12(b), *Davis v. Salesforce.com, Inc.*, No. 20-cv-1753 (N.D. Cal. Apr. 15, 2021), while the defendants prevail on the merits in others. *See*, *e.g.*, *Rozo v. Principal Life Ins. Co.*, No. 4:14-cv-463, 2021 WL 1837539 (S.D. Iowa Apr. 8, 2021). No case, class action or otherwise, has a 97% chance of success.

Mr. Kertis' argument demonstrates why "litigation risk must be measured as of when the case is filed" rather than years later after a settlement has been negotiated. *Goldberger v. Integrated Res.Inc.,* 209 F.3d 43, 55 (2d Cir. 2000). Class Counsel have been involved in nine other cases involving ERISA's actuarial equivalence requirements. To date, four of the nine have been dismissed or withdrawn and no other class case has settled. In one of the other cases, currently pending in this District, Class Counsel just concluded the third round of briefing on motions to dismiss. In another case, the only remaining steps are a final settlement conference with a magistrate judge and perhaps trial. Mr. Kertis, who is only looking at one case in which a significant settlement has already been achieved, simply underestimates the degree of risk Class Counsel assumed at the outset of the case.

B. Mr. Mankaruse's Objection to the Fee Request Should Be Overruled

Mr. Mankaruse also argues that the requested attorneys' fees are too high. Mankaruse Objection, ECF No. 88. However, his analysis is based on several incorrect assumptions.

First, Mr. Mankaruse argues that the fee award should be based on Massachusetts law. *Id.* at 2-3. However, in cases like this that involve federal question jurisdiction, courts apply federal common law with respect to the award of attorneys' fees. *See, e.g.,* 10 Fern M. Smith, *Moore's Federal Practice* Civil § 54.171 (2015) ("In cases within the district courts' federal-question jurisdiction, state fee-shifting statutes generally are inapplicable").[1] Federal law also applies with respect to the award of attorneys' fees from a common fund, as it is part of an equity court's traditional authority. *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). Accordingly, courts that analyze the appropriate award of fees in ERISA class action cases which involve the creation of a common fund or common benefit look to federal, not state, precedents. *Walsh v. Popular, Inc.,* 839 F. Supp. 2d 476, 483 (D.P.R. 2012) (applying federal precedents concerning common fund awards to determine amount of attorneys' fees in ERISA class action); *Berry v. Wells Fargo & Co.,* No. 3:17-cv-304, 2020 WL 9311859, at *11 (D.S.C. July 29, 2020) (same).[2]

Mr. Mankaruse also argues that the Class consists of retirees living on fixed incomes who did not earn the type of money that Counsel are requesting. ECF No. 88, at ¶¶ 5, 6 and 9. There

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[1] *See also Klein v. City of Laguna Beach*, 810 F.3d 693, 701–02 (9th Cir. 2016) (explaining that state law applies in diversity case under the *Erie* doctrine, but federal common law applies in cases based on federal claims); *Nutramax Lab'ys, Inc. v. Manna Pro Prod., LLC,* No. 0:16-cv-1255-JMC, 2017 WL 3473990, at *4 (D.S.C. Aug. 14, 2017); *Rodriguez v. Quicken Loans, Inc.*, 257 F. Supp. 3d 840, 844 (S.D. Tex. 2017); *Caston v. Bolivar Cty., Mississippi*, No. 4:17-cv-11-DMB-JMV, 2018 WL 2435602, at *9 (N.D. Miss. May 30, 2018), *aff'd,* 769 F. App'x 182 (5th Cir. 2019).

[2] *See also Tom v. Com Dev USA, LLC,* No. 16-cv-1363, 2017 WL 8236268, at *8 (C.D. Cal. Sept. 18, 2017) (same); *In re FedEx Ground Package Sys., Inc., Emp. Pracs. Litig.,* No. 3:05-md-527 RLM, 2017 WL 1735543, at *4 (N.D. Ind. Apr. 28, 2017) (same); *Kemp-DeLisser v. Saint Francis Hosp. & Med. Ctr.,* No. 15-cv-1113, 2016 WL 6542707, at *14 (D. Conn. Nov. 3, 2016) (applying federal common law to determine amount of fee in common benefit case); *Slipchenko v. Brunel Energy, Inc.,* No. 11-cv-1465, 2015 WL 338358, at *16 (S.D. Tex. Jan. 23, 2015) (common fund).

are two problems with this argument. First, if courts were to base their attorneys' fee awards on class members' earning potential or wealth, the people who need class representation the most would have the hardest time obtaining it. That would be especially true in pension cases, where the law is complex and litigation risk and cost is high. Second, Mr. Mankaruse fails to consider that amounts awarded as attorneys' fees are not pure profit. The attorneys' fees requested in this case will pay for expenses such as salaries and overhead.

Mr. Mankaruse finally argues that the case was "limited" and "routine," that it had "just started," and that the class representative, rather than Class Counsel, did most of the work. *Id.* at ¶¶ 7-8. However, Class Counsel spent over 2,400 hours litigating a novel legal theory on behalf of a class of over ten thousand people in five different retirement plans. Pl. Fee Br. at 12 and 16-17; Declaration of Douglas Needham, ¶ 8. Class Counsel also spent hundreds of thousands of dollars on expert fees, absorbing the risk that they would not recover these costs unless the case was successful. Pl. Fee Br. at 18-19. Mr. Mankaruse' objection fails to consider these risks or the success that Class Counsel achieved in relation to them.

C. Defendants' Objection to the Fee Request is Without Merit

Defendants' request that the Court should lower Class Counsel's fees "so as not to dilute class members' recovery" should be taken with a grain of salt. If Defendants wanted to, they could simply pay Class Counsel's fees ***without*** reducing the amount of benefits Class Members are entitled to receive under the Settlement. Or, they could have resolved this case after the Complaint was filed or at least after the motion to dismiss was denied rather than litigate a motion for summary judgment which, given that this case is in many respects a battle of the experts, they had to assume would be denied.

As demonstrated in Plaintiff's Fee Brief, in ***this*** case, on ***these*** facts, a fee equal to 14.37% of the Settlement is reasonable. Defendants' contrary arguments are without merit.

1. Defendants Solely Focus on a Single Factor of Limited Relevance to an Analysis of a Reasonable Fee

Defendants do not challenge the reasonableness of the hours Class Counsel devoted to prosecution of the case, and they acknowledge that Class Counsel are "skilled and experienced advocates." Def. Br. at 2. They also do not say that 14.37 percent is an unreasonable percentage compared to awards in other ERISA cases or complex class actions, and they concede — somewhat grudgingly — that the case "involves some novel (and so far, untested) legal theories." *Id.* at 5. Moreover, Defendants do not argue that the results obtained in the litigation, in the face of those risks, are insignificant, nor do they compare the results Class Counsel obtained to recoveries in cases involving more settled areas of law.

The issues that Defendants do not dispute are the primary criteria courts use to assess the reasonableness of a fee request in a common fund case, as discussed extensively in Plaintiff's Fee Brief at pages 6-16 and in the detailed and comprehensive expert declaration of Charles Silver submitted in support of the Plaintiff's fee request. Rather than address these factors, Defendants' entire brief is devoted to arguing that the requested fee is too high in relation to Class Counsel's lodestar — an analysis that the First Circuit does not even ***require*** in cases applying the percentage of fund ("POF") method. *In re Thirteen Appeals Arising Out of San Juan Dupont Plaza Hotel Fire Litig.,* 56 F.3d 295, 307 (1st Cir. 1995). As the Court noted in *In re Relafen Antitrust Litig.*, 231 F.R.D. 52, 81 (D. Mass. 2005), which Defendants cite in their brief, the lodestar cross-check is optional.

Defendants do not dispute that use of the POF method is the "prevailing praxis" in this Circuit (*In re Thirteen Appeals,* 56 F.3d at 307), nor do they explain why the Court should not employ it. Moreover, the reasons the First Circuit gave for its preference for the POF method directly rebut Defendants' arguments in opposition to Plaintiffs' fee request: the POF method

"enhances efficiency, or, put in the reverse, using the lodestar method in such a case encourages inefficiency" because the lodestar approach creates "a strong disincentive to early settlement." *Id.* The Court also emphasized that "because the POF technique is result-oriented rather than process-oriented, it better approximates the workings of the marketplace" and "the market pays for the results achieved." *Id.* The essence of Defendants' argument, however, is that Class Counsel should receive less than what is already a below-average percentage fee, ***regardless*** of the results achieved, precisely ***because*** they achieved a settlement after "only" litigating a motion to dismiss, conducting fact and expert discovery, moving to disqualify Defendants' expert and fully briefing cross-motions for summary judgment.

2. Defendants Improperly Apply Fee Shifting Analysis to a Common Fund Settlement Structure

Defendants' argument that lodestar enhancements are "rare" and "seldom entertained" is based exclusively on fee-shifting cases where Defendants are required to pay the fees of successful litigants, not common fund cases where the court determines the percentage the class should pay for the legal services that generated their recovery.[3] In fee-shifting cases, the Supreme Court has precluded lodestar enhancements that reflect contingency or risk. *Lipset v. Blanco,* 975 F.2d 934, 943 (1st Cir. 1992) (citing *City of Burlington v. Dague,* 112 S. Ct. 2638, 2643 (1992)). In contrast, such enhancements are both common and appropriate in common fund cases. One of the cases Defendants cite (Def. Br. at 4) makes this precise point:

> The bar against risk multipliers in statutory fee cases does not apply to common fund cases. Indeed, courts have ***routinely*** enhanced the lodestar to reflect the risk of non-payment in common fund cases. This mirrors the established practice in the private legal market of rewarding attorneys for taking the risk of nonpayment by

[3] *McLaughlin by McLaughlin v. Boston Sch. Comm.,* 976 F. Supp. 53, 63 (D. Mass. 1997) and *Lipset v. Blanco,* 975 F.2d 934, 942 (1st Cir. 1992) were Section 1988 civil rights cases, and *Connolly v. Harrelson*, 33 F. Supp. 2d 92, 98 (D. Mass. 1999) was a fee-shifting case involving the Massachusetts Civil Rights Act.

> paying them a premium over their normal hourly rates for winning contingency cases.

Vizcaino v. Microsoft Corp., 290 F.3d 1043, 1050–51 (9th Cir. 2002) (internal quotations omitted; emphasis added). *Vizcaino* upheld a fee award that was equal to a 3.65 lodestar multiplier.

As the Second Circuit recently explained, "an unenhanced lodestar fee does not account for the contingent risk that a lawyer may assume in taking on a case." *Fresno Cty. Employees' Ret. Ass'n v. Isaacson/Weaver Fam. Tr.,* 925 F.3d 63, 68 (2d Cir. 2019). Because it is not appropriate to adjust the lodestar to reflect this contingent risk when ***defendant*** is paying the fee, courts presume that the lodestar reflects a reasonable fee in fee-shifting cases. *Id.* In contrast, "fees awarded pursuant to the common-fund doctrine do not extract a tax on the losing party but instead confer a benefit on the victorious attorney for her representation of her client and the class members." *Id.* In consequence, in common fund cases there is no initial presumption that the lodestar amount represents a "reasonable" fee. *Id.*

3. Courts Do Not Consider Lodestar Multiples In Isolation

Defendants' argument that many cases have yielded lower lodestar multiples is meaningless. It is equally true that courts have awarded significantly higher lodestar multiples than the fee request here, which at this point in the litigation is 4.9.[4] For example, Defendants rely on *Vizcaino,* which found multiples in common fund cases that ranged from 0.6 to ***19.6***. Def. Br. at 4 (citing *Vizcaino*, 290 F.3d at 1051 n.6) (emphasis added). Moreover, the lodestar multiple may be driven by more the size of the case than the results achieved. A smaller dollar value case

[4] As set forth in paragraphs 6-8 of the Declaration of Douglas Needham, counsel have expended an additional 253.5 hours since submitting their fee petition responding to class member inquiries and briefing the issues raised by objecting class members and Defendants. Thus, Class Counsel's current lodestar total is $1,720,147.75, and the requested fee represents a 4.9 multiple on that lodestar.

generally results in a smaller settlement, a higher percentage fee and a smaller lodestar multiple.[5] Accordingly, looking at mean or median multiples without controlling for the size of the case and the size of the settlement provides little useful guidance as to whether a requested fee in a particular case is reasonable.

The relevant question is not whether a particular multiple is reasonable, it is whether the requested ***fee*** is reasonable, taking into account the particular circumstances of each case. While courts may consider the lodestar multiple, they do not do so in isolation, as Defendants do. Critically, courts evaluate the lodestar multiple in conjunction with the reasonableness of the fee percentage itself. This is shown by the cases Defendants cite.

For example, Defendants cite *Bettencourt v. Jeanne D'Arc Credit Union,* No. 17-cv-12548-NMG, 2020 WL 3316223 (D. Mass. June 17, 2020) for the proposition that Plaintiff's requested fee generates a lodestar multiple that is "well beyond the multipliers that courts in this District typically apply." Def. Br. at 1; *see also id.* at 4. But *Bettencourt* did not reject a fee petition because it yielded too high of a lodestar multiplier. Rather, the court determined that the requested ***30% fee*** was too high: "Class counsel provides very little reason, however, for this Court to deviate from its standard award of 25%." *Id.* at *3. The court then evaluated the request in light of counsel's lodestar, finding that the requested multiple was "well within the range of multipliers

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[5] *Baffa v. Donaldson Lufkin & Jenrette Sec. Corp.*, No. 96-cv-583, 2002 WL 1315603 (S.D.N.Y. June 17, 2002) provides a good example of this dynamic. *Donaldson* was a securities fraud case where plaintiffs requested a fee equal to 37% of the $3 million settlement, justifying the high percentage on the grounds that the request was only equal to 47% of counsel's lodestar. *Id.* at *2. The court noted that courts rarely grant common fund fees of more than 30% in securities fund cases, and the 37 percent request was excessive since the case did not involve any novel or risky legal theories. *Id.* However, the court found "the fact that any reasonable fee would necessarily represent a negative multiplier of the lodestar supports an award at the higher end of the spectrum" and awarded counsel a 30% fee. *Id.*

typically allowed by this Court," and decided to "split the difference" by "awarding attorneys' fees of 27% of the Settlement Fund." *Id.* Here, in contrast. Class Counsel seeks a fee that is approximately half that the percentage awarded in *Bettencourt.*

Vizcaino is similar. The District Court had awarded a 28% fee, slightly above the Ninth Circuit's "benchmark" fee of 25%, but within the normal range of 20-30 percent. 290 F.3d at 1047. The court determined that the percentage was reasonable based, *inter alia,* on the "exceptional results" class counsel had achieved in the "absence of supporting precedents," the extreme riskiness of the case, and the fact that the requested 28 percent fee was "at or below" the market rate for similar cases. *Id.* at 1048-49. Only then did the court conduct a lodestar cross-check, finding that the requested percentage resulted in a 3.65 multiple, which was "within the range of multipliers applied in common fund cases." *Id.* at 1051.

Other cases cited by Defendants confirm that the lodestar multiplier is not considered in isolation. *Bezdek v. Vibram USA, Inc.,* 809 F.3d 78, 84–85 (1st Cir. 2015) upheld the requested 25% fee award after noting that there was a negative lodestar multiple. *Relafen* determined that a 33 and 1/3 percent award was appropriate, and nothing about the 2.02 lodestar multiplier undermined that determination. 231 F.R.D. at 82. In *Fire & Police Retiree Health Care Fund, San Antonio v. Smith,* No. 18-cv-3670, 2020 WL 6826549, at *8 (D. Md. Nov. 20, 2020), the court confirmed its finding that the requested fee of 33 1/3 percent was high with a lodestar cross-check, and accordingly reduced the request to 30% (representing a lodestar multiple of just over 3).

Here, as discussed at length in Plaintiff's brief and in the Declaration of Professor Silver, the request for a 14.37 percent fee is low for class action cases in this District, low for cases that have achieved similar results and lower than most other ERISA class actions. *See* Fee Brief at 12-16; *see also* Declaration of Charles Silver, ECF No. 85-9., at ¶¶ 17–21, 63, and 64. Particularly

since the case broke new ground, entailed substantial risk and achieved an outstanding result — facts that Defendants do not challenge — the requested percentage is reasonable on its face. Because that percentage does not yield a lodestar multiple that is outside of the range that courts have awarded, there is no reason to reduce it.

Defendants' efforts to distinguish cases where courts have awarded fees with higher lodestar multiples focus on a single difference without considering the fuller context of each case. Defendant argues that the 8.3 multiple in *Conley v. Sears, Roebuck & Co.,* 222 B.R. 181, 189 (D. Mass. 1998) is distinguishable because *Conley* involved a fee award that would not come out of the settlement (Def. Br. at 6), ignoring (a) that this was only ***one*** of the reasons the court was comfortable with a high lodestar multiple; (b) that several other factors cited by the Court, such as the lack of any evidence of collusion and the value added by class counsel, are also present here; (c) that the Court was awarding between 20-25 percent of the value added to the class by counsel, not less than 15 percent as Class Counsel seeks here; and (d) that the Court awarded a ***substantially*** higher lodestar multiple than Class Counsel is seeking here. Similarly, Defendants argue that the 8.3 multiple approved in *New England Carpenters Health Benefits Fund v. First Databank, Inc.,* 2009 WL 2408560 (D. Mass. Aug. 3, 2009) was justified because the litigation was "hard-fought" (Def. Br. at 6), ignoring that the Court was awarding a 24% fee in a $350 million megafund case, and again awarded a much higher multiple than Plaintiff is seeking here.[6]

Defendants argue that *Bekker v. Neuberger Berman Grp. 401(k) Plan Investment Committee,* __ F. Supp. 3d __, 2020 WL 7043869 (S.D.N.Y. Dec. 1, 2020) is "non-binding" because it is not from this Circuit, ignoring their own multiple citations to out-of-circuit authority.

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[6] As discussed below, the Court should not reduce the requested fee based on Defendants' suggestion that the case was not "hard fought."

They also claim that *Bekker's* determination that a 5.85 multiple was "within the range of reasonableness for ERISA class actions" is "unpersuasive" because *Bekker* cites cases that "affirmed the propriety of fee awards that applied multipliers close to 2.5x." Def. Br. at 7 n.2. But of the cases *Bekker* cites, *In re Colgate-Palmolive Co. ERISA Litig.,* 36 F. Supp. 3d 344, 353 (S.D.N.Y. 2014) approved a 28% fee equal to a 5 multiple on lodestar and cited cases awarding multiples up to 8, while *Sewell v. Bovis Lend Lease, Inc.,* No. 09-cv-6548, 2012 WL 1320124, at *10 (S.D.N.Y. Apr. 16, 2012) approved a requested fee equal to 1/3 of the settlement representing a 2.93 multiple, and cited cases indicating that courts "commonly award lodestar multiples between two and six." *Id.* at *13. *Bekker's* reliance on these cases was correct. Moreover, *Bekker* challenged the use of a proprietary fund within a 401(k) plan; while such litigation does not have the lengthy track record of securities or antitrust cases, the theory has been tested in the courts dozens of times, with many cases having resulted in settlements. *Bekker*, No. 16-cv-6123, Dkt. 137-1 at 2 (identifying prior proprietary settlements concerning use of proprietary funds in a 401(k) plan). Here, the risks were greater given the lack of jurisprudence on Plaintiff's theory.

4. There Is No Special Lodestar Rule in ERISA Cases

Defendants' claim that "[m]ore conservative multipliers are generally applied in ERISA cases" (Def. Br. at 4) is wrong. The principal case that they rely upon, *Branch v. F.D.I.C.,* 1998 WL 151249 (D. Mass. March 24, 1998), did not make any such finding. The court merely noted that a "principled argument" could be made for taking a more conservative, lodestar-based approach in ERISA cases, while also noting that countervailing arguments favored the POF approach. *Id.* at *3. *Branch* also did not conduct an analysis of whether courts award lower multipliers in ERISA cases. The other case that Defendants cite, *Colgate*, suggested that the multipliers for ERISA and non-ERISA cases were about the same. 36 F. Supp. 3d at 353. Class counsel are not aware of any courts that have followed up on the "principled argument" which the

Branch court outlined (without adopting) in the twenty-plus years since the decision was published.

If anything, *Colgate* demonstrates that Defendants' broader argument that compensation should be lower in ERISA cases is exactly backward. *Colgate* cited empirical studies indicating that attorneys in ERISA cases receive a slightly higher fee percentage than in other cases. *Id.* at 350-51. The court reasoned that only a select group of experienced class counsel handle ERISA pension benefit class actions, and "as a case requires more expertise — and, consequently, as fewer lawyers could competently bring the case — a larger percentage of the fund should be awarded to those lawyers." *Id.* at 352; *see also Bekker,* 2020 WL 7043869, at *2 (fees in ERISA cases should take into account that class counsel "must be knowledgeable about this complex and developing area of law, aware of numerous merits and procedural pitfalls, willing to risk dismissal at any stage, and prepared to pursue many years of litigation"). A rule that attorneys who handle the risks and complexities of ERISA class actions should receive lower compensation than attorneys who handle other types of class actions or contingent fee cases would create exactly the wrong incentives.

5. The Class Has Benefited from Class Counsel's Involvement in Other Actuarial Equivalence Cases

Defendants' argument that its retirees should not "foot the bill in this case for work that benefits a plethora of class actions" (Def. Br. at 5) is doubly wrong. Each of the "actuarial equivalence" cases Class Counsel have brought has involved unique facts and circumstances. The time devoted to this case has been absolutely essential to achieving a Settlement that will provide substantial benefits to the Class.

Moreover, to the extent that there is overlap between these cases, the Class in ***this*** case has benefited from it. This is one of the later "actuarial equivalence" cases brought by Class Counsel.[7] Class counsel had already responded to motions to dismiss in *American Airlines, Anheuser Busch, PepsiCo, Partners HealthCare, Huntington Ingalls, MetLife, Rockwell* and *U.S. Bancorp* before filing Plaintiff's opposition to Defendants' Motion to Dismiss in this case on September 30, 2019. Given that Raytheon selected the same litigation counsel that represented Anheuser Busch, there were common elements in their arguments seeking dismissal. In the *Huntington Ingalls* litigation, where defendants' summary judgment motion relied on the same actuarial expert Raytheon subsequently retained, Class Counsel had already defeated defendants' summary judgment motion before they had to file a brief opposing Defendants' summary judgment motion in this case. Thus, the Class in this case was much more likely to benefit from work done in the earlier cases than the reverse.

6. Class Counsel Should Not Be Penalized for Efficiency

Defendants argue that Class Counsel "provides no justification for deviating from established precedent" (Def. Br. at 5), but as discussed above and in Plaintiff's Fee Brief, nothing in the fee request deviates from "established precedent." There is nothing 'unprecedented" about a 14.37 percent fee award in a common fund ERISA case. Nor is there anything unprecedented about a lodestar multiple of 4.9; even Defendants acknowledge that higher multiples are awarded.

[7] *Masten v. Metropolitan Life Ins. Co.,* No. 1:18-cv-11229 (S.D.N.Y.), *Martinez-Torres v. American Airlines,* 4:18-cv-00983 (N.D. Tex.), *DuBuske v. PepsiCo,* No. 7:18-cv-11618 (S.D.N.Y.), and *Smith v. U.S. Bancorp,* No. 0:18-cv-3405 (D. Minn.) were all filed in December of 2018, *Smith v. Rockwell,* No. 2:19-cv-505 (ED Wisc.) was filed in April of 2019, *Duffy v. Anheuser Busch,* No. 4:19-cv-1189-NC (E.D. Wisc.) and *Herndon v. Huntington Ingalls Industries, Inc.,* No. 4:19-cv-52 (E.D. Va.) were filed in May of 2019. *Belknap v. Partners Healthcare Syst.,* 1:19-cv-11437-FDS (D. Mass.) was filed the day after this case. The only case filed significantly later was *Brown v. United Parcel Service,* No. 1:20-cv-00460 (N.D. Ga.), which was dismissed for failure to exhaust administrative remedies in August of 2020.

Defendants suggest that the lodestar multiple is unreasonably high here because this case did not involve "'scorched earth' litigation tactics." Def. Br. at 6. This argument is misguided for two reasons. First, while this case was litigated efficiently and neither side salted the fields, Defendants' attempt to minimize the substantive legal work that was performed is unsupported by the record. Not only did Plaintiff overcome a Motion to Dismiss, the Parties also conducted fact and expert discovery and fully briefed cross-motions for summary judgment. With the Court's decision denying summary judgment, ***Cruz's*** claim was trial-ready. Within the bounds of the process established by the Court, this case was hard-fought by both sides.

Second, Defendants' claim that lengthy litigation justifies a high lodestar multiple ignores the fact the lodestar amount itself incorporates the number of hours spent litigating the case. It does not need to be further accounted for in the multiple of that larger lodestar. For example, if this settlement had only been reached after four years of litigation rather than two, or if Class Counsel had doubled their number of hours by the sort of "scorched earth" tactics Defendants describe, Class Counsel might have a lodestar of $3.5 million. Using Defendants' sliding scale, where "hard fought" litigation can justify a lodestar multiple of 5 or more, Class Counsel in that scenario would be justified in requesting a fee of more than $17.5 million, or almost 30 percent of the Settlement, a fee percentage that is by no means unusual in class action litigation. Instead, because of their efficiency, Class Counsel seek a fee of half of this amount.

But here, Defendants argue that the Court should multiply Class Counsel's lower lodestar by a lower lodestar multiple because the case was ***not*** litigated for four years and counsel did not run up billable hours on unnecessary items. Not only would Class Counsel's relative efficiency yield a substantially smaller fee in terms of absolute dollars, it would yield a smaller multiple on the time expended. Thus, Defendant's sliding scale proposal creates exactly the sort of "strong

disincentive to early settlement" that led the First Circuit to prefer the percentage of fund methodology in the first place. *In re Thirteen Appeals,* 56 F.3d at 307.

If the case had gone on for many more years, Class Counsel might have been justified in requesting a higher fee percentage that was closer to the average fees for class actions in this District, class actions in comparably sized settlements, and class actions in ERISA cases. Because Class Counsel settled hard-fought litigation that was not as long as it might have been, they requested a much smaller percentage fee. That fee yields a multiple that is in-line with, or lower than, other fees awarded in this District in cases such as *Conley* and *New England Carpenters.* There is no need to lower the amount further. While Defendants would always prefer to pay money to former employees rather than class action lawyers who seek to hold them accountable, the Court should be skeptical when the fox argues that the hen house guards are overpaid. The Court should accordingly overrule Defendants' objection.

CONCLUSION

For the reasons set forth above and in Plaintiff's prior briefs and supporting documents, the Court should grant the pending Motion for an Award of Attorneys' Fees and Expenses and a Case Contribution Award.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above document was served upon counsel of record through the Court's ECF system, and upon all other persons appearing *pro se* by first-class mail, postage pre-paid, this twenty-sixth day of May, 2021.

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