UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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

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

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Plaintiff Johnny Cruz, individually and on behalf of all other members of the Settlement Class ("Lead Plaintiff"), respectfully moves this Court for an Order awarding attorneys' fees, expenses and a Case Contribution Award in the aggregate amount of $8,900,000. Of this amount, Izard, Kindall & Raabe, LLP and Bailey & Glasser LLP ("Class Counsel") seek $8,501,751.77 in fees, $388,248.23 in litigation expenses, and a case contribution award of $10,000 to Mr. Cruz.[1]

I. INTRODUCTION

Because of this lawsuit, thousands of retirees will receive an increase in their monthly pension checks — a benefit they and their beneficiaries will continue to receive throughout their retirements. The present value of the Settlement is $59.17 million, which is approximately 40 percent of the past and future damages suffered by the Class, calculated using the methodology that Plaintiff's expert used in the report that Plaintiff filed in support of his motion for summary judgment. This is an excellent result, with benefits that will extend for decades.

Class Counsel's requested fee is approximately 14.37% percent of the Settlement's $59.17 million present value. They also seek reimbursement of $388,248.23 in expenses and a $10,000 Case Contribution Award for Mr. Cruz. Under the Settlement, Defendants will pay these amounts up front, and each Class Member's monthly benefit increase will be reduced by the same percentage that the fee, expense and Case Contribution Award comprises of the $59.17 million present value of the Settlement (approximately 15.04%). This same methodology has been employed in other cases where a class action settlement requires payments over many years such

[1] Plaintiff incorporates by reference the factual background set out in the motion for final approval of the Settlement, and relies upon the Declarations of Douglas Needham ("Needham Decl.") and Gregory Porter ("Porter Decl.") and the documents attached thereto, including the Declaration of Johnny Cruz (attached to the Needham Declaration as Exhibit H) and the Declaration of Charles Silver, the Roy W. and Eugenia C. McDonald Professor of Civil Procedure at the University of Texas School of Law (the "Silver Decl.," attached as Exhibit I to the Needham Declaration). Plaintiff retained Professor Silver to review and opine upon the structure and amount of this award.

as *Amara v. CIGNA,* which also involved adjustments to ERISA pension annuities. The proposed fee, expense and case contribution awards are fair and reasonable based on the results achieved, the risk that the case entailed, and the other factors courts typically consider.

II. ARGUMENT

A. The Court Should Award Fees Based on a Percentage of the Present Value of the Settlement

Courts may calculate attorneys' fees in common fund cases based on either a percentage of the fund or the lodestar method. *In re Thirteen Appeals Arising Out of San Juan Dupont Plaza Hotel Fire Litig.,* 56 F.3d 295, 307 (1st Cir. 1995); *see also Bezdek v. Vibram USA, Inc.,* 809 F.3d 78, 84 (1st Cir. 2015) (reaffirming *Thirteen Appeals*). The percentage of fund approach is the "prevailing praxis," is simpler to administer, enhances efficiency and better approximates the market by focusing on the results achieved rather than hours spent. *Thirteen Appeals*, 56 F.3d at 307. As this Court previously found, "the weight of the case law . . . approves of percentage of the fund as the methodology for determining attorneys' fees, with a lodestar calculation as a pragmatic cross-check." *New England Carpenters Health Benefits Fund v. First DataBank, Inc.*, No. 05-11148, 2009 WL 3418628, at *1 (D. Mass. Oct. 20, 2009) (collecting authorities).[2]

[2] Courts also award attorneys' fees from common funds in statutory fee shifting cases that settle prior to judgment. *See, e.g., In re Relafen Antitrust Litig.,* 231 F.R.D. 52, 78 (D. Mass. 2005) (percentage of fund method appropriate in case involving a fee-shifting statute that settled prior to trial and created a common fund); *see also In re TRS Recovery Servs., Inc. & Telecheck Servs., Inc., Fair Debt Collection Practices Act (FDCPA) Litig.,* No. 13-2426, 2016 WL 543137, at *8 n.19 (D. Me. Feb. 10, 2016) ("generally the circuits have agreed that common fund principles govern where a fee-shifting case settles in advance of judgment") (citing cases). While the lodestar approach is required when assessing a fee award against the defendants after trial, when the reasonableness of the fee must be considered from the defendants' perspective, "where an attorney has settled a case and created a common fund, we determine what a reasonable fee is from the *plaintiff's* perspective." *Fresno Cty. Employees' Ret. Ass'n v. Isaacson/Weaver Fam. Tr.,* 925 F.3d 63, 70 (2d Cir. 2019) (emphasis in original), *cert. denied,* 140 S. Ct. 385 (2019). Furthermore, "[n]othing in ERISA indicates that Congress intended to preempt the common benefit doctrine." *Florin v. Nationsbank of Georgia, N.A.,* 34 F.3d 560, 564 (7th Cir. 1994).

The "common fund" analysis applies equally to cases where some or all of the benefits to the class will be paid over time:

> [W]hen a defendant is ordered, or agrees, to pay some monies directly to the plaintiff class members individually, such as increased salary payments . . . . there may never be a lump sum payment, or literal common fund. Nonetheless, courts may consider the sum total of the payments due as the common fund.

William B. Rubenstein, 5 NEWBERG ON CLASS ACTIONS § 15:56 (5th ed.) (citing cases). Two recent cases illustrate this principle.

Amara v. CIGNA involved allegations that pension plan participants were receiving lower annuity benefits than they were entitled to under ERISA. The court reformed the plan to ensure that "class members will receive (1) the full value of their accrued benefits under Part A, including early retirement benefits, in annuity form; and (2) their accrued benefits under Part B, in annuity or lump sum form." *Amara v. CIGNA Corp.,* 925 F. Supp. 2d 242, 265 (D. Conn. 2012), *aff'd,* 775 F.3d 510 (2d Cir. 2014). The court awarded plaintiff's counsel fees equal to 17.5% of the present value of the present and future benefits under the reformed plan, and authorized CIGNA "to deduct 17.5% from the increased individual benefits to which class members are entitled" under the reformed plan *Amara v. CIGNA Corp.,* No. 01-2361, 2018 WL 5077894, at *4 (D. Conn. Oct. 17, 2018); *Amara v. CIGNA Corp.,* No. 01-2361, 2018 WL 6242496, at *3 (D. Conn. Nov. 29, 2018). *Kifafi v. Hilton Hotels Retirement Plan,* 999 F. Supp. 2d 88 (D. D.C. 2013), another ERISA case involving a remedial order that increased future benefit payments, employed the same methodology, awarding plaintiff's counsel 15% of the value of the future benefits and reducing each class member's future benefit increases by the same 15%. *Id.* at 100. Plaintiff proposes the exact same methodology here.

Numerous cases have determined the value of a "common fund" or "common benefit" based on the present value of future benefits. For example, *In re Puerto Rican Cabotage Antitrust*

Litig., 815 F. Supp. 2d 448, 459 n.13 (D.P.R. 2011), based its percentage fee award, in part, on the "actual tangible" value of future benefits "that are able to be calculated in the present." Similarly, *In re: Pharm. Indus. Average Wholesale Price Litig.,* No. 01-12257-PBS, 2008 WL 11389264, at *2 (D. Mass. Oct. 2, 2008), awarded a percentage of total settlement value that included the value of projected claims, *cy pres* awards, and the value of the fee and expense award. In *Cecil v. BP Am. Prod. Co.*, No. 16-410, 2018 WL 8367957, at *5 (E.D. Okla. Nov. 19, 2018) the court awarded attorneys' fees of 26.6% of the settlement's gross value, which specifically included "future benefits" valued at over $36 million. *In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices, & Prod. Liab. Litig.,* No. 10-02151, 2013 WL 12327929, at *34 (C.D. Cal. July 24, 2013) expressly considered the estimated value of future non-monetary benefits (primarily commitments related to vehicle repairs) when determining the settlement's value, finding that it was appropriate to do so because the "benefits can reasonably be valued" by experts. In *Anderson v. Merit Energy Co.*, No. 07-916, 2009 WL 3378526, at * 2 (D. Colo. Oct. 20, 2009), the court awarded fees equal to 26% percent of the settlement's total economic value, which included a new methodology to calculate future royalties. Similarly, *Ferrick v. Spotify USA Inc.*, No. 16-8412, 2018 WL 2324076, at *6 (S.D.N.Y. May 22, 2018), awarded fees equal to 11.6% of the settlement's value, which included future royalty payments "valued at $63.1 million."

Although not the case here, where the value of future benefits depended on decisions made at a later date, courts have sometimes bifurcated attorneys' fee awards to allow a portion of the award to reflect how the contingency resolves. For example, the *Duhaime v. John Hancock Mut. Life Ins. Co.,* 989 F. Supp. 375 (D. Mass. 1997), settlement allowed class members to choose either "General Policy Relief" or an award through an ADR process. *Id.* at 377–78. Because there was no way to know which option class members would select, how many would receive ADR awards

or what the value of those awards would be, the court found the value estimates to be problematic. Accordingly, the court awarded part of the fee up front and held the remainder in escrow for a year to see how the process played out, observing "[t]here seems to be no good reason to guess, when experience will shortly answer the crucial question" of the settlement's value. *Id.* at 379; *accord, Bussie v. Allamerica Fin. Corp.,* No. 97-40204, 1999 WL 342042, at *2 (D. Mass. May 19, 1999).[3]

Here, in contrast, "[t]here are no claim forms to fill out, no elections to make, and no documentation to scavenge out of old records. Indeed, Class Members do not have to take any action whatsoever to receive their benefits." *Cecil,* 2018 WL 8367957, at *6. The Class Notice even informs each Class Member of the amount of his or her recalculated benefit under the proposed Settlement. While the amounts that individual Class Members ultimately receive under the Settlement will depend on individual longevity, that is the nature of the annuity benefit that Class Members are already receiving, not a settlement contingency. The Class benefit was calculated using mortality assumptions proposed by Plaintiff's expert that are consistent with Raytheon's contemporaneous financial statements. With thousands of individuals in the Class, the "law of large numbers" ensures that individual differences in longevity will balance out and the Settlement's mortality assumptions will accurately reflect the experience of the Class as a whole.[4] Thus, the Settlement's present value of $59.17 million represents "actual tangible benefits

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[3] Notably, both *Duhaime* and *Bussie* agreed that attorneys' fees should be based on a percentage of the present value of future benefits, so long as the valuation was ***not*** based on litigation contingencies. *Bussie,* 1999 WL 342042, at *2 ("Although the Settlement in this case is not a classic 'common fund', in that Allmerica has not created a pool of money to be divided among class members, numerous courts have held that uncapped, non-cash settlements similar to the one here are appropriately treated the same as common funds") (citing, *inter alia, Duhaime*).

[4] The law of large numbers is the statistical theory that, "as the number of identically distributed, randomly generated variables increases, their sample mean (average) approaches their theoretical mean." https://www.britannica.com/science/law-of-large-numbers (last viewed April 5, 2021).

that are able to be calculated in the present." *Puerto Rican Cabotage,* 815 F. Supp. 2d 459 n.13.[5] Accordingly, the Court should award the full amount of the attorneys' fees up front, as was done in cases like *Amara* and *Kifafi* where the increase in the amount of future payments was automatic.

B. The Requested Fee Award is Fair and Reasonable.

Plaintiff is seeking a fee of $8,501,751.77, which is approximately 14.37% of the Settlement's $59.17 million present value. This request is reasonable based on the factors that courts in this Circuit generally consider, which include:

> (1) the size of the fund and the number of persons benefitted; (2) the skill, experience, and efficiency of the attorneys involved; (3) the complexity and duration of the litigation; (4) the risks of the litigation; (5) the amount of time devoted to the case by counsel; (6) awards in similar cases; and (7) public policy considerations, if any.

See Medoff v. CVS Caremark Corp., No. 09-554, 2016 WL 632238, at *8 (D.R.I. Feb. 17, 2016) (citing *In re Lupron Mktg. & Sales Prac. Litig*, No. 01-10861, 2005 WL 2006833, at *3 (D. Mass. Aug 17, 2005)); *see also Bezdek v. Vibram USA, Inc.,*, 79 F. Supp. 3d 324, 350 (D. Mass. 2015).

1. The Total Value of the Settlement is Significant and Benefits Thousands of Participants and Beneficiaries in Five Pension Plans

"Analyzing net dollars and cents results accomplished by counsel for their clients is often the most influential factor in assessing the reasonableness of any attorneys' fee award." *Puerto Rico Cabotage*, 815 F. Supp. 2d at 458 (citing *Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983)). The Settlement's present value of $59.17 million, 40% of Plaintiff's estimate of class-wide damages, will provide significant benefits to thousands of Class Members across five defined benefit plans. *See* Needham Decl. ¶ 18. The size of the recovery in relation to the number of Class Members supports the reasonableness of the requested fee. Professor Silver found that this

[5] The aggregate dollar amount of actual payments under the Settlement will be larger; the $59.17 million present value calculation discounts all future payments to reflect the time value of money.

percentage compared favorably to many class action recoveries, including recoveries in securities, consumer and antitrust actions. Silver Decl. at ¶¶ 17–21. This is particularly noteworthy because, unlike securities fraud cases where "the law is extremely well developed" and "every nuance has been litigated repeatedly," this case involved an untested legal theory. *Id.* at ¶ 22.

If the Court awards the requested fees, expenses and a case contribution award, Class Members will receive a net recovery of approximately 34% of their shortfalls in both past and future benefits (Needham Decl., ¶ 24), which compares favorably to ***gross*** recoveries approved in other ERISA cases. *See, e.g., Hochstadt v. Bos. Sci. Corp.,* 708 F. Supp. 2d 95, 109 (D. Mass. 2010) (settlement that represented 27 percent of a ***conservative*** estimate of damages was "plainly reasonable"); *Ramirez v. J.C. Penney Corp., Inc.,* No. 14-601, 2017 WL 6462355, at *4 (E.D. Tex. Nov. 30, 2017) (recovery of 22.5 percent of recoverable damages), *report and recommendation adopted,* No. 14-601, 2017 WL 6453012 (E.D. Tex. Dec. 18, 2017). The average benefit increase under the Settlement is $21.40 each month or about $250 each year for the rest of Class Members' lives. Needham Decl. ¶ 19. The present value of the average increase in a Class Member's net benefit is $4,737. *Id*. Further, because the Settlement does not provide a lump sum payout, Class Members avoid the potential tax liability and related consequences that can accompany a large payout. *Id.,* ¶ 20. And, they will receive a payout in the same form as the pension benefits that are the basis of the claims. This is an excellent recovery, particularly in light of the inherent risks associated with asserting a novel and complex legal theory.

2. The Skill, Experience and Efficiency of the Attorneys Involved Justifies the Requested Fee

Achieving the Settlement required considerable skill by Class Counsel. This was a complex case involving a novel and highly technical legal theory that Class Counsel pioneered. Class Counsel developed an in-depth understanding of the statutory and regulatory underpinnings of the

case and worked closely with experts to understand the actuarial science behind ERISA's "actuarial equivalence" requirement. Needham Decl., ¶ 6. Ultimately, Class Counsel used their skill, experience and knowledge to reach a Settlement, allowing the Class to avoid the expense and risks of trial and appeal.

Class Counsel are highly-skilled attorneys with substantial experience litigating complex class actions and negotiating settlements.[6] They are among the country's leading firms litigating nationwide ERISA class actions, having been appointed to represent plaintiffs in numerous cases. This area of law is highly specialized; "Class Counsel thus 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." *Bekker v. Neuberger Berman Group*, No. 16-06123, 2020 WL 7043869, *2 (S.D.N.Y. Dec. 1, 2020); *see also Savani v. URS Prof. Solutions, LLC*, 121 F. Supp. 3d 564, 574 (D.S.C. 2015) ("Very few plaintiffs' firms possess the skill set or requisite knowledge base to litigate. . . .class-wide, statutorily-based claims for pension benefits").

Defendants were represented by experienced lawyers from Covington & Burling LLP and Goodwin Procter LLP, firms known for their vigorous defense of complex ERISA class actions. Needham Decl. ¶ 39. Class Counsel's ability to secure a favorable settlement in the face of such opposition confirms the quality of their representation. *In re Tyco*, 535 F. Supp. 2d at 260 (evaluating reasonableness of fee requested, the court noted that "[d]efendants selected several of the country's most skilled advocates as their representatives . . . advancing every non-frivolous legal argument that could conceivably be presented on their clients' behalf").[7]

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[6] *See* Firm Resumes (Needham Decl., Ex. C; Porter Decl. Ex. A); *see also* Silver Decl., ¶¶ 32–35.

[7] *See also Schwartz v. TXU Corp.*, No. 02-2243, 2005 WL 3148350, at *30 (N.D. Tex. Jan. 13, 2006) ("The ability of plaintiffs' counsel to obtain such a favorable settlement for the Class in the

3. The Complexity and Novelty of the Issues Presented in this Case, Along with the Duration, Support the Requested Fee

The claims in this case were complex, highly technical and novel, providing further support for the requested fee. *In re Tyco Int'l, Ltd. Multidistrict Litig.*, 535 F. Supp. 2d 249, 260 (D.N.H. 2007) (case "was factually complex, turned on several novel and difficult legal issues"); *In re Neurontin Mktg. & Sales Practices Litig.*, 58 F. Supp. 3d 167, 172 (D. Mass. 2014) (case "involved novel cutting-edge legal questions and complex scientific issues"); *In re Thirteen*, 56 F.3d at 309 ("numerous complex and novel issues addressed during the proceedings").

Plaintiff alleged Defendants calculated annuity benefits using conversion factors that were based on outdated mortality and interest rate assumptions, causing Class Members to receive benefit payments that were less than an "actuarially equivalent" amount they should have received. *See* Dkt. 1, ¶¶ 1, 84, 89. The claims involve intertwined statutory and regulatory requirements from ERISA, the Pension Protection Act, the Retirement Equity Act and the Tax Code, as well as the complexities of actuarial valuations and benefit calculations. *Compare In re Colgate-Palmolive Co. ERISA Litig.,* 36 F. Supp. 3d 344, 347 (S.D.N.Y. 2014) ("The subject matter of this action is complex and requires a command of ERISA, the Internal Revenue Code, and related regulations and regulatory guidance"). Class Counsel pioneered the novel legal theory at the heart of the case. Needham Decl. ¶ 25.[8] These legal theories have still not been heard by any Court of Appeals, nor

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face of such formidable legal opposition confirms the superior quality of their representation"); *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 467 (S.D.N.Y. 2004) ("The quality of opposing counsel is also important in evaluating the quality of plaintiffs' counsels' work").

[8] *See, e.g., Herndon v. Huntington Ingalls Indust. Inc.,* No. 19-52, 2020 WL 5809965, at *1 (E.D. Va. Aug. 28, 2020) (cross-motions for summary judgment), *report and recommendation adopted sub nom. Herndon v. Huntington Ingalls Indus., Inc.,* No. 19-52, 2020 WL 5809996 (E.D. Va. Sept. 29, 2020); *Belknap v. Partners Healthcare Sys., Inc.,* No. 19-11437, 2020 WL 4506162 (D. Mass. Aug. 5, 2020) (motion to dismiss); *Smith v. Rockwell Automation, Inc.,* 438 F. Supp. 3d 912 (E.D. Wis. 2020) (same); *Duffy v. Anheuser-Busch Companies, LLC,* 449 F. Supp. 3d 882 (E.D. Mo. 2020) (same); *Smith v. U.S. Bancorp,* No. 18-3405, 2019 WL 2644204, at *1 (D. Minn. June

have any of these cases gone to trial. Needham Decl. ¶ 28.

If the litigation continued, Plaintiff would likely face complex arguments by Raytheon concerning such issues as the permissibility of using fixed factors to calculate joint and pre-retirement survivor annuity benefits and whether joint and survivor annuities must be actuarially equivalent to single-life annuities that could have been selected on the same retirement date. These and other complex issues would have required extensive expert testimony concerning the reasonableness of the actuarial assumptions used and their impact on the Class, and there was no guarantee that this Court would accept Plaintiff's expert's opinions over Raytheon's. *Id.*, ¶ 27.

Class Counsel's request for a fee award of less than 15% of the settlement — significantly below the typical percentage award — reflects the relatively early stage of the litigation. Further reductions would "unduly penalize[ ]" counsel "for promptly resolving litigation that could easily have been protracted." *See In re Fidelity/Micron Sec. Litig.*, No. 95–12676, 1998 WL 313735, at *4 n.11 (D. Mass. June 5, 1998), *rev'd in part on other grounds*, 167 F.3d 735 (1st Cir. 1999).

4. The Risks Involved Strongly Support the Requested Fee

The only certainty in class action litigation is that nothing is certain. *See Puerto Rican Cabotage*, 815 F. Supp. 2d at 460; *see also In re Lupron*, 2005 WL 2006833, at *4 ("History is replete with cases in which plaintiffs prevailed at trial on issues of liability, but recovered little or nothing by way of damages"). But this case did not simply present the same types of risks that are present in almost every class action.

"It is well-established that litigation risk must be measured as of when the case is filed." *Goldberger v. Integrated Res., Inc.,* 209 F.3d 43, 55 (2d Cir. 2000). This case was filed on June 27, 2019, which coincidently was the same date that the Judge Magnuson denied a motion to

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27, 2019) (same); *Torres v. Am. Airlines, Inc.,* 416 F. Supp. 3d 640 (N.D. Tex. 2019) (same).

dismiss a similar case in the District of Minnesota. *Smith v. U.S. Bancorp*, No. 18-3405, 2019 WL 2644204, at *1 (D. Minn. June 27, 2019). Prior to that date, no court had ruled on whether plans that used outdated actuarial factors might violate ERISA's actuarial equivalence requirements. While the statutory requirement is long-standing, its application had not been tested in court. Thus, the litigation risks were high. "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).

The key question — whether the benefits provided to Class Members during the Class period were less than the actuarial equivalent of the SLAs that they could have selected instead — is one that can only be determined at trial through expert testimony. The results of any "battles of experts" are notoriously difficult to predict.

Defendants vigorously denied all of Plaintiff's claims and contentions. *See generally* Dkt. 36. This was not a "copycat" case or byproduct of a governmental investigation or enforcement action upon which Plaintiff could piggy-back. *Cf. Puerto Rican Cabotage*, 815 F. Supp. 2d at 463 (court awarded 23% of common fund as attorneys' fees, where "Lead Counsel filed [the] class action a mere five days after the DOJ's and the FBI's raid on several defendants' offices."); *Conley*, 222 B.R. at 188 (court awarded between 20–25% of settlement value as attorneys' fees, where "the class action proceeded in tandem with federal and state law enforcement efforts[,]" and "liability for compensatory damages was a foregone conclusion in Massachusetts, and a strong likelihood of success was indicated nationally"). In addition to the contested issues of liability and damages, Class Counsel also faced the attendant risks of seeking class certification. *See id.*, ¶ 115.

Moreover, Class Counsel undertook this action on an entirely contingent fee basis, assuming a substantial risk that they would have to devote a significant amount of time and incur

substantial expenses without any assurance of being compensated for their efforts. Needham Decl. ¶¶ 32, 34; *see also In re Lupron,* 2005 WL 2006833, at *4 ("'A contingency fee arrangement often justifies an increase in the award of attorneys' fees.'") (quoting *Behrens v. Wometco Enters., Inc.*, 118 F.R.D. 534, 548 (S.D. Fla. 1988), *aff'd,* 899 F.2d 21 (11th Cir. 1990)).

5. Class Counsel Devoted a Substantial Amount of Time to this Case

The extensive time and effort expended by Class Counsel in prosecuting this action over the past two years and achieving the Settlement also establish that the requested fee is justified and reasonable. To date, Class Counsel have expended more than 2,200 hours investigating, prosecuting, and resolving this action. Needham Decl. ¶ 35; Porter Decl. ¶ 6. Class Counsel conducted an extensive and thorough investigation of the statutory and regulatory issues involved, which included lengthy discussions with actuarial experts, and reviewing and analyzing Plaintiff's pension documents in relation to general economic conditions at the time of his retirement. Counsel drafted a detailed Complaint laying out the relevant law and technical facts supporting the claim, successfully opposed Defendants' motion to dismiss, engaged in focused factual discovery, reviewed thousands of pages of Defendants' documents, consulted with actuarial experts, engaged in expert depositions, filed a motion for summary judgment and *Daubert* motion, engaged in extensive arms'-length settlement negotiations, and prepared all papers necessary to support approval of the Settlement. Needham Decl. ¶¶ 3–17.

6. The Request is Reasonable When Compared to Awards in Other Cases

The requested fee award is well below the percentage of fees typically awarded in the First Circuit. *See Bezdek*, 79 F. Supp. 3d at 349-350 (quoting *Latorraca v. Centennial Techs., Inc.*, 834 F. Supp. 2d 25, 27–28 (D. Mass. 2011) (collecting cases)), *aff'd*, 809 F.3d 78, 85 (1st Cir. 2015) ("Applying the percentage of the fund method, the district court found that twenty-five percent of the fund is consistent with what other district courts found to be reasonable") (collecting

cases); *In re Lupron*, 2005 WL 2006833, at *5 ("Courts in the First Circuit have recognized that fee awards in common fund cases typically range from 20 to 30 percent") (collecting cases). *Manual for Complex Litigation* § 14.121, at 188 (4th ed. 2004) ("Attorney fees awarded under the percentage method are often between 25% and 30% of the fund"). Moreover, these fee percentages "perhaps understate the appropriate percentage for fees in ERISA cases," which involve a "highly specialized field of law." *In re Colgate-Palmolive Co. ERISA Litig.,* 36 F. Supp. 3d 344, 350 (S.D.N.Y. 2014).[9]

Plaintiff's 14.37% fee request is well below awards in recent ERISA class actions. The courts in *In re J.P. Morgan Stable Value Fund ERISA Litig.*, No. 12-2548, 2019 WL 473496, * 6 (S.D.N.Y. Sept. 23, 2019), and *Owens v. Metropolitan Life Ins. Co.*, No. 14-74, Dkt. No. 239 (N.D. Ga. Nov. 19, 2019), both awarded 33 1/3% fees in ERISA cases with $75 million and $80 million recoveries, respectively. *Berry v. Wells Fargo & Co.*, No. 17-304, 2020 U.S. Dist. LEXIS 143893, * 29 (D.S.C. July 29, 2020), awarded a 25% fee in an ERISA case with a $79 million recovery. Courts in this district have awarded similar percentages in ERISA cases. *See Gordan v. Massachusetts Mut. Life Ins. Co.*, No. 13-30184, 2016 WL 11272044, at *1 (D. Mass. Nov. 3, 2016) ($10,300,000 fee award equal to 33 1/3% of the recovery in an ERISA class action); *Moitoso v. FMR, LLC, et al.*, No. 18-12122, Dkt. No. 271 (D. Mass. Feb. 26, 2021) ($9,002,127 fees award equal to 33 1/3% of the $28.5 million settlement fund). *Owens* and *Moitoso* are unpublished, and are included in Exhibit J to the Needham Declaration.

Courts in this district have awarded similar percentages in non-ERISA cases.

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[9] According to a study analyzing 458 class action settlements between 2009 and 2013, the mean percentage in this Circuit was 26, and the median was 23; for ERISA class actions, the mean and median percentage was 26 percent respectively. *See* Eisenberg et. al., *Attorneys' Fees in Class Actions: 2009-2013*, 92 N.Y.U. L. Rev. 937, 952 (2017).

See Roberts v. TJX Companies, Inc., No. 13-13142, 2016 WL 8677312, *13 (D. Mass. Sept. 30, 2016) (awarding 33%); S*ylvester v. Cigna Corp.*, 401 F. Supp. 2d 147, 151 (D. Me. 2005) (awarding 33%); *In re Relafen*, 231 F.R.D. at 82 (awarding 33%); *In re Indigo Sec. Litig.,* 995 F. Supp. 233, 235 (D. Mass 1998) (awarding 30%); *Bezdek,* 79 F. Supp. 3d at 349-50 (describing 25% as the "benchmark"); *Boyajian v. California Products Corp.*, No. 10–11849, 2013 WL 3828804, *2 (D. Mass. July 9, 2013) (awarding 30%).[10] Similar percentages have likewise been awarded in cases where the settlements are reached with little or no formal discovery, which was not the case here.[11]

In *In re Neurontin Mktg. & Sales Practices Litig.*, 58 F. Supp. 3d 167, 173 (D. Mass. 2014), this Court cited a study of class action fee awards showing that the mean percentage of ***mega-cases*** (i.e. settlements between $250 and $500 million) was 17.8% and that a "28% fee award is within the applicable range of reasonable percentage fund awards"); *see also Conley*, 222 B.R. at 188 (relying on NEWBERG ON CLASS ACTIONS § 14.03, which noted "that where fund recoveries range

[10] *See also In re Intuniv Antitrust Litig.,* No. 16-12653, 2020 WL 8373393, at *4 (D. Mass. Dec. 9, 2020) (33 1/3%); *Carlson v. Target Enter., Inc.*, 447 F. Supp. 3d 1, 5 (D. Mass. 2020) (23% of the "total value of the settlement fund"); *Bettencourt v. Jeanne D'Arc Credit Union*, No. 17-12548, 2020 WL 3316223, at *3 (D. Mass. June 17, 2020) (27%); *In re Solodyn Antitrust Litig.*, No. 14-2503, 2018 WL 7075881, at *2 (D. Mass. July 18, 2018) (33 1/3%); and *In re Asacol Antitrust Litig.,* No. 15-12730, 2017 WL 11475275, at *4 (D. Mass. Dec. 7, 2017) (33 1/3%).

[11] *See, e.g., Stevens v. SEI Investments Co.*, No. 18-4205, 2020 WL 996148, * 14 (E.D. Pa. Feb. 28, 2020) (awarding 33 1/3% in ERISA case where the parties agreed to early mediation during the initial Rule 16 conference); *Walsh v. Popular, Inc.*, 839 F. Supp. 2d 476, 484–85 (D.P.R. 2012) (court awarded 23%, where case settled "relatively early[,]" "full discovery was not concluded and defendants never filed a motion for summary judgment."); *Puerto Rican Cabotage,* 815 F. Supp. 2d at 459 and 464 (where "lack of discovery diminishes the complexity and duration of the litigation," court awarded 23%); *Conley*, 222 B.R. at 182 and 189 (where liability was a fait accompli and case settled early, court awarded 20-25% of the value added by plaintiffs' counsel to settlement); *see also In re First Databank Antitrust Litig.*, 209 F. Supp. 2d 96, 97-100 (D.D.C. 2002) (court awarded 30% of supplemental recovery, where class action was brought after defendants agreed to settle related litigation brought by the government, there was no formal discovery, no contested motion practice, and class counsel's role limited to negotiating supplemental recovery).

from $51 to $75 million, fee awards usually fall in the 13–20 percent range”). Here, Class Counsel’s fee request of 14.37% of $59.17 million is at the low end of that range.

Information about negotiated continency fee agreements can be used to assess the reasonableness of fee requests. *See, e.g., Colgate-Palmolive Co. ERISA Litig.,* 36 F. Supp. 3d at 352 (“the ‘ideal proxy’ for the award should reflect the fees upon which common fund plaintiffs negotiating in an efficient market for legal services would agree”) (quoting *Goldberger,* 209 F.3d at 52). Professor Silver observes that, when sophisticated clients retain counsel on a contingent fee basis, the fees are almost always set as a fixed percentage that is substantially higher than the 14.37 percent fee Plaintiff is requesting here. Specifically, Professor Silver notes “there is broad agreement that a fee of 32 percent is at the lower end of the range prevailing in most types of plaintiff representations” (¶ 44), that “attorneys regularly contract for contingent fees between 30 percent and 40 percent in non-class, commercial cases (¶ 45), and “[s]ophisticated business clients commonly agree to pay fees of 33 percent or greater when serving as lead plaintiffs in class actions.” ¶ 48. Thus, Plaintiff’s fee request is almost certainly less than what a sophisticated client would have agreed to pay in a contingency fee retainer agreement at the outset of a case. Moreover, Professor Silver analyzed fees in ERISA cases and determined that they were “on par with those made in other class actions,” and thus “awards equal to 15 percent or less are exceedingly uncommon.” ¶ 63. Professor Silver also analyzed cases with comparable recoveries, again finding that “awards rarely fall at or below 15 percent.” ¶ 64. Professor Silver’s findings are consistent with determinations by other courts. *See Kifafi,* 999 F. Supp. 2d at 104 (“‘the market for ERISA Class action attorney’s fees is a contingency fee between 25% and 33%’”) (quoting *Williams v. Rohm and Haas Pension Plan,* 658 F.3d 629, 636 (7th Cir. 2011)).

7. Public Policy Considerations Support the Requested Fee

This case could not have been litigated without substantial expert expenses, the cost of

which (over $350,000) dwarfed the damages suffered by almost all Class Members. It is highly unlikely, therefore, that any recovery would have been possible without the benefit of class action litigation and class counsel willing to invest the money necessary to prosecute the case at substantial risk. In securing a Settlement that will provide thousands of Class Members with additional pension benefits, Class Counsel has advanced an important public policy. *See*, *e.g*., *In re Lupron*, 2005 WL 2006833, at *6 ("there is a significant societal interest in obtaining redress for . . . harms [that] could not, given the cost of litigation, be pursued on an individual basis"). Class Counsel has provided "an invaluable service by aggregating the seemingly insignificant harms endured by a large multitude into a distinct sum where the collective injury can then become apparent." *Puerto Rican Cabotage*, 815 F. Supp. 2d at 463; *see also In re Flag Telecom Holdings, Ltd. Sec. Litig.*, No. 02–3400, 2010 WL 4537550, at *29 (S.D.N.Y. Nov. 8, 2010); *In re The Mills Corp. Sec. Litig.*, 265 F.R.D. 246, 263 (E.D. Va. 2009)).

Beyond that, the judiciary, the public, and class members have a keen interest in the expedient and efficient resolution of meritorious class actions. *See generally* Fed. R. Civ. P. 1 (underlying goal of the Federal Rules of Civil Procedure is to "secure the just, speedy, and inexpensive determination of every action and proceeding"). The ability of Class Counsel to secure the Settlement without the need for protracted and expensive litigation admirably served this important public interest and supports the reasonableness of the fee.

C. A Lodestar Cross-Check Confirms the Reasonableness of the Requested Fee

Although the First Circuit prefers the percentage of fund approach, a lodestar analysis may be performed as simply a check to ensure that the percentage award is fair and reasonable. *See In re Lupron*, 2005 WL 2006833, at *6 *(*quoting *Thirteen Appeals*, 56 F.3d at 307). Such a cross-check can sometimes help "inform the court's inquiry into the reasonableness of a particular

percentage." *In re Thirteen Appeals*, 56 F.3d at 307. Here, a lodestar cross-check confirms that Class Counsel's fee and expense request is within the range of reasonableness.

As of April 14, 2021, Class Counsel reasonably expended more than 2,200 total hours in prosecuting this case, with a total lodestar value of $1,533,176.25. Needham Decl., ¶ 35; Porter Decl., ¶ 6. The requested fee, just over $8.5 million, represents a multiplier of 5.55. This lodestar multiple is well within the range of reasonableness when compared to multiples in other common fund cases. For example, in *New England Carpenters,* this Court awarded a 20% fee that represented an 8.3 lodestar multiple, finding that a "lodestar multiplier in the range of 4.5 to 8.5 was 'unquestionably reasonable'" 2009 WL 2408560, at *1–2, citing *Rite Aid Corp. Sec. Litig.*, 146 F. Supp. 2d 706, 736 n. 44 (E.D. Pa. 2001). Similarly, in *Conley v. Sears, Roebuck & Co.,* 222 B.R. 181, 182 (D. Mass.1998), the Court awarded a fee with a lodestar multiple of approximately 8.9. In a recent ERISA settlement in the Southern District of New York, the court approved a fee request by B&G, finding that a 5.85 lodestar multiplier was "within the range of reasonableness" given the litigation risk, the amount obtained in settlement, and "the fact that the hourly rates identified are below those charged by other firms litigating in this field." *Bekker,* 2020 WL 7043869, at *3. Professor Silver also cites numerous cases where courts have awarded similar multipliers to the one Plaintiff requests here. Silver Decl., ¶ 87.[12]

The hours spent on this case, which are based on hourly records created contemporaneously and maintained in the records of the respective law firms, are reasonable.[13] The hourly rates used

[12] In addition to Class Counsel, Plaintiff's personal attorneys, James Glaser and Sean Flaherty of Keches Law Group, P.C., devoted their time to the case and will be compensated from the award to Class Counsel in accordance with a fee agreement approved by the Plaintiff. Needham Decl., ¶ 44; *see also* Declaration of Sean C. Flaherty.

[13] Upon request by the Court, these records can be submitted for *in camera* review (to protect confidentiality, privilege and work product protection).

to determine the lodestar are also reasonable. The hourly rates for each attorney are the same rates that are billed to hourly clients of the firms, and they have been approved in other ERISA class actions. Needham Decl., ¶ 37; Porter Decl., ¶ 5. These hourly rates are justified by the firms' expertise in complex ERISA class action litigation and are generally lower than the rates charged by opposing counsel, Covington & Burling LLP and Goodwin Procter LLP, as well as other defense firms practicing in the ERISA area against which proposed Class Counsel have frequently litigated. Needham Decl., ¶¶ 39–42. Higher rates to those proposed here were approved in *Kelly v. Johns Hopkins Univ.,* No. 16-2835, 2020 WL 434473, at *6 (D. Md. Jan. 28, 2020) (using hourly rates based on years of experience as follows: $1,060 for 25+ years; $900 for attorneys for 15–24 years; $650 for 5–14 years; $490 for 2–4 years of experience, plus $330 per hour for Paralegals and Law Clerks); *Spano v. Boeing Co.*, No. 06-743, 2016 WL 3791123, at *3 n.2 (S.D. Ill. Mar. 31, 2016) (approving rates $600 per hour for associates and counsel and $1,000 per hour for partners); *Momenta Pharm., Inc. v. Amphastar Pharm., Inc.*, No. 11-11681, 2016 WL 2642997, at *8 (D. Mass. May 9, 2016) (approving rates for partners up to $1,000 per hour, "of counsel" between $595 and $635 per hour and associates between $415 and $695 per hour).

Professor Silver compared Class Counsels' hourly rates to reported rates in bankruptcy cases (where such filings are common), as well as cases where hourly rates were reported in a lodestar cross-check. He concluded that "the rates upon which Class Counsel's lodestar is based are both reasonable and in line with rates in other cases that judges have approved." Silver Decl., ¶ 82. The rates and hours used to calculate the lodestar are therefore reasonable, given the specialized area of law, Class Counsel's development of the underlying legal theory, and their skill, reputation, and expertise. *See New England Carpenters*, 2009 WL 2408560, at *2.

III. COUNSEL SHOULD BE REIMBURSED FOR LITIGATION EXPENSES

Lawyers who recover a common fund for a class are entitled to reimbursement of litigation

expenses that were reasonably and necessarily incurred in connection with the litigation. *Hill v. State St. Corp.,* No. 09-12146, 2015 WL 127728, at *20 (D. Mass. Jan. 8, 2015) (citing *In re Fidelity/Micron Sec. Litig.,* 167 F.3d 735, 737 (1st Cir. 1999)). Here, Class Counsel incurred $388,248.23 in litigation expenses, over 92% of which were paid to experts whose analysis was central to the successful resolution of the case. Needham Decl., ¶ 43; Porter Decl., ¶ 3. This amount does not include Class Counsel's payment for Professor Silver's analysis of the fee request. Needham Decl., ¶ 43.

The expenses itemized above were actually paid, were reasonable and were necessary to the prosecution and resolution of the litigation. Accordingly, Plaintiff requests that the Court award these expenses to Class Counsel, to be paid in accordance with the provisions of the Settlement.

IV. THE REQUESTED CASE CONTRIBUTION AWARD IS FAIR AND REASONABLE

"A named plaintiff is a necessary component of any class action, and thus, an incentive or service award may be appropriate to induce an individual to take part in the suit." *In re TRS Recovery Servs., Inc*., 2016 WL 543137, at *9 (D. Me. Feb. 10, 2016). Lead Plaintiff has been an exemplary representative and an award of $10,000 is reasonable to compensate Lead Plaintiff for his time and service to the Class.

In this case, Lead Plaintiff's considerable efforts contributed substantially to the Settlement. Declaration of Johnny Cruz, ¶¶ 3–4. He has been an active participant from the outset, gathering his relevant documents, reviewing court filings, and consulting with counsel about the case's developments and the Settlement. *Id.; see also* Needham Decl., ¶ 46. The requested award of $10,000 is reasonable given these efforts, and compares very favorably to awards in similar cases. *See*, *e.g.*, *Lauture v. A.C. Moore Arts & Crafts, Inc.,* No. 17-10219, 2017 WL 6460244, at

*3 (D. Mass. June 8, 2017) (awarding $15,000 incentive award to plaintiffs who provided assistance throughout the lawsuit); *see also In re Prudential Ins. Co. of Am. SGLI/VGLI Cont. Litig.,* No. 11-2208, 2014 WL 6968424, at *7 (D. Mass. Dec. 9, 2014) (awarding $10,000 to each of the ten class representatives); and *In re Textron, Inc. ERISA Litig.,* No. 09–383, 2014 WL 2766777, at *4 (D.R.I. Feb. 10, 2014) (case contribution awards of $10,000).

The requested award will also encourage people to perform the important service of acting as a class representative in future cases. It took considerable courage for Lead Plaintiff to bring these claims against Raytheon, one of the world's largest companies. *Bekker,* 2020 WL 7043869, *3 (approving $20,000 award to lone named plaintiff in $17 million settlement because "[p]laintiff willingly put himself forward in litigation against his former employer regarding his personal finances" and "as the sole class representative the litigation could not have continued without him."). Granting an award to Lead Plaintiff will encourage others to come forward. *See Scovil v. FedEx Ground Package Sys, Inc.*, No. 10-515, 2014 WL 1057079, at *6 (D. Me. Mar. 14, 2014). Accordingly, the Court should find that an of $10,000 to Lead Plaintiff is reasonable in this case.

V. CONCLUSION

Based on the foregoing, and for the reasons set forth in the final approval memorandum submitted herewith, Class Counsel respectfully requests that the Court enter an Order awarding $8,501,751.77 in attorneys' fees, $388,248.23 in litigation expenses, and a Case Contribution Award of $10,000 to Mr. Cruz.

Dated: April 16, 2021

<u>/s/ Douglas P. Needham</u>
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CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic File (NEF) on April 16, 2021.

/s/ Douglas P. Needham
Douglas P. Needham