UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Jennifer Baker and Jean Greenberg, as representatives of a class of similarly situated persons, and on behalf of the Investment-Incentive Plan for John Hancock Employees, Plaintiffs, v. John Hancock Life Insurance Company (U.S.A.) and the John Hancock US Benefits Committee, Defendants.	Case No. 1:20-cv-10397-RGS **MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR APPROVAL OF ATTORNEYS' FEES AND COSTS, ADMINISTRATIVE EXPENSES, AND CLASS REPRESENTATIVE SERVICE AWARDS**

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INTRODUCTION

In light of the Settlement that they have achieved for the participants and beneficiaries of the Investment-Incentive Plan for John Hancock Employees ("Plan"), Plaintiffs and Class Counsel respectfully petition the Court to approve: (1) attorneys' fees to Class Counsel in the amount of $3,500,000 (25% of the $14 million Settlement Fund); (2) reimbursement of $38,475.13 in litigation costs and $85,087 in settlement administration expenses; and (3) service awards in the amount of $10,000 to each of the Named Plaintiffs as class representatives.

As discussed below, the requested distributions are appropriate under the Settlement Agreement and reasonable in comparison to awards in similar cases. For example, Class Counsel's requested fee of 25% of the Settlement Fund is ***less*** than the one-third amount allowed under Settlement Agreement, *see ECF No. 64-1 ("Settlement Agreement") ¶ 1.4*, and ***less*** than the "one-third fee [that] is consistent with the market rate in a complex ERISA 401(k) fee case such as this[.]" *Kruger v. Novant Health, Inc.*, 2016 WL 6769066, at *2 (M.D.N.C. Sept. 29, 2016) (quotations and citation omitted). "In such cases, courts have consistently awarded one-third contingent fees," *Krueger v. Ameriprise Fin., Inc.*, 2015 WL 4246879, at *2 (D. Minn. July 13, 2015), including two recent ERISA cases in this District involving the same counsel (Nichols Kaster, PLLP and Block & Leviton LLP). *See Moitoso v. FMR LLC*, No. 1:18-cv-12122, ECF No. 271 (D. Mass. Feb. 26, 2021) (approving one-third fee from net settlement fund following deduction of expenses from fund); *Brotherston v. Putnam Invs. LLC*, No. 1:15-cv-13825, ECF No. 237 (D. Mass. Apr. 6, 2021) (same).[1] Moreover, the requested 25% fee is ***less*** than the fees that

[1] *See also Karpik v. Huntington Bancshares Inc.*, 2021 WL 757123, at *1 (S.D. Ohio Feb. 18, 2021) (approving one-third fee to Nichols Kaster, PLLP in ERISA class action); *Intravaia v. Nat'l Rural Elec. Coop. Assoc.*, No. 1:19-cv-973, ECF No. 114 (E.D. Va. Feb. 25, 2021) (same); *Beach v. JPMorgan Chase Bank*, No. 1:17-cv-00563, ECF No. 232 at ¶¶ 2, 3 (S.D.N.Y. Oct. 7, 2020) (same); *In re M&T Bank Corp. ERISA Litig.*, No. 1:16-cv-375, ECF No. 190 at ¶ 1 (W.D.N.Y. Sept. 3, 2020) (same); *Larson v. Allina Health System*, No. 0:17-cv-03835, ECF No. 132 at ¶¶ 4–

were recently awarded in another recent case in this District involving a similar ERISA settlement. *See Tracey v. Mass. Inst. Tech.*, No. 1:16-cv-11620, ECF No. 317 (D. Mass. May 29, 2020) (approving attorneys' fees of $5,249,000, representing 29% of $18.1 million settlement fund).

Likewise, the proposed $10,000 service awards to the class representatives are authorized under the Settlement, *see Settlement Agreement, ¶ 7.2*, and well within the bounds of what has been approved in other ERISA cases. *See, e.g., Brotherston*, No. 1:15-cv-13825, ECF No. 237 (approving $25,000 service awards); *Tracey*, No. 1:16-cv-11620, ECF No. 317 (same); *Moitoso*, No. 1:18-cv-12122, ECF No. 271 (approving $10,000 service awards).

Finally, the requested expenses are typical and reasonable in comparison to other cases. *See, e.g., Moitoso*, No. 1:18-cv-12122, ECF No. 271 (approving reimbursement of $1,378,437.13 in litigation expenses and $115,302 in settlement administration expenses); *Brotherston*, No. 1:15-cv-13825, ECF No. 237 (approving $479,213 in expenses); *Tracey*, No. 1:16-cv-11620, ECF No. 317 (approving "reimbursement of expenses in the amount of $522,021.93 to be paid from the settlement amount").

Accordingly, Plaintiffs and Class Counsel respectfully request that the Court approve the requested distributions. As of the date of this motion, no Class Member has objected to the proposed distributions, and Defendants also do not oppose the motion.

BACKGROUND

I. PROCEDURAL HISTORY

A. Pleadings and Court Proceedings

Plaintiff Jennifer Baker filed the initial Class Action Complaint on February 27, 2020,

5 (D. Minn. May 22, 2020) (same); *Stevens v. SEI Invs. Co.*, 2020 WL 996418, at *13 (E.D. Pa. Feb. 28, 2020) (same); *Sims v. BB&T Corp.*, 2019 WL 1995314, at *2 (M.D.N.C. May 6, 2019) (same); *Clark v. Oasis Outsourcing Holdings Inc.*, No. 18-81101, ECF No. 23 at ¶ 1 (S.D. Fla. Dec. 20, 2018) (same); *Andrus v. New York Life Ins. Co.*, No. 16-05698, ECF No. 83 at ¶ 1 (S.D.N.Y. June 15, 2017) (same).

alleging that Defendants breached their fiduciary duties of prudence and loyalty under ERISA by selecting, monitoring, and retaining John Hancock-affiliated investments for the Plan that performed worse than nonproprietary alternatives. *See ECF No. 1*. Plaintiffs later filed a First Amended Complaint ("FAC") that included additional allegations regarding the investments in the Plan (including their expenses), a claim for failure to monitor the Plan's fiduciaries against John Hancock, and an additional Named Plaintiff, Jean Greenberg.[2] *ECF No. 19*. Defendants moved to dismiss, *ECF No. 32*, and the Court denied Defendants' motion on July 23, 2020. *ECF No. 43.* Defendants filed an Answer on August 7, 2020. *ECF No. 44*.

On February 12, 2021, Plaintiffs filed an unopposed motion for class certification, *ECF No. 53*, which the Court granted on February 17, 2021. *ECF No. 59*. In the meantime, the parties engaged in discovery, as outlined below.

B. Discovery, Mediation, and Settlement

Prior to settling, Defendants produced over 5,000 pages of documents, and Plaintiffs produced over 4,000 pages. *Declaration of Kai Richter in Support of Motion of Preliminary Approval of Class Action Settlement ("First Richter Decl."), ECF No. 64, ¶ 10.* Plaintiffs also served interrogatories on Defendants (to which Defendants responded), and responded to interrogatories served by Defendants. *Id.* In addition, Class Counsel noticed the deposition of a witness associated with John Hancock for February 10, 2021, but that deposition was postponed when a necessary participant was diagnosed with COVID-19. *Id.*

On February 12, 2021, the Parties jointly requested a 75-day stay of the action to allow the parties to attempt to voluntarily resolve this action through mediation. *ECF No. 57.* The Parties then engaged in a full-day mediation on April 9, 2021 before the Honorable Layn Phillips, a former

[2] Plaintiffs' FAC also included Gregory Benloss as a plaintiff, who was subsequently voluntarily dismissed from this action without prejudice. *See ECF Nos. 51, 52.*

United States District Judge. *First Richter Decl. ¶ 11.* At the conclusion of the mediation, Judge Phillips made a mediator's proposal to settle the Action, which both Parties accepted. *Id. ¶ 12.*

II. SETTLEMENT TERMS AND PRELIMINARY APPROVAL

Under the Settlement, John Hancock will contribute a Gross Settlement Amount of $14 million to a common settlement fund (the "Settlement Fund"). *Settlement Agreement ¶¶ 1.30, 4.1, 4.2.* After accounting for any Attorneys' Fees and Costs, Administrative Expenses, and class representative Service Awards approved by the Court, the Net Settlement Amount will be distributed to eligible Class Members. *Id. ¶¶ 1.34, 5.2-5.3.*

In addition to this monetary relief, the Settlement also provides that the following procedures shall be undertaken on a prospective basis as of the Settlement Effective Date:

(a) Defendants shall retain an independent third-party investment consultant to provide ongoing monitoring and review of the investment options in the Plan's investment lineup for at least five years from the Settlement Effective Date;

(b) Defendants shall develop and approve an Investment Policy Statement ("IPS") for the Plan; and,

(c) At or before the expiration of the Plan's current recordkeeping contract, Defendants will utilize the services of an independent consultant to assist with negotiating the next recordkeeping agreement and issuing a request for information for recordkeeping services.

Settlement Agreement ¶ 6.1.

Plaintiffs filed a motion seeking preliminary approval of the Settlement on June 1, 2021. *ECF No. 62*. The Court granted that motion on June 2, 2021. *ECF No. 67*. Plaintiffs are filing the present motion 14 days in advance of the deadline for objections, pursuant the Court's order preliminarily approving the Settlement. *Id. ¶ 6*. To date, no objections to the Settlement or the requested distributions have been received. *Declaration of Kai Richter in Support of Motion for*

Attorneys' Fees and Costs, Administrative Expenses, and Class Representative Service Awards ("Second Richter Decl.") ¶ 26.

III. WORK OF CLASS COUNSEL

Class Counsel have expended significant time and effort prosecuting this action and achieving the Settlement on behalf of the Class. This work is detailed in the accompanying declaration from Class Counsel, and is briefly summarized below.

A. Work Conducted to Date

Prior to filing this action, Class Counsel conducted an in-depth investigation of the Plan and the Plan's investments. *First Richter Decl. ¶ 10*. Thereafter, Class Counsel vigorously prosecuted the action on behalf of the class. Among other things, Class Counsel: (1) drafted the initial class action Complaint and First Amended Complaint; (2) responded to Defendants' motion to dismiss; (3) drafted a comprehensive set of discovery requests; (4) responded to Defendants' discovery requests; (5) repeatedly met and conferred with Defendants during the course of discovery; (6) reviewed over 5,000 pages of documents produced by Defendants; (7) produced over 4,000 pages of documents; (8) successfully moved for class certification; (9) drafted a written mediation statement and reply statement; (10) participated in a full-day mediation with Defendants; and (11) consulted with the Named Plaintiffs throughout the course of the case. *Second Richter Decl. ¶ 10.*

In addition, Class Counsel have undertaken considerable work in connection with the Settlement and settlement administration. This has included (1) drafting the Settlement Agreement and exhibits thereto; (2) preparing Plaintiffs' Preliminary Approval Motion papers; (3) reviewing the bid received from the Settlement Administrator (Analytics Consulting); (4) reviewing the final drafts of the Notices of Settlement and Former Participant Rollover Form prepared by the

Settlement Administrator, and ensuring that they were timely mailed; (5) working with the Settlement Administrator to create a settlement website and telephone support line for Class Members; (6) communicating with Class Members; (7) communicating with the Independent Fiduciary (Newport Trust Company) and providing it with information in connection with its review of the proposed release on behalf of the Plan;[3] and (8) preparing the present motion. *Id.*

B. Remaining Work to Be Performed

Class Counsel's work on this matter remains ongoing. Prior to the Fairness Hearing, Class Counsel will draft Plaintiffs' motion for final approval of the Settlement and respond to any objections. *Id. ¶ 15*. Class Counsel will then attend the Fairness Hearing, and if final approval is granted, supervise the distribution of payments to Class Members. *Id.* In addition, Class Counsel will continue to respond to questions from Class Members and take any other actions necessary to support the Settlement until the conclusion of the Settlement Period. *Id.*

IV. WORK OF NAMED PLAINTIFFS

The Named Plaintiffs also have worked to advance the interests of the class. Among other things, the Named Plaintiffs: (1) reviewed the allegations in the Complaints bearing their names; (2) provided information to counsel in connection with the lawsuit; (3) produced documents in response to Defendants' discovery requests; (4) reviewed and signed answers to interrogatories; (5) communicated with counsel regarding the litigation and Settlement; and (6) reviewed the Settlement Agreement in its entirety. *Id. ¶ 24*; *see also ECF Nos. 65-66* (Plaintiff declarations).

V. WORK OF THE ADMINISTRATOR, ESCROW AGENT, AND INDEPENDENT FIDUCIARY

Finally, in order to be administered and effectuated, the Settlement also requires time, resources, and expertise from several non-parties. *See Settlement Agreement ¶¶ 1.23, 1.31, 1.50.*

[3] A release on behalf of a plan is subject to independent fiduciary review under Prohibited Transaction Class Exemption 2003-39, 68 Fed. Reg. 75,632, as amended (Dec. 31, 2003). This independent review is also required by Paragraph 2.2 of the Settlement Agreement.

Analytics, as the approved Settlement Administrator, disseminated the Notices of Settlement to Class Members and established the settlement website and telephone message line. *Id.* ¶¶ *3.2-3.3; Second Richter Decl.* ¶ *20*. Analytics also will review the Former Participant Rollover Forms submitted by Former Participant Class Members, and coordinate distribution of payments to Class Members in the event that the Settlement receives final approval. *Settlement Agreement* ¶¶ *3.4, 5.1-5.4.* The Escrow Agent (Alerus) will hold the monies in the Settlement Fund while approval of the Settlement and distributions to Class Members are pending. *Id.* ¶¶ *4.1-4.2*. Upon final approval of the Settlement, Alerus will release these funds and also execute the investment and tax qualification mandates in the Settlement Agreement. *Id.* ¶¶ *4.8, 4.10*. Finally, Newport Trust Company will review the Settlement, and independently determine whether it is in the best interest of the Plan to release its claims against Defendants in exchange for the relief provided. *Id.* ¶ *2.2*. This independent fiduciary review is called for by DOL regulations and is also required by Paragraph 2.2 of the Settlement Agreement. *See supra* at n.3.

VI. ATTORNEYS' FEES, EXPENSES, AND SERVICE AWARDS SOUGHT

In consideration of the work summarized above and associated expenses, the Settlement Agreement provides that Plaintiffs may seek (1) reasonable attorneys' fees of no more than one-third of the Gross Settlement Amount; (2) reasonable litigation costs and administrative expenses; and (3) service awards of up to $10,000 for each class representative. *Settlement Agreement* ¶¶ *7.1-7.2*. Accordingly, Plaintiffs seek the following amounts in connection with this motion:

- Attorneys' fees: $3,500,000 (25% of the settlement amount, instead of one-third)
- Litigation Expenses: $38,475.13
- Settlement Administration Expenses: $85,087
    - Settlement Administrator (Analytics): $62,587
    - Escrow Agent (Alerus): $2,500
    - Independent Fiduciary (Newport Trust): $20,000
- Named Plaintiffs Service Awards: $20,000 total ($10,000 each)

ARGUMENT

I. LEGAL STANDARD

When counsel obtain a settlement for a class, courts "may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement." Fed. R. Civ. P. 23(h). Here, the requested distributions are authorized both under Article 7 of the Settlement Agreement (*see supra* at 7) and by applicable law.

The Supreme Court "has recognized consistently that a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). Likewise, "reasonable expenses of litigation" may be recovered from a common fund. *See Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375, 391-92 (1970),[4] as well as administrative expenses of settlement, *see In re Prudential Ins. Co. of Am. SGLI/VGLI Contract Litig.*, 2014 WL 6968424, at *7 (D. Mass. Dec. 9, 2014). Finally, class representative service awards "serve an important function in promoting class action settlements" and may be awarded to compensate efforts undertaken on behalf of class members. *In re Lupron Mktg. & Sales Practices Litig.*, 2005 WL 2006833, at *7 (D. Mass. Aug. 17, 2005). In summary, the requested distributions are customary in a class action such as this, and should be approved for the reasons set forth below.

II. THE COURT SHOULD GRANT CLASS COUNSEL'S REQUEST FOR ATTORNEYS' FEES

Courts typically employ either the "percentage of the fund" method or the "lodestar" method to compute fees, with the First Circuit preferring the former. *Bacchi v. Mass. Mut. Life Ins. Co.*, 2017 WL 5177610, at *4 (D. Mass. Nov. 8, 2017), *appeal dismissed*, 2018 WL 2337712 (1st Cir. Mar. 29, 2018) ("The First Circuit has recognized that the 'prevailing praxis' for such

[4] *See also In re Fidelity,* 167 F.3d 735, 737 (1st Cir. 1999) (when a common fund is created "for the benefit of a class" then parties may seek from the fund "expenses, reasonable in amount, that were necessary to bring the action to a climax").

determination is the 'percentage of fund' approach") (citing *In re Thirteen Appeals Arising Out of San Juan Dupont Plaza Hotel Fire Litig*., 56 F. 3d 295, 305 (1st Cir. 1995)). Under either method, the Court's primary concern is whether the requested fee is reasonable. *In re Lupron*, 2005 WL 2006833, at *2 (citing *Boeing Co,* 444 U.S. at 478).

Although the First Circuit has not articulated a particular set of factors for assessing the reasonableness of a fee request, district courts in the circuit generally analyze factors such as: (1) awards in similar cases; (2) the size of the fund and benefit to class members; (3) the risk that the litigation would be unsuccessful; (4) the skill and experience of counsel; (5) the time and labor expended by counsel; (6) any objections to the settlement; and, (7) applicable public policy considerations. *See In re Relafen Antitrust Litigation*, 231 F.R.D. 52, 79 (D. Mass 2005); *In re Lupron*, 2005 WL 2006833, at *3. Each of these factors support approval of the requested fee.

A. The Requested Fee Is Reasonable in Comparison to Awards in Similar Cases

The requested fee of 25% of the settlement is not only reasonable, but substantially *less* than the one-third fee award consistently granted in ERISA cases. As the court stated in *Krueger* (another case involving breach of fiduciary duty claims regarding a defined contribution plan):

> [I]n comparing the requested fee with fee awards in similar cases, the relevant comparators are ERISA class actions asserting breaches of fiduciary duties in…defined contribution plan[s] []. **In such cases, courts have consistently awarded one-third contingent fees**.

2015 WL 4246879, at *2 (emphasis added); *see also Kruger*, 2016 WL 6769066, at *2 ("[C]ourts have found that a one-third fee is consistent with the market rate" in complex ERISA class actions) (quotation omitted); *Tussey v. ABB, Inc.*, 2019 WL 3859763, at *4 (W.D. Mo. Aug. 16, 2019) ("*Tussey II*") ("Class Counsel's requested one-third fee is common in these cases."). Consistent with this established benchmark, Class Counsel have received one-third fee awards in several ERISA cases, *see supra* at 1 & n.1, including two cases in this District, *see Moitoso*, No. 1:18-cv-

12122, ECF No. 271; *Brotherston*, No. 1:15-cv-13825, ECF No. 237. In addition, a one-third fee was recently approved in another ERISA case in this District. *See Price v. Eaton Vance Corp.*, No. 18-12098, ECF Nos. 62, 63 (D. Mass. Nov. 25, 2019).[5]

Even where courts do not award the standard one-third fee, the amount of fees awarded is consistently at least 25%, and often greater. For example, Judge Gorton approved a 29% fee in connection with an $18.1 million ERISA settlement involving MIT's defined contribution plan. *See Tracey*, No. 1:16-cv-11620, ECF No. 317. Similarly, Judge Zobel approved a 25% fee in connection with an ERISA settlement involving Massachusetts Financial Services, *see Velazquez v. Mass. Fin. Services Co.*, No. 17-cv-11249, ECF No. 109 (D. Mass. Dec. 5, 2019), and a 30% fee in connection with another ERISA class action settlement, *see Boyajian v. California Products Corp.*, 2013 WL 3828804, at *2 (D. Mass. July 9, 2013). And Class Counsel were recently awarded a 25% fee by Judge Sorokin in connection with an ERISA class action that settled at a similar stage, *Toomey v. Demoulas Super Markets, Inc.*, No. 19-cv-11633, ECF No. 99 (D. Mass. Apr. 7, 2021), and also have received multiple fee awards in this 25% to 30% range in other ERISA cases.[6]

In summary, the requested 25% fee is substantially less than the one-third "market rate" in ERISA cases, and falls at the low end of the range even considering cases that have awarded less than the standard market rate. Accordingly, the first factor (awards in similar cases) weighs strongly in favor of approval of the requested fee.

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[5] Courts in this District have frequently awarded one-third fees in other cases as well. *See Roberts v. TJX Companies, Inc.*, 2016 WL 8677312, at *13 (D. Mass. Sept. 30, 2016) (awarding 33% of $4,750,000 settlement); *In re Relafen*, 231 F.R.D. at 82 (awarding one-third of $67,000,000 settlement); *Lauture v. A.C. Moore Arts & Crafts, Inc.*, 2017 WL 5900058, at *1 (D. Mass. Nov. 28, 2017) (awarding one-third fee); *Lapan v. Dick's Sporting Goods*, No. 13-cv-11390, ECF No. 220 ¶ 17 (D. Mass. Apr. 19, 2016) (same).

[6] *See, e.g., Moreno v. Deutsche Bank Americas Holding Corp.*, No. 1:15-cv-09936, ECF No. 348 (S.D.N.Y. Mar. 7, 2019) (awarding 30% fee to Nichols Kaster, PLLP); *Main v. Am. Airlines, Inc.*, No. 4:16-00473, ECF No. 138 (N.D. Tex. Feb. 21, 2018) (30%); *Urakhchin v. Allianz Asset Mgmt. of Am., L.P.*, No. 8:15-cv-01614, ECF No. 185 (C.D. Cal. July 30, 2018) (25%); *Johnson v. Fujitsu Tech. & Bus. of Am., Inc.*, 2018 WL 2183253 (N.D. Cal. May 11, 2018) (25%).

B. The Benefit Obtained for Class Members is Substantial

The results achieved in this case also support the requested fee. The $14,000,000 settlement amount is substantial in relation to other ERISA settlements involving defined contribution plans. *See First Richter Decl.* ¶ *6.* On an aggregate basis, the recovery is greater than the ERISA settlements involving Putnam ($12.5 million), Massachusetts Financial Services ($6.875 million), and Eaton Vance ($3.45 million). *Id.* Similarly, on a percentage-of assets basis, the $17.5 million settlement represents approximately 0.76% of Plan assets, which is greater than the settlements involving Massachusetts Financial Services (0.64%), MIT (0.33%) and Fidelity (0.14%). *Id.*[7]

Moreover, the settlement provides for prospective relief, including the retention of a third-party investment consultant to provide ongoing monitoring and review of the Plan's investment lineup for at least five years, the development of an IPS for the Plan, and the assistance of an independent consultant to negotiate the next recordkeeping agreement and issue a related request for information. *See supra* at 4. These non-monetary benefits further support approval of the requested fee. *See Kruger*, 2016 WL 6769066, at *3 ("Considering the non-monetary benefits and relief created by counsel's efforts is important because it encourages attorneys to obtain meaningful affirmative relief.") (approving one-third fee); *Moreno*, No. 1:15-cv-09936, ECF No. 348 at 4 ("In light of the substantial non-monetary benefits achieved by the settlement, an upward

[7] As another metric, the $14 million recovery represents approximately 20-23% of the alleged losses to the Plan during the Class Period. *See First Richter Decl.* ¶ *7.* This is also on par with other settlements that have been approved. *See Sims*, 2019 WL 1995314, at *5 (approving one-third fee to Nichols Kaster, PLLP in connection with $24 million ERISA 401(k) settlement that represented 19% of estimated damages); *Johnson*, 2018 WL 2183253, at *6-7 (approving 25% fee to Nichols Kaster, PLLP in connection with $14 million ERISA 401(k) settlement that represented "just under 10% of the Plaintiffs' most aggressive 'all in' measure of damages"); *accord Toomey v. Demoulas Super Markets, Inc.*, No. 1:19-cv-11633, ECF No. 95 at 10 (Mar. 24, 2021) (noting that recovery represented approximately 15% – 20% of alleged damages); ECF No. 100 (D. Mass. Apr. 7, 2021) (granting final approval); *Price v. Eaton Vance Corp.*, No. 18-12098, ECF No. 32 at 12 (May 6, 2019) (noting that recovery represented 23% of calculated damages); ECF No. 57 (D. Mass. Sept. 24, 2019) (granting final approval).

adjustment to the baseline fee is warranted.") (approving 30% fee); *Bezdek v. Vibram USA Inc.*, 79 F. Supp. 3d 324, 347 (D. Mass. 2015), *aff'd*, 809 F.3d 78 (1st Cir. 2015) (injunctive relief is "a valuable contribution to this settlement agreement.") (approving 25% fee).

C. ERISA Litigation is Complex and Involves Significant Risks

The results that were achieved are especially impressive in light of the risks involved. Litigation inherently involves "a significant element of risk." *In re Lupron*, 228 F.R.D. 75, 97 (D. Mass. 2005). These risks are only amplified in complex ERISA cases such as this. *See Ameriprise*, 2015 WL 4246879, at *1 ("ERISA is a complex field that involves difficult and novel legal theories and often leads to lengthy litigation."); *Abbott v. Lockheed Martin Corp.*, 2015 WL 4398475, at *2 (S.D. Ill. July 17, 2015) (noting that ERSIA 401(k) cases are "particularly complex"); *In re Marsh ERISA Litig.*, 265 F.R.D. 128, 138 (S.D.N.Y. 2010) ("Many courts have recognized the complexity of ERISA breach of fiduciary duty actions.").

For example, the court entered judgment in favor of the defendants following seven days of trial in the *Putnam* case in this District (which also involved the inclusion of proprietary funds in a 401(k) plan). *See Brotherston v. Putnam Invs., LLC*, 2017 WL 2634361 (D. Mass. June 19, 2017), *aff'd in part, vacated in part, remanded,* 907 F.3d 17 (1st Cir. 2018). Although the parties settled after the First Circuit partially vacated the defense judgment and remanded the matter for further proceedings, *see* 907 F.3d at 23, the proceedings in that case illustrate the risks posed by a case such as this. In two other recent trials involving defined contribution plans, the defendants also were the prevailing party. *See Wildman v. Am. Century Servs., LLC*, 362 F. Supp. 3d 685, 711 (W.D. Mo. 2019); *Sacerdote v. New York Univ.*, 328 F. Supp. 3d 273 (S.D.N.Y. 2018). The risks associated with this action, which Class Counsel handled on a strictly contingent fee basis, further support the reasonableness of the fee request.

D. Class Counsel Are Skilled and Provided High Quality Representation

Handling a large and complex ERISA case involving a retirement plan requires counsel with specialized skills. *See Savani v. URS Prof. Solutions LLC*, 121 F. Supp. 3d 564, 573 (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"). Counsel must possess "expertise regarding industry practices" and also be able to analyze pertinent records and data. *See Novant Health,* 2016 WL 6769066, at *3. In addition, there are "difficult" questions regarding the appropriate measure of "recovery from a trustee for imprudent or otherwise improper investments." Restatement (Third) of Trusts, § 100 cmt. b(1) (2012); *see also Tussey v. ABB, Inc.*, 2017 WL 6343803, at *1-3 (W.D. Mo. Dec. 12, 2017) ("*Tussey I*") (summarizing more than five years of post-trial briefing, including appeals, on the measure of damages in a 401(k) case, and declaring the need for further submissions from the parties).

Courts have recognized Class Counsel's experience and qualifications in this difficult area. *See, e.g., Karpik*, 2021 WL 757123, at *9 ("Class Counsel is one of the relatively few firms in the country that has the experience and skills necessary to successfully litigate a complex ERISA action such as this."); *Moreno v. Deutsche Bank Americas Holding Corp.*, 2017 WL 3868803, at 11 (S.D.N.Y Sept. 5, 2017) ("Plaintiffs' counsel are experienced litigators who serve as class counsel in ERISA actions involving defined-contribution plans."). As set forth in the accompanying Declaration, Class Counsel have won favorable rulings on class certification and dispositive motions in several ERISA cases, recently tried three other ERISA class actions, successfully litigated an appeal before the First Circuit in *Putnam*, and have negotiated class action settlements that have received court approval in numerous cases in addition to this case. *Second Richter Decl.* ¶¶ *6-7.* Based on their experience, the firm's attorneys have been interviewed by

several media outlets in connection with their ERISA work, and Nichols Kaster's undersigned counsel has spoken at multiple national forums on ERISA litigation. *Id.* ¶ *8.* Class Counsel's experience in similar litigation further weighs in favor of the requested fee. *See Hill v. State St. Corp.*, 2015 WL 127728, at *17 (D. Mass. Jan. 8, 2015); *Bezdek*, 79 F. Supp. 3d at 350.

E. Class Counsel Invested Significant Time and Effort to the Case

The requested fee is also reasonable considering the efforts expended by counsel. As noted above, Class Counsel undertook a thorough investigation of the matter prior to filing suit; drafted a detailed complaint and amended complaint; defeated a motion to dismiss; drafted a comprehensive set of discovery requests; responded to discovery; repeatedly met and conferred with Defendants; reviewed over 5,000 pages of documents; obtained class certification; drafted a lengthy mediation statement; engaged in a full-day mediation; drafted the Settlement Agreement and accompanying exhibits; worked closely with Analytics as part of the settlement administration process; and prepared all of the motion papers in connection with the Settlement. *See supra* at 5-6. As of the date of this motion, Class Counsel's lodestar is already approximately $704,157.50.[8] *Second Richter Decl. ¶ 13*. Moreover, because additional work remains to be done, the lodestar amount will increase by the time the action is concluded.[9]

[8] The hourly rates used to calculate Class Counsel's lodestar are "reasonable and are comparable to fees that have been recently approved in [other] ERISA class actions." *Sims*, 2019 WL 1993519, at *3 (addressing and approving Nichols Kaster's billing rates); *see also Johnson*, 2018 WL 2183253, at *7 (finding Nichols Kaster's billing rates in ERISA class action to be "reasonable"). Indeed, these rates are less than the rates approved for other experienced ERISA litigators. *See e.g.*, *Pledger v. Reliance Tr. Co.*, 2021 WL 2253497, at *7 (N.D. Ga. Mar. 8, 2021) (adopting rates of $490 to $1,060 per hour based on years of experience); *Kruger*, 2016 WL 6769066, at *4 (adopting rates of $460 to $998 per hour based on years of experience); *Spano v. Boeing Co.*, 2016 WL 3791123, at *3 (S.D. Ill. Mar. 31, 2016) (same); *Abbott*, 2015 WL 4398475, at *3 (adopting rates of $447 to $974 per hour based on years of experience). Moreover, the hours expended were reasonable given the difficult and complex nature of the action. Other firms with less experience would not have been able to litigate the case nearly as efficiently.

[9] This additional work should be considered by the Court in connection with the present motion. *See Yuzary v. HSBC Bank USA, N.A.*, 2013 WL 5492998, at *11 (S.D.N.Y. Oct. 2, 2013) ("[W]here

Due to the risks associated with contingent fee litigation, Class Counsel are entitled to an appropriate multiplier. *See City of Detroit v. Grinnell*, 495 F.2d 448, 470 (2d Cir. 1974) ("No one expects a lawyer whose compensation is contingent upon his success to charge, when successful, as little as he would charge a client who in advance had agreed to pay for his services, regardless of success."). While the multiplier here falls on the higher end (~4.97 at the time of this motion), it is within the range that Courts in this District have approved and determined to be reasonable, including in another ERISA class action in this District involving Class Counsel that settled at a similar stage. *See Toomey*, No. 19-cv-11633, ECF No. 88, at 14 (Feb. 8, 2021) (plaintiffs' memorandum noting class counsel's lodestar was $507,762), ECF No. 99 (D. Mass. Apr. 7, 2021) (order approving requested 25% fee of $4,375,000, resulting in lodestar multiplier of 8.6); *see also Conley v. Sears Roebuck & Co.*, 222 B.R. 181, 182 (D. Mass. 1998) (approving $7.5 million in attorneys' fees at lodestar multiplier of 8.9); *New England Carpenters Health Benefits Fund v. First Databank, Inc.*, 2009 WL 2408560, at *2 (D. Mass. Aug. 3, 2009) (approving $70 million fee, and finding a lodestar multiplier of 8.3 to be reasonable).[10]

Moreover, several factors specific to this case demonstrate why it is reasonable under the circumstances. First, as noted above, the recovery for the class is significant. *See supra* at 11; *see also In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 302 (3d Cir. 2005) (weighing size of common fund in awarding large multiplier). The higher recovery results in a higher multiplier because the

class counsel will be required to spend significant additional time on this litigation in connection with implementing and monitoring the settlement, the multiplier will actually be significantly lower because the award includes not only time spent prior to the award, but after in enforcing the settlement.") (citation and quotation marks omitted).

[10] The multiplier is also less than in similar ERISA class actions that have awarded a greater percentage of the settlement fund. *See, e.g.*, *SEI Invs.*, No. 2:18-cv-04205, ECF No. 45 (Feb. 28, 2020) (plaintiffs' memorandum noting that class counsel's requested one-third fee resulted in a 6.16 multiplier), 2020 WL 996418, at *13 (order approving requested fee); *Andrus*, No. 16-05698, ECF No. 74 (Apr. 14, 2017) (plaintiffs' memorandum requesting one-third of $3 million settlement and noting class counsel's lodestar stood at $169,312.50, resulting in multiplier of 5.9), ECF No. 83 at ¶ 1 (S.D.N.Y. June 15, 2017) (approving requested fee).

requested 25% contingent fee is tied to the size of the recovery. A larger recovery should work in favor of Class Counsel's fee request, not against it.

Second, the size of the multiplier is also due to the fact that the case settled early. Class Counsel should not be "penalize[ed] … for achieving an early settlement, particularly where, as here, the settlement amount is substantial." *Zeltser v. Merrill Lynch & Co., Inc.*, 2014 WL 4816134, at *10 (S.D.N.Y. Sept. 23, 2014); *see also Sala v. National Railroad Passenger Corp.*, 128 F.R.D. 210, 215 (E.D. Pa. 1989) ("[I]t would be the height of folly to penalize an efficient attorney for settling a case on the ground that less total hours were expended in the litigation.") (internal quotation omitted). While continued litigation would have yielded a lower multiplier, it would not have benefitted the class. *See McKenzie Constr. Co. v. Maynard*, 758 F. 2d 97, 101-02 (3d Cir 1985) ("a prompt and efficient attorney who achieves a fair settlement without litigation serves both his client and the interests of justice"). Because the case settled early, Class Counsel have substantially discounted their standard market rate from 33.3% to 25%. This is a significant additional benefit to the class.

Third, in achieving a substantial early settlement on behalf of the class, Class Counsel did not rely "on the fruits of any official investigation." *In re Rite Aid Corp. Sec. Litig.*, 362 F. Supp. 2d 587, 590 (E.D. Pa. 2005) (25% fee award yielding 6.96 multiplier was reasonable in part because claims were identified through counsel's own investigation). The result is strictly attributable to Class Counsel's own work.

Finally, Class Counsel's relatively modest lodestar reflects, in large part, the fact that Class Counsel were able to leverage their experience from prior cases. Other firms with less experience would not have been able to litigate the case nearly as efficiently, if at all. Moreover, Class Counsel staffed the case efficiently. Nearly 90% of the total attorney hours were performed by a core team

of two attorneys, comprising one associate (who spent the bulk of the time on the file) and one partner. *See Second Richter Decl. Ex. 2*. Class Counsel's lean and efficient staffing provides further context for the multiplier.

F. There Have Been No Objections to the Settlement or the Requested Fees

Notably, there have been no objections to the Settlement or the requested attorneys' fees as of the date of this motion. *See Second Richter Decl. ¶ 26.* This further demonstrates the fairness of the Settlement and the reasonableness of the requested 25% fee. *See Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 118 (2d Cir. 2005) (finding that "absence of substantial opposition is indicative of class approval"); *Roberts*, 2016 WL 8677312, at *11; *Tussey II*, 2019 WL 3859763. This is especially so, given that the Settlement Notices disclosed that Class Counsel could seek up to a one-third fee. *See ECF No. 64-1 at 33-34* ("Class Counsel will apply to the Court for an award of reasonable attorneys' fees (not to exceed one-third of the settlement fund), plus their costs and settlement administrative expenses.").

G. Public Policy Supports the Requested Fee Award

Finally, public policy considerations support the requested fee. There is a "significant" public interest achieved by lawyers bringing class actions benefitting a large group of people that would not otherwise pursue their claims individually. *In re Lupron*, 2005 WL 2006833, at *6. These public policy considerations are particularly compelling in the ERISA context because "Congress passed ERISA to promote the important goals of protecting and preserving the retirement savings of American workers." *In re Marsh*, 265 F.R.D. at 149-50. As noted above, very few counsel are willing and able to pursue ERISA class actions because of their complexity. *See supra* at 13. Accordingly, "there is a public interest in ensuring that attorneys willing to represent employees in ERISA litigation are adequately paid so that they and others like them will

continue to take on such cases." *Rankin v. Rots*, 2006 WL 1791377, at *2 (E.D. Mich. June 27, 2006); *see also Bacchi*, 2017 WL 5177610, at *5 (public interest supports fee award where litigation is complex and counsel are experienced).[11]

III. THE COURT SHOULD APPROVE THE REQUESTED COSTS AND EXPENSES

In addition to awarding the requested fees, the Court should approve the requested litigation costs and administrative expenses.

A. Litigation Costs

It is well established that "[l]awyers 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*, 2015 WL 127728, at *20 (citing *In re Fidelity,* 167 F. 3d at 737). This includes any expenses that are typically billed to clients in an hourly billing arrangement. *Id*. at *21; *see also Sims*, 2019 WL 1993519, at *4 (approving expenses that "included the costs of hiring experts and consultants, taking depositions, travel, lodging and parking, copies and communication costs, and mediation and settlement costs, and professional fees, among others"). Those are precisely the type of expenses that are sought here. *See Second Richter Decl. ¶ 17*. Moreover, the total amount of litigation costs being sought ($38,475.13) is reasonable and even modest compared to the amounts awarded in similar cases. *See, e.g.*, *Moitoso*, No. 1:18-cv-12122, ECF No. 271 (approving $1,378,437.13 in litigation expenses); *Brotherston*, No. 1:15-cv-13825, ECF No. 237 (approving $479,213 in expenses); *Tracey*, No. 1:16-cv-11620, ECF No. 317 (approving $522,021.93 in expenses); *Sims*, 2019 WL 1993519, at *5 (approving $768,176 in expenses).

[11] Suits like this are one of the reasons why fees in 401(k) plans have dropped in recent years. *See 401(k) Fees Continue To Drop*, FORBES (Aug. 20, 2015) (noting that fees have fallen "[i]n part in response to 401(k) fee litigation[.]"), *available at* https://www.forbes.com/sites/ashleaebeling/2015/08/20/401k-fees-continue-to-drop/#6b8caf21164f (last visited Feb. 3, 2021).

B. Administrative Expenses

In addition, the Court should approve the requested expenses for settlement administration. *See In re Prudential*, 2014 WL 6968424, at *7 (awarding settlement notice and administration expenses). The class notice and other administrative services provided by Analytics are essential to carrying out the settlement. The cost of providing those services ($62,587) is reasonable in light of the size of the Settlement. *Second Richter Decl. ¶ 20*. The Escrow Agent expense of $2,500 is also reasonable and amounts to less than 0.02% of the settlement fund. *Id. ¶ 21*. Finally, review of the Settlement by the Independent Fiduciary is required by DOL regulations, and is deemed to be a "critically important" benefit to plan participants. *See In re Marsh ERISA Litig.*, 265 F.R.D. at 139. All of these expenses are routinely approved in other ERISA cases. *See, e.g.*, *Moreno*, No. 1:15-cv-09936, ECF No. 348 ("Class Counsel's request for $106,536 in settlement administration expenses (comprising $64,036 to the settlement administrator, $2,500 to the escrow agent and $40,000 to the independent fiduciary) is granted."); *Moitoso*, No. 1:18-cv-12122, ECF No. 271 (approving $115,302 in settlement administration expenses); *Toomey*, No. 19-cv-11633, ECF No. 99 (approving settlement administrator, escrow agent, and independent fiduciary expenses); *Velazquez*, No. 17-cv-11249, ECF No. 108 (same).[12]

IV. THE COURT SHOULD APPROVE THE REQUESTED SERVICE AWARDS

Finally, the Court also should approve the requested service awards to the class representatives. "Courts routinely approve incentive awards to compensate named plaintiffs for the services they provided and the risks they incurred during the course of the class action litigation." *In re Lupron*, 2005 WL 2006833, at *7 (citation and internal quotation marks omitted).

[12] *See also Stevens*, 2020 WL 996418, at *14 (approving expenses for settlement administrator, escrow agent, and independent fiduciary); *In re M&T Bank Corp. ERISA Litig.*, No. 1:16-cv-375, ECF No. 190 at ¶ 3 (same); *Clark*, No. 18-81101, ECF No. 23 at ¶ 2 (same); *Andrus*, No. 16-05698, ECF No. 83 at ¶ 3 (same).

The awards sought in this case are consistent with these recognized rationales. First, the class representatives invested time pursuing the case on behalf of the class. *See Second Richter Decl. ¶ 24; see also ECF Nos. 55-56* (Plaintiffs' declarations). Second, they assumed financial risks, *see* 29 U.S.C. § 1132(g) (providing that "the court may allow a reasonable attorney's fee and costs of action to either party"), as well as reputational risks by suing their former employer.[13]

Accordingly, "[a] substantial incentive award is appropriate in [this] complex ERISA case given the benefits accruing to the entire class in part resulting from [plaintiff's] efforts." *Kruger*, 2016 WL 6769066, at *6 (quoting *Savani v. URS Prof'l Sols. LLC*, 121 F. Supp. 3d 564, 577 (D.S.C. 2015)). The proposed service awards of $10,000 per class representative ($20,000 total) represent less than 0.15% of the settlement fund, and are reasonable in comparison to other cases. *See, e.g., Brotherston*, No. 1:15-cv-13825, ECF No. 237 (approving $25,000 service awards); *Tracey*, No. 1:16-cv-11620, ECF No. 317 (approving $25,000 service awards); *Moitoso*, No. 1:18-cv-12122, ECF No. 271 (approving $10,000 service awards); *Toomey*, No. 19-cv-11633, ECF No. 99 ($10,000); *Velazquez*, No. 17-cv-11249, ECF No. 108 ($10,000).[14] Additionally, no Class Members have objected to these awards.

CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that the Court approve the requested distributions.

[13] Courts have noted that bringing a lawsuit against an employer relating management of a 401(k) plan entails risk that the plaintiff will be viewed unfavorably by future employers. *See Lockheed Martin*, 2015 WL 4398475, at *4; *see also Kruger*, 2016 WL 6769066 at *6 (recognizing reputational risks of named plaintiffs in ERISA actions).

[14] *See also Sims*, 2019 WL 1993519, at *4 (approving $20,000 service award to each plaintiff); *Tussey II*, 2019 WL 3859763, at *6 (approving $25,000 service awards to named plaintiffs in ERISA action); *Novant Health*, 2016 WL 6769066, at *6 (same); *Ameriprise*, 2015 WL 4246879, at *3 (same); *Abbott*, 2015 WL 4398475, at *4 (same).

Respectfully Submitted,

Dated: August 25, 2021

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LOCAL RULE 7.1 CERTIFICATION

I, Kai Richter, hereby certify that I conferred with counsel for Defendants in good faith on August 25, 2021 regarding the issues raised in this motion and have been advised that Defendants do not oppose the motion.

Dated: August 25, 2021

s/Kai Richter
Kai Richter

CERTIFICATE OF SERVICE

I hereby certify that on August 25, 2021, a true and correct copy of Plaintiffs' Memorandum of Law in Support of Plaintiffs' Motion for Approval of Attorneys' Fees and Costs, Administrative Expenses, and Class Representative Services Awards was served by CM/ECF to the parties registered to the Court's CM/ECF system.

Dated: August 25, 2021

s/Kai Richter
Kai Richter