COMMONWEALTH OF MASSACHUSETTS

ESSEX, ss.

SUPERIOR COURT
CIVIL ACTION NO. 1877CV01343G
Lead Case

IN RE: COLUMBIA GAS CASES

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR AWARD OF ATTORNEYS' FEES, COSTS, AND INCENTIVE PAYMENTS

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I. Introduction

Class Counsel reached agreement to settle this consolidated class action for an unprecedented $143 million, and within a year after the September 13, 2018 Incident. Reaching settlement so quickly in such a far-reaching matter is the ideal – the norm is protracted litigation with an uncertain outcome. Here, Class Counsel were able to first bring together all lawyers representing the plaintiffs in the twelve aggregate proceedings as a consolidated group speaking with one voice. And then they persuaded Columbia Gas to try mediation rather than fire the first shot in the war of attrition that significant class action matters typically engage. Class Counsel drew on the diverse skills, experience and affinities of the fourteen firms that took on leadership and committee roles,[1] and this group worked together from the inception of the negotiations throughout the year it took to bring the case to a Settlement on the brink of fruition. From the parties' initial agreement to stay litigation for three months to test the waters in mediation, through extensions of that stay as negotiations progressed, it still took more than six months of hard bargaining to sketch the outlines of the Settlement, and another two months to finalize it. See Exhibit F: Declaration of Eric Green, ¶ 8.

Class Counsel uniformly believe the Settlement to be fair, reasonable and adequate. Exhibits E 1-4, Declarations of Petosa, Graham, Boyle/Henry, Roddy And from the time the Settlement was signed, Class Counsel complemented the notice process with extraordinary outreach, conducted numerous town halls to educate class

[1]See note 1 to the final approval brief.

members about the Settlement, and held three all day claims fairs to provide hands-on assistance to more than a thousand class members in completing their claim forms. Exhibit D, Declaration of Jeanne Finegan, ¶¶ 58-60-63; Ex. E-1, Roddy Decl. ¶ 25. This coordinated group of 65 lawyers, along with dozens of paralegals, worked for what is now a year and a half to bring the Settlement to this juncture.

The benefits to the Class are readily apparent and easily valued — a $143 million fund, of which roughly $115 million will be distributed to Class Members if the Court approves the requested fees and expenses. And that $115 million cash infusion into the Merrimack Valley economy is projected to have a positive economic ripple effect of $37.4 million, creating approximately 400 jobs to boot. Exhibit A, Schouten Decl. ¶ 8. This kind of hyper-localized economic stimulus to a community recovering from catastrophe is a rarity, so the immediate as well as the ongoing benefits of the Settlement go far beyond merely providing compensation. Schouten Decl., ¶ 9.[2]

Class Counsel worked efficiently to obtain this outstanding recovery without the risk, cost and years-long delay that litigation would have brought. Rather than becoming mired in a protracted legal proceeding with no guarantee of success, Class Counsel focused on negotiating a Settlement that will bring in many cases life-changing compensation to class members, and within a time frame that allows class members' lives to be normalized as quickly as possible. The Settlement will result in the

[2] This is a conservative estimate. "Making alternative, but still reasonable assumptions, the ripple effect in the Lower Merrimack Valley could increase output by approximately $119.4 million, with a corresponding increase in full-time-equivalent jobs by approximately 1,300." *Id.*, ¶ 8.

processing and payment of claims within 20 months after the Incident. Class Counsel should be rewarded appropriately for their efforts, their efficiency, and the exceptional results achieved. Exhibit G, Declaration of Charles Silver ("Silver Decl."), ¶¶ 1, 35-38, 58-70, 71-81.

To compensate the fourteen firms of the PSC for their collective efforts, Class Counsel request a fee of 16.5% of the Settlement Fund, $23,595,000. This fee request represents half the standard contingent fee of one-third of the recovery and is well below the normal range of percentage-based class action fees approved in the Superior Court and in First Circuit fee jurisprudence. *See, e.g., In re: Walgreens Item Pricing Coordinated Class Action*, 2004 WL 6036251 (Mass. Super. September 13, 2004)) (VanGestel, J.)(awarding fees of one third of settlement amount); *In re Neurontin Mktg. and Sales Practices Litig.*, 58 F. Supp. 3d 167, 172 (D. Mass. 2014) (nearly two-thirds of percentage based class action fees were between 25% and 35% of the common fund; First Circuit mean was 27% and median was 25%).

Because of the relative paucity of state decisional law on class actions, state courts routinely rely on the more well-developed federal class action jurisprudence. *Eldridge v. Provident Companies, Inc.*, 2005 WL 503701, at *1 (Mass. Super. 2005); *see also Sniffin v. Prudential Ins. Co. of America*, 395 Mass. 415, 420-21 (1985) (upholding use of lower court's standard "similar to that adopted by the Federal courts when reviewing proposed settlements of class actions under Fed. R. Civ. P. 23(e), the Federal provision analogous to Mass. R. Civ. P. 23(c)"); Exhibit B, Rubenstein Decl., ¶ 12

While the First Circuit has not established a benchmark percentage for common fund awards, other courts in the Circuit have approved percentage-based fees that range from twenty to thirty-five percent. *See Mazola v. May Dept. Stores Co.*, No. 97-cv-10872-NG, 1999 WL 1261312, at *4 (D. Mass. Jan. 27, 1999) ("[I]n this circuit, percentage fee awards range from 20% to 35% of the fund. This approach mirrors that taken by the federal courts in other jurisdictions"); *Pavlidis v. New England Patriots Football Club,* 675 F. Supp. 707, 709, 712 (D. Mass. 1987) (observing that fees in the 20%-50%range in common fund class actions are not uncommon, and approving fees calculated as 33% of the first $2 million recovered, 25% of the next $3 million, and 20% of any amount over $5 million).

The requested fee will compensate Class Counsel for their investment of more than ten thousand collective of hours of time and the millions in expenses needed to bring this case to expeditious resolution, the substantial risk they accepted, and the excellent results they obtained. And it will do so at a percentage that is substantially below the one-quarter to one-third awards common in the jurisprudence. Ex. G, Silver Decl., ¶¶ 35-57. Without Class Counsel's investment of time, work and resources, made on an entirely contingent basis, this Settlement would not have been possible. The fee request is fair and reasonable whether evaluated on a percentage basis or using the "lodestar cross-check." Ex. G, Silver Decl., ¶¶ 71-79. The requested service awards for the named plaintiffs are reasonable as well, as more fully described below.

II. The Requested Attorneys' Fees Are Reasonable And Appropriate

A. The Parties Negotiated The Fees After Agreement On All Material Settlement Terms, At Arm's Length, With The Assistance Of The Mediators

The parties did not discuss fees until all material terms of the Settlement were agreed upon. Exhibit F, Declaration of Eric Green, ¶ 14. And the discussion of fees was also facilitated and overseen by the mediators. *Id.* In this respect, the parties' negotiation and agreement on fees and costs meets the Supreme Court's guidance on this issue, which sets out consensual, arm's length resolution of attorneys' fees as the ideal culmination of successful litigation. In *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983), the Court emphasized that a request for attorney's fees should not result in a second major litigation: "Ideally, of course, litigants will settle the amount of a fee."

This is a principle found throughout the jurisprudence. As one court put it: "[b]ecause this Court believes the parties should be encouraged to settle all their disputes as part of the settlement . . ., including the amount of the fee, it believes that if the agreed-to fee falls within a range of reasonableness, it should be approved as part of the negotiated settlement between plaintiffs and defendants." *In re M.D.C. Holdings Sec. Litig.*, [1990 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 95,474 at 97, 487-88 (S.D. Cal. Aug. 30, 1990). At a minimum, this circumstance is entitled to substantial weight:

> [T]he fee was negotiated at arms' length with sophisticated defendants by the attorneys who were intimately familiar with the case, the risks, the amount and value of their time, and the nature of the result obtained for the class. . . . [T]he Court is reluctant to interpose its judgment as to the amount of attorneys' fees in the place of the amount negotiated. . . .

In re First Capital Holdings Corp. Fin. Prods. Sec. Litig., MDL No. 901, 1992 U.S. Dist. LEXIS 14337 at *13 (C.D. Cal. June 10, 1992).

B. The Percentage Of Fund Method Is "The Prevailing Praxis" Because It Aligns Counsel And Class Members' Interests, And Rewards Efficiency And Results

The determination of a reasonable fee "is a question that is committed to the sound discretion of the judge." *Berman v. Linnane*, 434 Mass. 301, 303 (2001) (citations omitted). In exercising that discretion, a court may award fees "on either a percentage of the fund basis or by fashioning a lodestar." *Heien v. Archstone*, 837 F.3d 97, 100 (1st Cir. 2016) (citing *In Re Thirteen Appeals Arising out of the San Juan Dupont Plaza Hotel Fire Litig.*, 56 F.3d 295, 307 (1st Cir. 1995)).

In cases like this, where a class action settlement results in a common fund, the majority of federal and state cases approve fees based on a percentage of the recovery. As Judge VanGestel observed in *In re: Walgreens Item Pricing Coordinated Class Action*, 2004 WL 6036251, "the lodestar method, once the dominant approach, has now lost considerable favor to what is called the percentage of fund ("POF") or recovery method." In fact, the percentage of fund method in common fund cases "is *the prevailing praxis*" because of its distinct advantages over the lodestar. *In re Thirteen Appeals*, 56 F.3d at 305 (emphasis added); *McLaughlin on Class Actions*, § 6:24 at 165 (collecting cases). Silver Decl., ¶¶ 29-34, 54-57.

Because Mass. R. Civ. P. 23 is modeled after and similar to its federal counterpart, case law interpreting the federal rule provides useful guidance. *In re: Walgreens Item Pricing Coordinated Class Action*, 2004 WL 6036251 (citing First Circuit case law in awarding percentage-based fee); *See also* Rubenstein Decl., ¶12, citing cases.

Courts in the First Circuit have identified multiple reasons to prefer the percentage of fund method in cases like this. *First*, it "more appropriately aligns the interests of the class with the interests of class counsel—the larger the value of the settlement, the larger the value of the fee award." *Bussie v. Allamerica Financial Corp.*, 1999 WL 342042, *2 (D. Mass. May 19, 1999); *In re Relafen Antitrust Litigation*, 231 F.R.D. 52, 79 (D. Mass. 2005) (accord); *Duhaime v. John Hancock Mut. Life Ins. Co.*, 989 F. Supp. 375, 377 (D. Mass. 1997) (one of the "distinct advantages" of the POF method is its focus "on result, rather than process"). *See also* Silver Decl., ¶¶ 18-20 (fees should reward maximizing net recovery to the class). As Judge VanGestel emphasizes in *Walgreens Item Pricing*, the percentage of fund method is focused on results. 2004 WL 6036251, at *2. Ultimately, from the perspective of the class, results are what matter most. This reality has been accepted class action doctrine for at least two decades. *See* Third Circuit Task Force Report, *Selection of Class Counsel*, 208 F.R.D. 340, 355 (Jan. 15, 2002) (percentage method "better aligns the interests of class counsel and class members because it ties the attorneys' award to the overall result achieved rather than the hours expended.").

Second, the percentage of fund method rewards efficiency and "avoids the disincentive to settle cases early created by the lodestar method." *In re Relafen*, 231 F.R.D. at 79; *In re Thirteen Appeals*, 56 F.3d at 307 (percentage method enhances efficiency while lodestar encourages inefficiency by creating monetary incentive to spend as many hours as possible, and to delay settlement); *Duhaime*, 989 F. Supp. at 377 (same).

Finally, the percentage method "is less burdensome to administer," and is

therefore less taxing on judicial resources than the lodestar. *In re Thirteen Appeals*, 56 F.3d at 307; *In re Lupron Mktg. & Sales Practices Litig.*, No. 01-CV-10861-RGS, 2005 WL 2006833, at *3 (D. Mass. Aug. 17, 2005) (citing *In Re Thirteen Appeals*). Unlike the lodestar analysis, which here would force the court to analyze the time records of more than five dozen attorneys, the percentage of fund method allows the court to focus on what is more meaningful to the class, a "showing that the fund conferring a benefit on the class resulted from the lawyers' efforts.'" *In re Thirteen Appeals,* at 307, citing *Camden I Condominium Ass'n, Inc. v. Dunkle*, 946 F.2d 768, 774 (11th Cir. 1991).

All of these benefits —tying the fee closely to the results, rewarding efficiency, and alleviating the burden on the court — make the percentage method appropriate here.

C. All The Operative Factors Support The Fee Request

When determining the reasonableness of a fee award generally, Massachusetts state courts cite a number of factors, including "the nature of the case and the issues presented, the time and labor required, the amount of damages involved, the results obtained, the experience, reputation, and ability of the attorney, the usual price charged for similar services by other attorneys in the same area, and the amount of awards in similar cases." *Berman*, 748 434 Mass. 301, 303 (citing *Linthicum v. Archambault*, 379 Mass. 381, 388-89, 303 (Mass. 1979)).

Federal courts in the First Circuit consider similar factors in determining the reasonableness of a class action fee award:

the size of the fund and the number of persons benefitted;

the skill, experience, and efficiency of the attorneys involved;
the complexity and duration of the litigation;
the risks of the litigation;
the amount of time devoted to the case by counsel;
awards in similar cases; and
public policy considerations.

In re Neurontin Mktg. & Sales Practices Litig., 58 F. Supp. 3d 167, 170 (D. Mass. 2014), *In re Lupron*, 2005 WL 2006833, at *3; *In re Tyco Intern., Ltd. Multidistrict Litig.*, 535 F. Supp. 2d 249, 266 (D.N.H. 2007). Many of the state and federal factors overlap, but all support the requested fee here.

1. The $143 Million Settlement Fund Is A "Superb" Outcome

The $143M common fund is by far the largest class action settlement in Massachusetts state court history, almost four times greater than the $40 million *Salvas v. Walmart Stores* settlement. Ex. B, Rubenstein Decl., ¶ 14. The percentage fee requested is significantly lower than those awarded in similar mega-fund class actions. Silver Decl., ¶ 56. It is especially beneficial to injured class members because the allocation Plan designed by Class Counsel and their experts directs the vast bulk of Settlement funds to those who were caught in the maelstrom "When comparing "the significance of immediate recovery by way of the compromise to the mere possibility of relief in the future, after protracted and expensive litigation," there are clearly strong arguments for approving a settlement.'" *Rolland* v. *Cellucci*, 191 F.R.D. 3, 10 (D. Mass 2000) (See Exhibit I to Fenwick Decl., Heat Map. Individual payments under the Settlement will also be substantial; given the Settlement Administrator's preliminary data, the average lump

sum compensation per household will be approximately $8,750. Ex. C, Fenwick Decl., ¶ 32.[3]

And the Settlement's value is enhanced by benefits being provided to the Class now, without the delay, risks and burdens of further litigation.[4] In cases involving similarly catastrophic events it is common to measure the time to resolve class action in *years*, not months. *See, e.g., In Re: FEMA Trailer Formaldehyde Product Liability Litigation*, MDL 1873, Case No. 2:07-md-01873-KDE-ALC, ECF nos. 25887 and 25888 (E.D. La. Sept. 27, 2012) (approving class settlements in September 2012, *seven years* after Hurricanes Katrina and Rita occurred in 2005).

2. Class Counsel Assumed A Significant Risk of Non-Recovery – The Complexity And Novelty Of The Issues Heightened That Risk

Plaintiffs believe that their claims have merit and that they could ultimately make a compelling case at trial. Nevertheless, they faced critical legal and factual issues which created the very real prospect of total loss. Because Class Counsel's work on this case was entirely contingent, they bore the entire risk of loss. Judge Posner explains the significance of this risk factor:

> A contingent fee must be higher than the fee for the same legal services as they are performed. The contingent fee compensates the lawyer not only for the legal services he renders, but also for the loan of those services. The implicit interest rate on such a loan is higher because the risk of default (the loss of the case, which cancels the debt of the client to the lawyer) is much higher than that of a conventional loan.

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[3] Because itemized claims will require lengthy review no preliminary estimate of the average value of those claims is possible. The Settlement Administrator will provide the Court with a complete report on all amounts disseminated by June 2020.

[4] Ex. B, Rubenstein Decl., ¶ 23.

Richard Posner, Economic Analysis of Law, 534, 567 (4th ed. 1992).

Two legal issues in particular had the potential to derail this litigation: (a) Columbia Gas's Tariff and (b) the economic loss doctrine.

a) The Tariff's Express Language Insulates Columbia Gas From Incidental and Consequential Damages

As discussed in the final approval brief, the Tariff language expressly precludes incidental and consequential damage claims. It contains daunting and explicit disclaimers of liability for the vast majority of the claims for which the Settlement nevertheless provides compensation. In short, Columbia Gas "shall be liable *only for direct damages*..." and "in no event shall the Company be liable to any party for any indirect, consequential, or special damages...". Tariff, § 20.2.

See generally, Tariffs, Rate Schedules, and Agreements at Art. 9, and Art. 10 ("Tariffs").[5] Columbia Gas asserted from the beginning that these provisions drastically limited its potential liability.

b) The Economic Loss Doctrine Could Have Barred Recovery For The Vast Majority Of Class Members

In addition, Plaintiffs faced the possibility of a ruling that the economic loss doctrine completely bars recovery for purely economic losses in the absence of personal injury or property damage. *FMR Corp. v. Boston Edison Co.,* 613 N.E.2d 902, 903 (Mass. 1993); *Garweth Corp. v. Boston Edison Co.,* 613 N.E.2d 92, 94 (Mass. 1993) ("The traditional

[5] This language is replicated and reinforced by the Interruptible Transportation and Interruptible Gas Supply Service Agreements Columbia Gas has with the MDPU (Articles 9 and 10), provide: Columbia Gas "shall not be liable to Customer for any loss or damage incurred by Customer resulting from any curtailment or interruption..." of service. A fuller description of the obstacles these defenses create is contained in the final approval brief, at 13-16.

economic loss rule provides that, when a defendant interferes with a contract or economic opportunity due to negligence and causes no harm to either the person or property of the plaintiff, the plaintiff may not recover for purely economic losses."). The cautionary tale of the *Porter Ranch* litigation synopsized in the final approval brief illustrates how the doctrine can eviscerate or significantly reduce a certifiable class.

c) Risk vs. Reward Calculus — The Settlement Entitles Class Members To Benefits That May Well Have Been Denied Them In Contested Litigation

Were the court to rule in Columbia Gas's favor on the economic loss doctrine, as in *Porter Ranch*, or under the Tariffs, Class Members would likely have recovered nothing. At the same time, Class Counsel faced the always present risks in obtaining and maintaining class certification, given that class members include Columbia Gas customers and non-customers, homeowners, renters, and business owners, who suffered various degrees of harm, and have been paid various amounts in reimbursement.

Here, the considerable risk of losing critical legal issues outright, coupled with the substantial investment of time and hundreds of thousands of dollars in expenses advanced, weighs strongly in favor of the requested fee. Ex. G, Silver Decl., ¶¶ 21, 39, 45, 50-53, 57. *See, e.g., Jenson v. First Tr. Corp.*, No. CV 05-3124 ABC, 2008 WL 11338161, at *12 (C.D. Cal. June 9, 2008) ("Uncertainty that *any* recovery ultimately would be obtained is a highly relevant consideration. Indeed, the risks assumed by Counsel, particularly the risk of non-payment or reimbursement of expenses, is important to determining a proper fee award." (internal citation omitted)); *In re Omnivision Techs.,*

Inc., 559 F. Supp. 2d 1036, 1046–47 (N.D. Cal. 2008) ("The risk that further litigation might result in Plaintiffs not recovering at all, particularly a case involving complicated legal issues, is a significant factor in the award of fees."

3. The Fourteen Firms That Comprise the PSC Spent More Than 10,000 Hours And $900,000 To Bring The Settlement To Fruition

Class Counsel have tracked the time and money spent prosecuting this case pursuant to Procedural Order No. 2. For ease of reference, Counsel has consolidated this information for the Court's review in the attached Declaration of Plaintiffs' Co-Lead Counsel John Roddy. *See* Roddy Dec. ¶36, 41. The summaries of hours contained in the attached declaration show that to date, Class Counsel have spent roughly 10,700 hours to bring about the Settlement. *Id*, at 36.[6] In addition to their time in the case, Class Counsel advanced $912,607,000 for experts, mediation, travel, and other expenses. These expenses are broken down by category. *Id.*

Importantly, the time and money Class Counsel spent, though significant, was far less time consuming and costly than litigating twelve class actions with complex factual issues would have been. Class Counsel avoided many of the costs associated with complex and drawn-out litigation, *e.g.*, spending time and money on expert reports, obtaining deposition transcripts, and maintaining an e-discovery platform, and instead focused their resources intensively on resolving the case for the class.

Class Counsel's investment of 10,700 hours of time and advancement of almost a

[6] Class Counsel expects to spend at least 500 additional hours over the next several months responding to Class Member inquiries and communicating and resolving issues with the Settlement Administrator.

million dollars in expenses was all done contingently, with no assurance of recovery. And, each firm chose to forgo the opportunity to bring other cases in favor of bringing this one, as this has proved to be all-encompassing for a host of reasons. Roddy Decl. at ¶ 28; Petosa Dec. at ¶ 18; Boyle/Henry Dec. at ¶ 19.

4. The PSC Brought A Complement Of Skills And Experience To This Case

This Court previously considered Class Counsel's experience when it approved the formation of Plaintiffs' Leadership, *i.e.*, the Plaintiffs' Liaison Counsel, Plaintiffs' Co-Lead Counsel, Plaintiffs' Executive Committee, and Plaintiffs' Steering Committee, pursuant to Procedural Order No. 2. Procedural Order No. 2, *In Re: Columbia Gas Cases*, No. 1877-cv-1343, Dkt. #17 at 2-10 (Mass. Sup. Ct. Jan. 14, 2019) (appointing Plaintiffs' Leadership Structure). As their declarations demonstrate, Class Counsel are highly experienced in litigating class actions in general, and the specialized legal and factual issues presented by mass disaster and gas explosion cases like this one. See generally Declarations of Co-Lead and Liaison Counsel. The four firms serving as Co-Lead and Liaison Counsel, along with those which make up the Executive and Steering Committees, worked together efficiently to consolidate all aggregate cases, and to globally resolve it.

5. The Percentage Requested Is Half The One-Third Contingency Fee Norm, And Substantially Less Than Fees Awarded In Similar Cases

Percentage based fees approved by state and federal courts in Massachusetts, and elsewhere, typically range from 25% to 35% of the fund, and fees of one-third are common. *See In re Neurontin.*, 58 F. Supp. 3d at 172 (noting most fees in the 25% to 35%

range; awarding fee of 25%); *In re: Walgreens Item Pricing Coordinated Class Action*, 2004 WL 6036251 (Mass. Super.) (VanGestel, J.) (approving fees of one-third of settlement fund).[7] Undersigned counsel were the recent recipients of two such awards. *See, e.g., Cullinane v. Uber Technologies, Inc.*, Case No. 1:14-cv-14750-DPW (D. Mass.) (ECF # 239, January 29, 2020 order awarding 30% of $3 million settlement fund obtained for class of Uber riders charged "Massport fees" which Uber did not pay to Massport); *Henderson v. BNY Mellon*, Case No. 1:15-cv-10599-PBS (D. Mass.) (ECF # 606, September 30, 2019 order awarding one third fee of $10 million nationwide class settlement). *See also, Krakauer v. Dish Network.*, Case No. 1:14-CV-00333-CCE (M.D.N.C.) ($61 million jury

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[7] *See also, Mendez v. Job Done LLC,* No. 1281CV04992, Dkt. # 28 (Mass. Super. Nov. 18, 2014) (awarding 33% of the fund as an attorneys' fee award); *Barkley v. The Convertible Castle, Inc., d/b/a Bernie and Phyl's Furniture,* No. 1384CV01078-BLS1, Dkt. # 25 (Mass. Super. Sept. 15, 2014) (approving attorneys' fees and expenses of 30% of the class settlement fund); *Yeretzian v. Subcontracting Concepts, Inc.* (originally *Reynolds v. City Express, Inc.*), No. 1084CV02655, Dkt. # 77 (Mass. Super. Oct. 31, 2018) (awarding 33 1/3% of the fund as an attorneys' fee and expense award); *Banks v. SBH Corp.*, No. SUCV2004-03515, Dkt. # 24 (Mass. Super. Nov. 19, 2007) (approving attorneys' fees and expenses of 33 1/3% of the class settlement fund); *Byrne v. Elephant & Castle Group, Inc.*, No. SUCV2006-04732, Dkt. # 12 (Mass. Super. Apr. 24, 2008) (awarding 33 1/3% of the fund as an attorneys' fee and expense award); *Fernandez v. Four Seasons Hotels Ltd*, No. SUCV2002-04689, Dkt. # 39 (Mass. Super. Jan. 22, 2008) (awarding 33 1/3% of the fund as an attorneys' fee and expense award); *Keyo v. Seaport Hotel and World Trade Center*, No. SUCV2002-03339, Dkt. # 12 (Mass. Super. Apr. 6, 2004) (awarding one-third of the fund as an attorneys' fee award); *Simmons v. Kilnapp Enterprises, Inc.*, No. 1377CV00551, Dkt. # 63 (Mass. Super. Dec. 17, 2014) (awarding 33 1/3% of the fund as an attorneys' fee and expense award); *Rose v. Ruth's Chris Steakhouse*, C. A. No. 07-5081-A (Suffolk Sup. Dec. 4, 2008) (awarding one-third of the fund as an attorneys' fee and expense award); *Wieland v. Bring Care Home,* C.A. No. ESCV2013-01380 (Mass. Super. Feb. 17, 2015) (approving fees of one-third of settlement fund); *Fitzgerald v. The Chateau Restaurant Corp.*, No. 1481CV01990, Dkt. # 41, (Mass. Super. Sept. 21, 2016) (approving fees of 37.5% of settlement fund); *Texeira v. DaggettCrandall-Newcomb Home, Inc.*, No. 1573CV00264 (Mass. Super. Aug. 31, 2016) (approving fees and expenses of one-third of settlement fund); *Raposa v. Mardi Gras Entertainment, Inc.*, No. 1079CV00034, Dkt. # 105 (Mass. Super. Dec. 23, 2014) (approving fees and expenses of one-third of settlement fund); *DeVito v. Longwood Security Services, Inc.*, No. 1384CV01724, Dkt. # 117 (Mass. Super. Nov. 7, 2018) (approving fees of one-third of settlement fund).

verdict for certified nationwide class of Do Not Call Registrants repeatedly called by Dish marketing agents; court awarded $20M+ fee).

The 16.5% fee award requested here is substantially below what courts in similar cases across the country have awarded. *See, e.g., Halley v. Honeywell, Int'l*, 861 F.3d 481, 487 (3d Cir. 2017) (awarding 25% attorneys' fees); *In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, On April 20, 2010,* 2012 U.S. Dist. LEXIS 83214 at *4 (E.D. La. June 15, 2012) (limiting all attorney's fees to no more than 25%). Silver Decl., ¶¶ 58-70. And empirical studies substantiate the reasonableness of Class Counsel's request. *Id.*

As Massachusetts state and federal courts routinely award fees of 25% to 35% of the recovery, with one-third being common, Class Counsel's fee request is substantially below the norm for comparable class action settlements, even though the outcome here is exceptional. See Ex. G, Silver Decl., ¶¶ 58-70; Ex. B, Rubenstein Decl., ¶¶ 1, 14.

6. Public Policy Considerations Support The Fee Request

When a class action settlement produces a common fund, courts generally favor an award of fees from the fund, as called for by the proposed settlement in this case. As the Supreme Court explained:

> [T]his 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 attorneys' fee from the fund as a whole. . . . Jurisdiction over the fund involved in the litigation allows a Court to prevent . . . inequity by assessing attorney's fees against the entire fund, thus spreading fees proportionately among those benefited by the suit.

Boeing Co. v. Van Gemert, 444 U.S. 472, 478 (1980) (citations omitted).

There is an overriding public interest in favor of settling class actions. *See Lazar v. Pierce*, 757 F.2d 435, 439 (1st Cir. 1985); *In re Lupron Mktg. & Sales Practices Litig.*, 228 F.R.D. 75, 88 (D. Mass. 2005); *Durrett v. Housing Auth. of City of Providence*, 896 F.2d 600, 604 (1st Cir. 1990) (citing "long-recognized policy of encouraging settlements"). Having the fee amount settled, subject to review by the Court, supports that public interest.

D. The Lodestar Cross-Check Similarly Supports The Requested Fee

In applying the percentage of the fund method, Courts may consider a "lodestar cross check" to gauge the reasonableness of any percentage of fund award. *Bacchi v. Mass. Mut. Life Ins. Co.*, 2017 WL 5777610 at *4 (D. Mass. Nov. 8, 2017). When the lodestar is used as a cross-check, "the focus is not on the 'necessity and reasonableness of every hour' of the lodestar, but on the broader question of whether the fee award appropriately reflects the degree of time and effort expended by the attorneys." *In re Tyco*, 535 F. Supp. 2d 249, 270 (D.N.H. 2007) (citing *Thirteen Appeals*, 56 F.3d at 307).[8]

Class Counsel has submitted declarations with summary entries documenting the hours worked and the categories of tasks completed which were necessary to achieve this Settlement. See Exhibits E (1-4). Each PSC firm has confirmed to Class counsel that their billing rates have been previously approved by courts in

[8] *Schiefer v. Bain Capital, LP*, 2018 WL 6184638 246 at *2 (Mass. Super. Oct. 1, 2018) did calculate fees in a common fund case using the lodestar approach. But *Schiefer* did not examine the dichotomy between the lodestar calculus —which applies in statutory fee shifting cases where the *defendant* is obligated to pay a reasonable fee —versus a common fund case such as this, where the *class* that enjoys the benefits of the lawyers' work is obligated to pay the fee. Compare *Schiefer*, at *3-4 (relying on the fee shifting decision in *Fontaine v. Ebtec*, 415 Mass. 309, 324 (Mass. 1993)), with *Boeing*, 444 U.S. at 478 (avoiding "inequity" via windfall to class members by "assessing attorney's fees against the entire [common] fund, thus spreading fees proportionately among those benefited by the suit").

Massachusetts and elsewhere. And the declarations of co-lead and liaison counsel Petosa, Graham, Boyle/Henry and Roddy further attest that their firms' rates have been consistently approved by other federal and state courts considering petitions for fee awards in which the co-lead firms have served as class counsel.[9] *See, e.g., Haddad v. Wal-Mart Stores, Inc.* 455 Mass. 1024, 1025-26 (Mass. 2010) (citing *Stratos v. Dep't of Pub. Welfare,* 387 Mass. 312 (Mass. 1982)) (assessing a reasonable hourly rate based on the average rates in the community for similar work done). These declarations show that the combined lodestar for all fourteen firms is $6,949,150. Ex. E-1, Roddy Decl., ¶ 41.

Given the results obtained for the class, the skill and efficiency they employed and the high degree of risk they faced, a lodestar multiplier would be appropriate. *In re AMICAS,* 2010 Mass. Super. LEXIS 325 at *9-10; *see Gordan v. Mass. Mut. Life Ins. Co.,* No. 13-CV-30184-MAP, 2016 WL 11272044, at *3 (D. Mass. Nov. 3, 2016) ("In cases where there is high risk and the likelihood of receiving no [sic] little or no recovery is a distinct possibility, it is common for a court to apply a multiplier to compensate the attorneys for the risk of nonpayment."). Exhibit G: Silver Decl. ¶¶ 71-79; *See Relafen,* 231 F.R.D. at 82 (generally, multipliers range from 1.6 to as high as 19.6); *see also Conley v. Sears, Roebuck and Co.,* 222 B.R. 181 (D. Mass. 1998) (awarding multiplier of 8.9); *Bilewicz v. FMR LLC,* C.A. No. 13-10636-DJC (D. Mass. Oct. 16, 2014) (multiplier of 3.3).

[9] Although co-lead and liaison counsel's rates are significantly higher than the blended rate used for the lodestar calculation, the blended rate provides a reasonable and workable method for calculating the total lodestar of all fourteen firms. *See* Ex. G, Silver Decl., ¶¶ 72-77.

Class Counsel respectfully submit that the $143 million Settlement here is an excellent result for which a multiplier is appropriate. Here, the fee requested represents a lodestar multiplier of 3.39, well within the range of reasonable multipliers for purposes of the cross-check. Ex. G, Silver Decl., ¶¶ 74, 79.

E. Expenses Not To Exceed $2.5 Million Are Necessary And Reasonable And Should Be Reimbursed Upon Submission Of A Finalized Accounting

Additionally, the parties anticipate that the aggregate litigation, notice and administration costs will not exceed $2.5 million, and are currently estimated to be $2,162,607. Class Counsel request that the Court approve the payment of litigation expenses, and the costs of notice and administration costs from the Settlement Fund. A categorized summary of current expenses is embedded in the Roddy Decl., ¶44. [10]

III. The Requested Incentive Awards Are Reasonable.

Class Counsel seek approval of incentive awards of $5,000 each to Named Plaintiffs Francely Acosta, Robert McNaughton, Irasema Zapata, Thomas Tulip, Edward Accomando, Yohanny Cespedes, Cavallo Diner & Restaurant, LLC, and Capilla Evangelica Hispana, Inc. These proposed awards are fair and reasonable, as these Plaintiffs agreed to be the face of the litigation, and through that initiative played a significant part in obtaining this recovery. The Plaintiffs participated in interviews with Class Counsel, attended town halls, court hearings, and mediations, participated in

[10] Heffler currently estimates that it will cost no more than $1.25 million in total for notice and administration, including claims evaluation and check processing. However, there are still 1,000 outstanding claims and so, to be conservative, Class Counsel have estimated that all expenses will not exceed $2.5 million. A detailed expense itemization will be provided to the Court upon conclusion of the Settlement Administrator's work.

settlement discussions, and provided valuable assistance to Class Counsel, including providing key documents and facts regarding the case.

It is not uncommon for courts to approve incentive payments in amounts much higher than that requested here. *See, e.g., Godt et al. v. Anthony's Pier Four, Inc.*, Suffolk Civ. A. No. 07-3919 (Mass. Super. 2009) ($25,000 incentive payment for lead plaintiff); *Shea v. Weston Golf Club*, Middlesex Civ. A. No. 02-1826 (Mass. Super. 2009) ($25,000 incentive payments for lead plaintiffs; *Henderson v. BNY Mellon*, Case No. 1:15-cv-10599-PBS (D. Mass.) (awarding named plaintiffs $30,000 each).

Courts have widely recognized that incentive awards serve an important function in promoting enforcement of state and federal law by private individuals, while encouraging class action settlements. *See In re Relafen*, 231 F.R.D. at 82 ("incentive awards are recognized as serving an important function in promoting class action settlements"); *In re Compact Disc Min. Adver. Price Antitrust Litig.*, 292 F. Supp. 2d 184, 189 (D. Me. 2003) ("because a named plaintiff is an essential ingredient of any class action, an incentive award can be appropriate to encourage or induce an individual to participate in the suit").

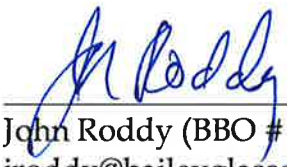
IV. Conclusion

Class Counsel respectfully requests that the Court approve the fees, costs, and incentive payments requested.

DATED: February 7, 2020

Respectfully submitted,

Plaintiffs,
By their attorneys:



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