COMMONWEALTH OF MASSACHUSETTS

Essex, ss

SUPERIOR COURT DEPARTMENT

ELAINE LAFRATTA, individually and on behalf of all others similarly situated, Plaintiff, v. MEDICAL HEALTHCARE SOLUTIONS, INC., Defendant.	Case No. 2277CV00106 (Lead Case)

Consolidated With:

CHRISTIAN DONNER, individually and on behalf of all others similarly situated, Plaintiff, v. MEDICAL HEALTHCARE SOLUTIONS, INC., Defendant.	Case No. 2277CV00108

-and-

EVAN WEISENFELD, individually and on behalf of all others similarly situated, Plaintiff, v. MEDICAL HEALTHCARE SOLUTIONS, INC., Defendant.	Case No. 2277CV00110

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

I. INTRODUCTION

Class Counsel[1] negotiated a class settlement that provides for substantial benefits to Settlement Class[2] Members, including compensation for out-of-pocket losses, reimbursement for lost time, compensation for extraordinary losses, credit monitoring, and alternative cash payments. The settlement also permits Class Counsel to seek payment from the Settlement Fund for attorneys' fees of up to $242,422, costs and expenses in the sum of $6,567.16 and a Service Award to the Class Representative of $2,000.

Plaintiff now respectfully moves this Court for payment of a $2,000 Service Award to the Class Representative, a combined award of attorneys' fees in the amount of $242,422, which represents a multiplier of about 1.06, and reimbursement of costs and expenses in the sum of $6,567.16. Applying the relevant factors and standards, the requested award is well within the range of reasonableness.

II. BACKGROUND AND SUMMARY OF THE LITIGATION AND THE SETTLEMENT

A. Factual and Procedural Background

This class action against Medical Healthcare Solutions, Inc. ("MHS") results from an incident that allowed an unauthorized actor or actors to potentially access the personal identifying information ("PII") and personal health information ("PHI") (together "PII/PHI") of approximately 133,997 individuals[3] between October 1, 2021 and October 4, 2021 (the "Data

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[1] Unless otherwise indicated, capitalized terms have the same meaning as those terms are used in the Settlement Agreement.

[2] The Settlement Class is defined as "all persons whose personal information and personal health information was accessed by and disclosed to unauthorized persons in the Data Breach, including all who were sent notice of the Data Brach." The term "Data Breach," as used here, is intended to be consistent with the definition of that term in Paragraph 10(h) of the Settlement Agreement." Declaration of David Pastor ("Pastor Decl."), ¶ 4.

[3] *See* https://ocrportal.hhs.gov/ocr/breach/breach_report.jsf (last accessed Dec. 22, 2023).

Breach"). Class Action Complaint ("Complaint"), ¶¶ 1, 3. MHS detected the intrusion on or about November 19, 2021, and began notifying victims of the Data Breach on or about January 21, 2022. *Id.* ¶ 5.

The Complaint was filed on February 3, 2022. It alleged, *inter alia*, that MHS failed to take appropriate measures to protect putative class members' PII/PHI. On September 26, 2022, the Court appointed Ben Barnow and David Pastor as Co-Lead Counsel.

Thereafter, the Parties engaged in a dialogue and discussed the prospect of early resolution, including with McCormack Consultants, Inc. ("MCI"), upon whom MHS had made a demand for contribution. Pastor Decl. ¶ 9. As a result of these efforts, the Parties[4] agreed to attend a mediation. *Id.* In advance of the mediation, the Parties submitted detailed mediation statements to the mediator. Plaintiff requested informal discovery from MHS and MCI, and both parties responded, with MHS producing many pages of documentation to Plaintiff to allow for a meaningful evaluation of the claims and to better inform the parties in preparation for the mediation. *Id.*

On January 17, 2023, the Parties engaged in a full day mediation before mediator Brad Honoroff of The Mediation Group. *Id.*, ¶10. Despite diligent efforts by the Parties, the mediation did not result in a settlement. *Id.* The Parties continued to engage in arm's-length negotiations until they were able to reach an agreement in principle. *Id.* Thereafter, the Parties negotiated and finalized the details of the Settlement, exchanging drafts of the Settlement Agreement and its exhibits. *Id.*, ¶11. Plaintiff's counsel also obtained competitive bids from various experienced Settlement Administrators and chose Epiq Class Action & Claims Solutions, Inc. ("Epiq") to act as the Settlement Administrator, subject to Court approval. *Id.*, ¶ 12.

[4] The term "the Parties," as used herein, is meant, unless otherwise indicated, to refer collectively to Plaintiff, MHS, and MCI.

The Settlement Agreement was finalized and executed on July 9, 2023. *Id.*, ¶ 13. Plaintiff moved for preliminary approval of the Settlement and for certification of the Settlement Class, and the Court held a hearing on preliminary approval on October 5, 2023. On the same date, the Court entered the Order Allowing Preliminary Approval of Class Action Settlement and Directing Notice of Proposed Settlement ("Preliminary Approval Order").[5] Notice of the settlement, including the amounts sought for attorneys' fees, costs, expenses, and Class Representative Service Award, was sent to Settlement Class Members on November 6, 2023, as provided in the Preliminary Approval Order.[6]

B. The Settlement

Pursuant to the Settlement, MHS and MCI will establish a $727,266 non-reversionary Settlement Fund. Settlement Class Members can elect cash payments for ordinary losses up to $150, lost time spent dealing with the Data Breach of up to 3 hours at $25 per hour, and extraordinary documented losses up to $5,000. Claimants can also elect to receive 24 months of three-bureau credit and identity theft monitoring that includes $1,000,000 of identity theft insurance with no deductible. In the alternative to these options, the Settlement allows Settlement Class Members to submit a claim for a cash payment, which is estimated to be approximately $50 but will be subject to a *pro rata* adjustment depending upon the number of claimants that participate in the Settlement.

III. THE COURT SHOULD APPROVE THE REQUESTED AWARD OF ATTORNEYS' FEES TO CLASS COUNSEL

Class Counsel request an award of $242,422 in attorneys' fees. This award is reasonable and appropriate. This award represents a small multiplier of Class Counsel's actual collective

[5] *Id.*, ¶ 14.
[6] *Id.*, ¶ 15.

lodestar, as discussed in greater detail below. In their settlement discussions with MHS' and MCI's counsel, Class Counsel did not commence any negotiations for attorneys' fees until an agreement was reached on the settlement consideration to the Class.[7]

Awards of attorney fees help to ensure adequate enforcement of class members' legal rights which might otherwise go unenforced. "[A] financial incentive is necessary to entice capable attorneys, who otherwise could be paid regularly by hourly-rate clients, to devote their time to complex, time-consuming cases for which they may never be paid." *Mashburn v. Nat'l Healthcare, Inc.*, 684 F. Supp. 679, 687 (M.D. Ala. 1988). Contingent fees awarded to class counsel must be greater than the fees that the same attorneys would charge their clients in non-contingency cases. "No one expects a lawyer whose compensation is contingent on success of his services to charge, when successful, as little as he would charge a client who in advance has agreed to pay for his services, regardless of success." *In re Sumitomo Copper Litig.*, 74 F. Supp. 2d 393, 396 (S.D.N.Y. 1999); *see also In re Veeco Instruments Inc. Sec. Litig.*, 2007 WL 4115808, at *6 (S.D.N.Y. Nov. 7, 2007) (same). Consistent with this reasoning, Massachusetts state courts routinely award attorneys' fees in class action cases. *See, e.g., In Re: Columbia Gas Cases*, No. 1877CV01343-G at 18-25 (Mass. Super. Mar. 12, 2020) ("*Columbia Gas*");[8] *Chambers v. Tufts Assoc. Health Maint. Org., Inc.*, No. 2082CV2837 at 4-6 (Mass. Super. Sept. 30, 2022).[9]

A. Methods for Determining a Reasonable Fee

In determining a reasonable attorneys' fee, Massachusetts courts have historically employed two methods, the lodestar approach[10] and a multi-factor analysis. There is a fair amount

[7] Pastor Decl., ¶ 16.
[8] Copy annexed hereto as **Exhibit 1**.
[9] Copy annexed hereto as **Exhibit 2**.
[10] Massachusetts courts have noted that "[t]he lodestar approach has the advantage of producing generally consistent results from case to case." *Fontaine v. Ebtec Corp.*, 415 Mass. 309, 325 (1993).

of overlap between the two approaches, and they are often discussed together because a determination of lodestar is one of the elements of the multi-factor analysis. Commonly used and oft-cited Massachusetts factors include:

> the ability and reputation of the attorney, the demand for his services by others, the amount and importance of the matter involved, the time spent, the prices usually charged for similar services by other attorneys in the same neighborhood, the amount of money or the value of the property affected by the controversy, and the results secured.

Cummings v. National Shawmut Bank of Boston, 284 Mass. 563, 569 (1934); *Linthicum v. Archambault*, 379 Mass. 381, 388-389 (1979) ("the nature of the case and the issues presented, the time and labor required, the amount of damages involved, the result 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"); *Blake v. Hometown America Communities*, 486 Mass. 268, 284-285 (2020) (same). When applying the multi-factor analysis, "[n]either the time spent nor any other single factor is necessarily decisive of what is to be considered as a fair and reasonable charge for such services." *Cummings*, 284 Mass. at 569.

There is a significant and growing trend on the part of Massachusetts courts supporting application of the percentage-of-the-fund ("POF") approach in awarding fees to plaintiffs' counsel in class actions, with some courts suggesting that it is the preferred approach. The *Columbia Gas* decision contains a cogent discussion of the reasons for using the POF method: while recognizing that "the lodestar method of computation . . . is the typical standard by which the reasonableness of attorneys' fees are measured, especially when applying fee-shifting statutes[,]"[11] the court noted that "it is not the favored method for class actions with settlement funds. In such cases, the preferred approach is the percentage of fund (POF) method whereby attorneys' fees are determined

[11] *Columbia Gas* at 19, citing *Fontaine*, 415 Mass. at 324.

based on the court's determination of what is a reasonable percentage of the fund recovered for those benefitted by the litigation. [citing cases]" *Id.* The Court in *Columbia Gas* went on to point out why the POF method is the "preferred approach":

> The POF method has become predominant in so-called "common fund" cases because of several identified advantages over the lodestar method. These include its focus on the results that have been obtained for the class, which tends to more closely align the attorneys' interest with that of the class members, its elimination of a disincentive to settle cases early, and its less burdensome administration by courts who are charged with making fee determinations.

Id. (first citing *In re Thirteen Appeals Arising out of San Juan DuPont Plaza Hotel Fire Ltig.*, 56 F. 3d 295, 305 (1st Cir. 1995); and then citing *In re Relafen Antitrust Litig.*, 231 F.R.D. 52, 79 (D. Mass. 2005)); *see also In re: Walgreens Item Pricing Coordinated Class Action*, 2004 WL 6036251 (Mass. Super. Sept. 13, 2004) ("The lodestar method, once the dominant approach, has now lost considerable favor to what is called the percentage of fund ("POF") or recovery method.") (citing *Thirteen Appeals*).

Significantly, the requested fee award here is reasonable under all of the applicable approaches employed by Massachusetts courts, and the reasonableness of the requested fee is demonstrated by application of the relevant factors.

B. Class Counsel's Lodestar is Reasonable

Under Massachusetts law, counsel's lodestar (*i.e.*, multiplying the attorney's reasonably spent hours by a reasonable hourly rate) is used to determine a reasonable fee award. *See, e.g., Stratos v. Dep't of Public Welfare*, 387 Mass. 312, 322 (1982) ("fair market rates for time reasonably spent should be the basic measure of reasonable fees, and should govern unless there are special reasons to depart from them"); *Stowe v. Bologna*, 417 Mass. 199, 203 (1994) ("the first component of the basic measure amount is the amount of time reasonably expended on the case . . . [t]he judge should begin his inquiry with the amount of time documented by the plaintiff's

attorney"); *Fontaine*, 415 Mass. at 325 ("[*Stratos*, 387 Mass. at 322], then, expresses basic approval of the lodestar approach"). Massachusetts Courts have recognized that "[t]he lodestar approach has the advantage of producing generally consistent results from case to case." *Id.* Attorneys' fees that are based on counsel's lodestar are presumptively valid unless "the time invested and the results achieved . . . [were] wholly disproportionate to the interests at stake." *Killeen v. Westban Hotel Venture, L.P.*, 69 Mass. App. Ct. 784, 796 (2007) (citing *Stratos*, 387 Mass. at 323).

The lodestar analysis starts with time spent by the attorneys on the case and the rates charged for the attorneys' time. *Stowe*, 417 Mass. at 203. The Court then assesses the reasonableness of the time spent and the rates charged. *Id.* Here, Class Counsel's lodestar and hours are summarized by the following chart:

FIRM	**HOURS**	**LODESTAR**
Barnow and Associates, P.C.	197.1	$128,552.50
Pastor Law Office, PC	137.2	$99,517.50
TOTALS	**334.3**	**$228,070.00**

For further detail on the individual firms' lodestars, *see* Declaration of Ben Barnow ("Barnow Decl."), ¶ 16; Pastor Decl., ¶ 23, n. 3. Collectively, Class Counsel and their firms devoted approximately 334 hours prosecuting and settling this action. Pastor Decl., ¶ 29. This yields a collective lodestar of $228,070. *Id.* Substantial fee awards in successful cases, such as the present action, encourage and support meritorious class actions and promote private enforcement of, and compliance with, laws designed to preserve the confidentiality and privacy of consumers' PII/PHI. It is, therefore, important to adequately compensate plaintiff's counsel in cases like this one.

1. The Time Expended by Class Counsel is Reasonable

The Parties commenced settlement discussions at a fairly early stage in the litigation, and this was because the Parties saw an opportunity to pursue resolution before proceeding further with costly and time-consuming litigation,[12] and these discussions continued over several months, including a mediation before a respected mediator with substantial experience. In addition, Class Counsel pursued this case aggressively prior to entering into an agreement in principle to settle the matter, including substantial time spent investigating the respective roles of MHS and MCI in the Data Breach. The litigation involved a significant commitment of resources. After the parties commenced discussions relating to settlement and agreed to mediate the matter, Plaintiff requested, and MHS produced, substantial pre-mediation discovery in the form of documents and narrative responses to requests for information. A settlement was not reached at the mediation, and intense discussions and negotiations continued post-mediation among Plaintiff and MHS and MCI for several weeks, until an agreement in principle was reached.

The time spent by Class Counsel included, among other things: conferring with Plaintiff and performing an initial investigation; preparing interrogatories and document requests to MHS; extensive discussions with counsel for MHS and MCI concerning their investigation of the matter and possible settlement and settlement negotiations; preparing pre-mediation discovery requests and review of documents and information produced by MHS in response to those requests; preparation for and participation in a full day mediation session; additional post-mediation settlement discussions, culminating in an agreement to settle the case on a class-wide basis;

[12] At the time the Parties entered into settlement discussions and engaged in mediation, the case was at a critical juncture, because if the litigation proceeded without a settlement, Plaintiff intended to amend the pleadings to name MCI as an additional defendant, which would have had the likely effect of increasing the complexity, expense, and duration of the litigation. Plaintiff made this intent known in discussions with MHS and MCI.

preparing and negotiating the terms and language of the class action settlement agreement and the related settlement documents, such as the class notices and the proposed orders for settlement approval; other actions in connection with seeking settlement approval (including preparation of papers in support of preliminary settlement approval and appearance at the preliminary approval hearing); and communications with class members and the Settlement Administrator regarding class member questions about the settlement and the claim process.[13] There is also substantial additional work yet to be done in connection with the Settlement and settlement approval, including preparation of papers in support of final settlement approval, appearance at the final settlement approval hearing, and additional communications with the Settlement Administrator and Settlement Class Members regarding questions and issues relating to claims and the claims process.[14]

As the above summary demonstrates, the work done by Class Counsel was necessary and appropriate and the hours expended by Class Counsel are therefore reasonable.

2. Class Counsel's Rates are Reasonable

Class Counsel's hourly rates are reasonable and consistent with rates charged by firms for similar work by attorneys of comparable experience. The rates for all professionals whose time is included in the collective lodestar of Class Counsel fall into the following ranges: from $725 to $1,050 per hour for partners; and from $425 to $725 for associates. *See* Pastor Decl., ¶ 24.

Class Counsel are experienced in class action litigation, are highly qualified, have extensive experience in complex civil litigation, and have routinely been appointed class counsel by courts across the country, including by this Court.[15] Class Counsel understand the duties

[13] Pastor Decl., ¶ 27.
[14] *Id.*, ¶ 28.
[15] *See* Barnow Decl., ¶¶ 5-8; Pastor Decl., ¶¶ 19-21. 26.

imposed upon class counsel in class actions, and have proven adept at all phases of litigation, from discovery and motion practice to trial and appeal or settlement. As detailed in Class Counsel's individual firm Declarations, Class Counsel have substantial experience in class action litigation, particularly in class actions relating to data breaches and other privacy issues and other consumer litigation.[16] Class Counsel's rates easily fall within the standard range of hourly rates for this type of work.[17] *See* Pastor Decl., ¶¶ 25-26; Barnow Decl., ¶ 17; *Lukens v. Utah Imaging Associates, Inc.*, No. 210906618 (Salt Lake Cnty., Utah) (approving a fee award of $700,000 which included Barnow and Associates' lodestar at its current hourly rates); *Kesner v. UMass Mem'l Health Care, Inc.*, No. 2185 CV 01210 (Worcester Cnty., Mass. May 25, 2023) (approving Barnow and Associates' and Pastor Law Office's current hourly rates); *Kostka v. Dickey's Barbecue Rests., Inc.*, 2023 U.S. Dist. LEXIS 110058, *11 (N.D. Tex. June 6, 2023) (approving a fee award for plaintiffs' counsel, including Barnow and Associates' current rates); *In re BJC Healthcare Data Breach Litigation*, No. 2022-CC09492 (Circuit Court of the City of St. Louis, Missouri Sep. 6, 2022 (approving fee award of $790,000, which included Barnow and Associates' fees at rates of $1,050/hour for Ben Barnow, $725/hour for Anthony L. Parkhill, and $425/hour for Riley W. Prince); *Shedd v. Sturdy Mem. Hosp., Inc.*, No. 2173CV00498 (Mass. Super. Ct. Feb. 27, 2023) (approving fee of $300,000, which included Pastor Law Office, PC's rates of $650/hour for David Pastor);[18] *Phillips v. Equity Res. Mgmt., L.L.C.*, No. 13-12092-RWZ (D. Mass. May 3, 2018)

[16] Barnow Decl., ¶¶ 5-8; Pastor Decl., ¶¶ 19-21, 26.

[17] The Court should use counsel's current hourly rates, even if their rates have changed over time, to compensate for inflation and loss of use of funds that could have been devoted to other endeavors. *Missouri v. Jenkins*, 491 U.S. 274, 284 (1989); *In re Union Carbide Corp. Consumer Prods. Bus. Sec. Litig.*, 724 F. Supp. 160, 163-64 (S.D.N.Y. 1989) (citing cases); *In re NASDAQ Mkt.-Makers Antitrust Litig.*, 187 F.R.D. 465, 489, n.25 (S.D.N.Y. 1998).

[18] David Pastor's hourly rate was changed from $650 per hour to $725 per hour in January, 2023. Prior to that, it had been at $650 per hour since approximately 2014. The fee application in *Shedd* was submitted at the time of, or shortly before the rate change and listed the prior $650 rate.

(approving fees of $303,000, which included Pastor Law Office, PC's rates of $650/hour for David Pastor); *Baker v. Equity Res. Mgmt., L.L.C.*, No. 18-11175-PBS (D. Mass. Nov. 4, 2019) (approving fees of $500,000, which included Pastor Law Office, PC's rates of $650/hour for David Pastor).

Accordingly, the rates charged by Class Counsel are reasonable and should be accepted by the Court.

C. The Relevant Factors Support the Reasonableness of the Requested Fees

1. The Nature of the Case and the Issues Presented/Risk Factors

The risk involved in prosecuting a class action is an important consideration in determining an appropriate fee award. This factor is intended to recognize that cases taken on a contingent fee basis entail risk of non-payment for the attorneys who prosecute them, and it embodies an assumption that contingency work is entitled to greater compensation than non-contingency work. *In re Lupron Mktg. and Sales Practices Litig.*, 2005 WL 2006833, at *4 (D. Mass. Aug. 17, 2005) ("Many cases recognize that the risk assumed by an attorney is perhaps the foremost factor in determining an appropriate fee award" (internal quotation marks and citation omitted)).

The risk of a class action should not be viewed in retrospect, from the standpoint of a settlement, but as it existed at the outset of the litigation. *See e.g.*, *In re Dairy Farmers of Am., Inc., Cheese Antitrust Litig.*, 80 F. Supp. 3d 838, 847-48 (N.D. Ill. 2015) ("When determining the reasonableness of a fee request, courts put a fair amount of emphasis on the severity of the risk (read: financial risk) that class counsel assumed in undertaking the lawsuit."). Indeed, when Class Counsel undertook representation of the Class here, there were no assurances that any compensation would ever be received. Even if Plaintiffs had proceeded and obtained a final

judgment for the Class, without a settlement, an appeal would have been a virtual certainty, together with the risks and time delay accompanying an appeal.

Because this case seeks to recover damages for injuries occurring as a result of a data breach, the risks may even be greater than in class actions generally. This field of litigation is evolving, and there is far from any guarantee of the ultimate result. *See, e.g., Gordon v. Chipotle Mexican Grill, Inc.*, 2019 WL 6972701, at *1 (D. Colo. Dec. 16, 2019) ("Data breach cases . . . are particularly risky, expensive, and complex."). While Plaintiff believes this case is a strong one, all cases, including this one, are subject to substantial risk. Due at least in part to their cutting-edge, innovative nature and the rapidly evolving law, data incident cases like this one generally face substantial hurdles. *See, e.g., In re Hannaford Bros. Co. Customer Data Sec. Breach Litig.*, 293 F.R.D. 21, 35 (D. Me. 2013) (denying class certification in cybersecurity incident class action litigation). The difficulty and complexity of data breach cases are particularly acute with respect to issues of class certification and injury and damages that are vigorously contested in these cases, and the same is to be expected here, with capable and experienced counsel representing Defendant. Had the case continued, without the Settlement, these factors would have been multiplied because Plaintiff would have added MCI as a defendant; and MCI's counsel would have vigorously and aggressively defended against Plaintiff's allegations.

Compounding this aspect of risk and uncertainty is the fact that the law with respect to data breach litigation, particularly as it relates to class certification and damages, is much less developed in the Massachusetts state courts than it is in the federal courts.

2. The Time and Labor Required/Time Spent

The time and labor expended by Class Counsel is described in detail in Section **III.B**. above (discussing application of the lodestar method).

3. The Amount and Importance of the Matter Involved

This case involves serious issues of privacy and confidentiality, with the exposure of Plaintiffs' and Settlement Class Members' personal information, including names, addresses, dates of birth, gender, Social Security numbers, drivers' license numbers, financial account numbers, routing numbers, payment card numbers, diagnosis/treatment information, medical procedure types, provider names, prescription information, dates of service, medical record numbers, patient account numbers, insurance ID numbers, insurance group numbers, claim numbers, insurance plan names, provider ID numbers, procedure codes, treatment costs, and diagnostic codes, with the serious risk that such information would be used for identity theft and other types of fraudulent activity. While Plaintiff's and most Settlement Class Members' individual damages may be small, the fraud risks referenced here can lead to substantial and even devastating circumstances and the damage done can be very difficult and expensive to correct and repair. As alleged in the Complaint, the monetary losses can include the loss or diminution of the value of Plaintiffs' and Settlement Class Members' personal information and time spent on mitigation of damages, among other things.

4. The Results Obtained

The Settlement created a substantial benefit for the Settlement Class, creating a non-reversionary Settlement Fund of $727,266. The Settlement Fund will be used to pay Settlement Class Members' claims for out-of-pocket expenses incurred in connection with the data breach, compensation for ordinary losses, compensation for lost time spent addressing issues related to the breach, compensation for extraordinary losses for those who qualify, and two years of three-bureau credit and identity theft monitoring with $1,000,000 of identity theft insurance with no deductible, as well as cash compensation for those who elect this option. The Settlement Fund will also be

used to pay the expenses of settlement administration, Class Counsel's attorneys' fees, costs and expenses, and a service award to the Class Representative. The Settlement Agreement provides that "[n]o portion of the Settlement Fund shall revert to or be repaid to MHS and MCI after the Effective Date."[19]

5. The Ability, Experience, and Reputation of the Attorneys Involved

The quality of Class Counsel's representation is reflected in the reputation of Class Counsel, the experience of the attorneys involved in this case, and the manner in which they prosecuted this case from its inception through the settlement negotiations and the settlement approval process. Class Counsel enjoy an excellent reputation and have substantial experience in the area of class action and consumer litigation. *See* Barnow Decl., ¶¶ 5-8; Pastor Decl., ¶¶ 19-21.

The Settlement negotiated with MHS and MCI is a highly favorable outcome for the Class, and it is the direct result of the creativity, diligence, hard work, and skill brought to bear by Class Counsel throughout this litigation. Class Counsel aggressively litigated this case and achieved a settlement providing the Settlement Class with substantial benefits. Class Counsel's prosecution of this class action weighs strongly in favor of the proposed fee award.

The high quality of the opposition that Class Counsel faced is a further testament to the quality of Class Counsel's representation. MHS and MCI are represented by skilled and highly regarded counsel from prestigious law firms with a reputation for vigorous advocacy in the defense of complex civil cases, and the attorneys representing MHS and MCI in this case have substantial experience in defending data breach class actions.

Courts have repeatedly recognized that the caliber of the opposition faced by the plaintiff's counsel should be taken into consideration in assessing the quality of the plaintiff's counsel's

[19] Settlement Agreement, ¶ 42.

performance, and in this case, it supports approval of the requested fee. *See*, *e.g.*, *In re Marsh & McLennan Cos., Inc. Sec. Litig.*, 2009 U.S. Dist. LEXIS 120953, at *56 (S.D.N.Y. Dec. 23, 2009) (reasonableness of fee was supported by fact that defendants "were represented by first-rate attorneys who vigorously contested Lead Plaintiffs' claims and allegations").

6. The Usual Price Charged for Similar Services

In evaluating the usual price charged for similar services in the same area, courts focus on counsel's hourly rates. As in Section **III.B.2**. above, Class Counsel's hourly rates are commensurate with the level of experience and ability demonstrated by the attorneys who litigated this action on behalf of Plaintiff and the Settlement Class, they are consistent with the rates of comparably experienced attorneys and they have been approved by state and federal courts in Massachusetts and around the country.

7. Public Policy Considerations

Courts also consider public policy concerns in deciding upon a reasonable attorneys' fee, noting that public policy supports rewarding counsel for bringing successful class action litigation. *See*, *e.g.*, *In re Flag Telecom Holdings, Ltd. Sec. Litig.*, 2010 WL 4537550, at *29 (S.D.N.Y. Nov. 8, 2010) (holding that if the "important public policy [of enforcing consumer protection laws] is to be carried out, the courts should award fees which will adequately compensate Lead Counsel for the value of their efforts, taking into account the enormous risks they undertook"); *In re Tyco Int'l Ltd. Multidistrict Litigation*, 535 F. Supp. 2d 249, 270 (D.N.H. 2007) ("Without a fee that reflects the risk and effort involved in this litigation, future plaintiffs' attorneys might hesitate to be similarly aggressive and persistent."). Massachusetts state courts are in accord. *See*, *e.g.*, *In re Columbia Gas Cases* (**Exhibit 1** hereto) at 18 (noting "public policy considerations" as one of the factors weighed by courts in the First Circuit); *Stowe*, 417 Mass. at 203-204 (in considering the

reasonableness of attorneys' fees, the judge should consider "the public interest in having persons with valid claims . . . represented by competent legal counsel") (internal quotation marks and citations omitted); *Killeen*, 69 Mass. App. Ct. at 791 (quoting *Stowe*, 417 Mass. at 203-04) (same).[20] As recognized by the Appeals Court in *Sch. Comm. v. Mass. Comm'n Against Discrimination*, 63 Mass. App. Ct. 839 (2005):

> A significant attorneys' fee may be upheld because of the importance of providing an incentive to attorneys to represent litigants . . . who seek to vindicate . . . rights but whose claim may not result in substantial monetary compensation and because of the deterrent impact of such litigation.

Id. at 854 (alterations in original; internal quotation marks and citation omitted).

The Settlement serves important public policy concerns by protecting consumers' interests in the privacy and confidentiality of their personal information and by causing MHS and MCI to improve their procedures for protecting these interests. Accordingly, compensating Class Counsel appropriately for bringing this action serves these important policy goals.

D. The Requested Fee is Supported by the Percentage-of-the-Fund Approach

The requested fee award is also supported by the POF approach. Massachusetts courts have awarded fees as a percentage-of-the-fund recovered for the class. The Massachusetts courts and federal courts applying the percentage-of-the-fund method often award percentages between 30% and 40%. *See, e.g., In re: Walgreens* 2004 WL 6036251 (awarding one-third of fund in fees); *Salvas*, 81 Mass. App. Ct. 1103 (affirming award of 38% of settlement fund to plaintiffs' attorneys); *Commonwealth Care Alliance*, 2013 WL 6268236 at *2-3 (plaintiff's counsel requested a fee award of "30% of the common fund" and the Court granted the request, without endorsing

[20] *See also Killeen*, 69 Mass. App. Ct. at 794 ("That the plaintiff prevailed was important not only for her own claim but for others similarly situated").

the POF approach); *Bilewicz v. FMR LLC*, Civil Action No. 13-10636-DJC, 2014 WL 8332137 at *6 (D. Mass. Oct. 16, 2014) (awarding counsel 33.3% of the settlement amount in attorneys' fees).

In view of the above-referenced authorities and examples, the requested fee award, which amounts to one-third of the Settlement Fund, is reasonable under the POF method. Courts applying the POF approach sometimes use a lodestar cross-check to evaluate the reasonableness of the fee. *See Columbia Gas* at 22-25 ([t]o ensure the validity of [the percentage fee award], the court will undertake a lodestar cross-check"). Application of the lodestar method is discussed in detail in Section **III.B**. above, and this discussion demonstrates the reasonableness of the fee by application of a lodestar cross-check.

E. A Lodestar Multiplier Would Be Appropriate and Reasonable Here

A positive multiplier is warranted under the circumstances of this case. Plaintiff's requested multiplier is only 1.06. The same factors discussed above that support the overall reasonableness of the fee request also justify an increase or upward adjustment of the lodestar amount. *See Fontaine*, 415 Mass. at 324 ("[S]tatutory fee awards may be enhanced to compensate for the risk of nonpayment . . . ."). The rationale for a multiplier was explained by Judge Sanders as follows:

> A multiplier recognizes that the lawyer who does not charge for his services until and unless he recovers for his client has essentially made a loan of his time: where there is a high risk that loan will "default" (i.e., there will be no recovery), the interest rate must be high enough to compensate the lawyer accordingly.

Commonwealth Care Alliance, 2013 WL 6268236, at *2. A review of the relevant factors (as demonstrated by the discussion in Section **III.C.1-7** above) shows that a lodestar multiplier would be appropriate here. Massachusetts courts routinely award multipliers. *See, e.g., Commonwealth Care Alliance* (2.0 multiplier); *In re AMICAS, Inc. S'holder Litig.,* 27 Mass. L. Rptr. 568 at *4 (Mass. Super. Dec. 6, 2010) (5.0 multiplier); *Schiefer v. Bain Capital*, 35 Mass. L. Rptr. 295 at *2 (Mass. Super. Oct. 1, 2018) (court applies 1.6 multiplier and notes that "[m]ultipliers between 1.5

and 2.0 are not uncommon"); *Wright v. Balise Motor Sales Co.,* 2020 WL 5268239 at *3 (Mass. Super. July 31, 2020) (3.0 multiplier); *Columbia Gas* at 22-25 (3.39 multiplier applied on lodestar cross-check).

F. Class Counsel's Reimbursable Costs and Expenses

In addition to the time spent litigating this case, Class Counsel incurred out of pocket costs and expenses, for which they seek reimbursement. Collectively, Class Counsel incurred a total of $6,567.16 in out-of-pocket costs and expenses.[21] The costs and expenses incurred by Class Counsel are clearly reasonable and were necessary for this litigation, and they include mediation fees, court filing fees, and travel to attend court hearings. Massachusetts courts routinely approve awards to plaintiffs' counsel for reimbursement for appropriate litigation costs and expenses, necessarily incurred in the prosecution of the action. *See, e.g., In re Walgreens*, 2004 WL 6036251; *Columbia Gas* at 17-18 (approving reimbursement for expenses including "experts, mediation, travel and other expenses"). A summary of Class Counsel's expenses is below:

Expense	**Amount**
Court Filing Fees	$350.00
Service of Process	$123.00
Electronic Research	$58.05
Travel	$2,830.65
Attorney Admission Fees	$1,065.00
Conference Call Charges	$15.46
Mediation Fees	$2,125.00
TOTAL	**$6,567.16**

[21] Pastor Decl., ¶ 32.

IV. THE PROPOSED SERVICE AWARD SHOULD BE APPROVED

MHS and MCI have also agreed to pay the Plaintiff a Service Award of $2,000, separate from and in addition to any Settlement Class Member compensation. Courts approve service awards to plaintiffs who prosecute class actions because there would be no class-wide benefit absent their lawsuits. *See In re Relafen Antitrust Litig.*, 231 F.R.D. at 82 ("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.") (citation omitted); *In re Lupron*, 2005 WL 2006833 at *7 ("Incentive awards serve an important function in promoting class action settlements[.]"). "In granting incentive awards to named plaintiffs in class actions, courts consider not only the efforts of the plaintiffs in pursuing the claims, but also the important public policy of fostering enforcement laws and rewarding representative plaintiffs for being instrumental in obtaining recoveries for persons other than themselves." *Bussie v. Allmerica Fin. Corp.*, 1999 WL 342042, at *3 (D. Mass. May 19, 1999); *see also Chambers* at 6 (approving a service award to the named plaintiff of $10,000 as "reasonable and appropriate"); *Columbia Gas* at 17 ("The court has no hesitation in approving the request that each of the eight named plaintiffs be awarded $5,000."). Here, Plaintiff has been actively involved in the litigation. Plaintiff pursued the interests of the Settlement Class by undertaking the responsibilities attendant to serving as a Class Representative, including, without limitation, periodically conferring with counsel, providing relevant documents and information, and reviewing pleadings and other documents in the case.[22] Accordingly, given Plaintiff's efforts in supporting the litigation, combined with the risks and burdens of serving as a Class Representative, the application for a $2,000 Service Award to the Plaintiff should be granted.

[22] Pastor Decl., ¶ 34.

V. CONCLUSION

For all the foregoing reasons, the Court should approve the requested award of attorneys' fees, costs, and expenses, and the requested Service Award to the Plaintiff.

Dated: December 22, 2023

Respectfully submitted,

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EXHIBIT 1

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COMMONWEALTH OF MASSACHUSETTS

ESSEX, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 1877CV01343-G

IN RE: COLUMBIA GAS CASES

MEMORANDUM AND ORDER FOR JUDGMENT ON PLAINTIFFS' MOTIONS FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND FOR AWARD OF ATTORNEYS' FEES, COSTS, AND INCENTIVE PAYMENTS

I. INTRODUCTION

On February 27, 2020, the court held a hearing on two motions filed by Class Counsel: (1) Plaintiffs' Motion for Final Approval of Class Action Settlement (Paper #72); and (2) Plaintiffs' Motion for Award of Attorneys' Fees, Costs, and Incentive Payments (Paper #73). Prior to the hearing, the court received and reviewed the following submissions: (1) Class Counsel's memoranda in support of each of their motions and a draft final order approving the settlement; (2) a declaration of Economist Evan Schouten regarding the potential economic benefit of the settlement to the affected communities; (3) a declaration of Harvard Law School Professor William Rubenstein regarding whether the proposed settlement is fair, reasonable, and adequate and therefore warrants judicial approval; (4) declarations of Scott Fenwick, Chief Operating Officer (COO) of Heffler Claims Group (Heffler), and Jeanne Finegan, Chief Media Officer of a division of Heffler, regarding Heffler's efforts to provide notice to Class Members, the result of those efforts, the claims received to date, and some information about likely lump sum payments; (5) declarations of Class Counsel John Roddy, Frank Petosa, Elizabeth Graham, Leo Boyle, and Bradley Henry regarding their background and experience as lawyers, their work and that of their

firms in this case, the number of hours worked, and the billing rates for the attorneys and non-attorneys at their firm who worked on the Class Action; (6) a declaration of Mediator Eric Green regarding his background and experience and his mediation work in this case; (7) a report of University of Texas Law School Professor Charles Silver regarding whether the amount of attorneys' fees requested is reasonable; (8) a declaration of Ernie Cintron, the founder and managing partner of EN Business Solutions, LLP, regarding his work assisting businesses in the three affected communities, his liaison work with Columbia Gas, and his work with Class Counsel following preliminary settlement approval to assist business owners with the filing of claims; (9) objections to the motion for final approval and/or the request for attorneys' fees; (10) Columbia Gas's "Omnibus Response to Settlement Objections" and "Class Counsel's Response to Objections;" (11) a more recent declaration of Scott Fenwick of Heffler regarding the objections that have been received; and (12) a supplemental memorandum by one set of objectors, the "D'Angelo Objectors" and separate reply memoranda by them to the responses of Columbia Gas and Class Counsel to their earlier submitted objection. Following the hearing, Class Counsel submitted a supplemental memorandum in support of their request for attorneys' fees, and Mayor's Rivera's opposition to the same. Class Counsel also submitted a supplemental declaration of Heffler's COO, Mr. Fenwick, attesting that, as of March 11, 2020, only four objections to the Settlement that had been filed had been withdrawn.

At the final approval hearing, the court heard from Class Counsel in support of both motions and Columbia Gas' counsel in support of the motion for final approval of the settlement. Also speaking on behalf of the proposed settlement were three Class Members, among them Ernie Cintron, who was, as noted above, a declarant of one of the written submissions. The court was

advised that only four of the objections that had been filed remained pending as of the date of the hearing. Two of those four objectors addressed the court at the hearing. They were Mayor Daniel Rivera of Lawrence, who spoke in his personal capacity as a Lawrence resident and Class Member, and Tania Gonzalez, a former Lawrence resident and a Class Member. Additional documents that were submitted by Class Counsel and marked as exhibits included the following: an updated chart showing a breakdown of submitted claims by community and type (residential or commercial), with some other related information (Exhibit 1); a printout of Powerpoint slides in support of Class Counsel's motion for final settlement approval (Exhibit 2); and a printout of Powerpoint slides in support of Class Counsel's motion for attorneys' fees, and costs (Exhibit 3). In addition, a photograph of the Lawrence home of Mary Mlodzianowski, one of the three class members who spoke at the hearing, was marked as Exhibit 4 (that photograph principally showed the extensive and irreparable damage that had been done to the home of Ms. Mlodzianowski's next door neighbor). For the reasons that follow, the motion for final approval of the Settlement is **ALLOWED** and the motion for approval of requested attorneys' fees and costs is **ALLOWED**.

II. BACKGROUND INFORMATION REGARDING THE SETTLEMENT, THE CLAIMS PROCESS, AND THE CLAIMS THAT HAVE BEEN FILED TO DATE

A. The Event and Immediate Aftermath

September 13, 2018 was a devastating day for the residents and businesses of the City of Lawrence and the Towns of Andover and North Andover, the adverse effects of which continue to be felt by many to this day. On that date, as a result of over-pressurization of Columbia Gas' natural gas distribution lines that occurred when work was being done to replace a low-pressure distribution line in South Lawrence, a series of explosions and fires occurred across those three

communities. "The Event," as it has come to be called by some (and which phrase the court will use herein), was catastrophic for the residents, property owners, and businesses of Lawrence, Andover, and North Andover. Many homes were damaged or destroyed, natural gas was cut off to tens of thousands of Columbia Gas customers for protracted periods of time, stretching into months for some, many residents and businesses were displaced, and many suffered significant financial impacts that they could ill afford. Some businesses were shuttered for extended periods of time, and those that reopened, whether soon after the Event or after protracted delay, experienced a loss of customers due to the disruption of remediation efforts in the affected communities, or because the customers were forced to relocate to other communities, or for other reasons causally related to the Event. The lives of the residents and the functioning of the businesses were adversely impacted in a myriad of ways.

B. Columbia Gas' Response

In the aftermath of the Event, Columbia Gas made a public commitment to restore the Merrimack Valley and make its residents and businesses whole. It spent over $1 billion to provide relief and assistance to the communities and those who were harmed. In the weeks after the Event, Columbia Gas' efforts included the following: it established a team to provide displaced residents with funds for daily expenses and distributed cash cards to impacted individuals for their immediate needs; it made temporary housing arrangements for those who were evacuated from their homes or were unable to return to them, including renting all available hotel rooms in the area and providing mobile homes as temporary housing at various locations; it reimbursed landlords for lost rent payments; and it paid residents for heaters, food, alternative cooking appliances, and other necessities. Columbia Gas also initiated its own pre-Settlement

Claims Process (PSCP). It opened claims centers in each of the three communities and hired nearly 400 claims adjustors to staff the centers seven days a week and process the claims of those who had been affected. It established a toll-free claim line that was available twenty-four hours a day. Through the PSCP, Columbia Gas provided residents and businesses with reimbursements for food spoilage, damaged appliances, evacuation expenses, living expenses, loss of commercial, rental, or other commercial income, and damage to real and personal property. Columbia Gas provided funding in a directed effort to address the needs of affected businesses and small business owners, and it hired accountants to work with businesses in determining their lost profits. It also hired a workforce of over 5,000 individuals, including plumbers and electricians, in its attempt to fully restore gas service as expeditiously as possible. Columbia Gas also repaired and replaced infrastructure.

C. The Settlement and Preliminary Approval

On September 23, 2019, following the filing of a number of class action suits against Columbia Gas and their consolidation into this Aggregate Proceeding, Class Counsel and Columbia Gas executed a Settlement Agreement. The total amount of the Settlement is $143 million. The Settlement provides for cash payments to Class Members, who are broadly defined as all persons who resided, owned property, or owned a business in any of the three communities. Physical bodily injury and wrongful death claims are excluded from class coverage, as are claims for emotional distress arising out of physical bodily injury. Other claims for emotional distress, whether or not resulting in physical manifestations, are potentially covered. In addition to the compensation to be paid to Class Members if the Settlement is approved, Economist Schouten estimates that the economic stimulus from disbursement of the Settlements funds will be in the

range of $37 million to $119 million and will result in the creation of 400 to 1,300 jobs.

The Settlement Agreement provides that attorneys' fees are not to exceed 16.5% of the Settlement Fund, i.e., $23,595,000, costs are not to exceed 3% of the Settlement Fund, i.e., $4,290,000, and the incentive fees to named plaintiffs are not to exceed $40,000 in the aggregate, or $5,000 for each of the eight named plaintiffs. Concomitant with their request for final approval of the Settlement, Class Counsel are requesting an award of the full 16.5% of the Settlement Fund for fees, reimbursement of costs of up to $2.5 million, and payment of a total of $40,000 to the eight named plaintiffs. If the Court grants final approval of the Settlement and allows the request for fees and costs with no reduction, that would leave about $116 million for disbursement to Class Members.[1]

The Settlement is the product of extensive mediation by the parties before Eric Green, a highly skilled and experienced mediator of national renown, who was assisted by his very capable colleagues Carmin Reis and Michael Robertson. Over a six-month period, there were twelve in-person mediation sessions and numerous telephone conferences or consultations. According to Mr Green, the level of advocacy was exceptionally informed, vigorous, engaged, ethical, and effective. He described the participating attorneys as "among the most knowledgeable, sophisticated, and accomplished attorneys in the fields of tort, class action, and complex litigation." Counsel provided a series of briefs and white papers regarding contested issues, with analyses of procedural and substantive issues. The Settlement was the product of vigorous arm's

[1]In their post-hearing memorandum, Class Counsel put the figure at $116.9 million if the final costs sought are $2.5 million and somewhat above that if the requested costs are below that. But the court will use the $116 million figure herein, as that was the figure used for demarcating the portion of the net Settlement that would be allotted for lump sum awards and for itemized and extraordinary injury awards.

length and contentious negotiations.

After a hearing on October 7, 2019, on October 11, 2019, the court allowed Class Counsel's motion (Paper #56) for preliminary approval of the Settlement. By its order, the court: (1) conditionally certified the proposed Settlement Class; (2) granted preliminary approval of the proposed Settlement, as set forth in the Settlement Agreement; (3) approved the proposed form and manner of giving notice of the Settlement to the Class Members; (4) appointed Heffler as Settlement Administrator and approved of the proposed notice to Class Members and the proposed methodology for providing such notice; (5) set a claims submission deadline of 90 days from the date of the preliminary approval; and (6) set a hearing date for a hearing regarding the court's final approval of the Settlement and approved the proposed protocol for the handling of claims and objections to the Settlement.

D. Notice and Outreach

Following the court's preliminary approval of the Settlement Agreement, Heffler engaged in what have been characterized as unprecedented efforts to provide notice to Class Members of the Settlement and of the claims process. Those efforts went well beyond being merely adequate. In addition to three separate mailings to about 50,000 residential addresses and a mailing to about 28,000 commercial addresses, there were extensive television, local cable television, radio, and newspaper ads, social media innundation, community outreach through town hall meetings and claims fairs, and an informational website and hotline. Heffler estimates that notice reached 90% of Class Members, with an average frequency of delivery of message of six times.

Beyond providing notice to Class Members, Heffler established a claims facility in Andover to provide direct assistance to Class Members in the filing of claims. It was open for

nearly three months, operating five days a week, and it typically helped about thirty Class Members per day.

Mr. Cintron, the principal of EN Business Solutions, was initially involved in efforts to assist the business communities in Lawrence, Andover, and North Andover following the Event, and he acted as a liaison with Columbia Gas. Once the Settlement was preliminarily approved, Mr. Cintron worked with Class Counsel to assist with outreach efforts and claims preparation and submission. Together, he and those collaborating in the effort visited 845 businesses to offer assistance, established temporary claims centers in various businesses, advertised extensively on radio stations and social media, and distributed fliers. They assisted 220 business owners in gathering documentation, creating inventories, preparing profit and loss statements, and in all aspects of the claims process. They also assisted with nearly 1,000 residential claims involving several thousands residents. A team of eight logged more than 2,000 hours in their efforts.

In mid-December 2019, the court allowed Class Counsel's assented-to motion for a three-week extension of the deadline for Class Members to file claims. This was done because two holidays had fallen within the initial 90-day claims period.

E. Response

As of mid-February 2020, Class Members had submitted a total of 11,077 claims. Some 5,000 of those claims were submitted during the three-week extension of the original filing deadline. Of the 11,077 claims filed to date, 10,432 are residential and 645 are commercial. The claims have been submitted on behalf of about 35,000 class members in total. Fifty-six percent of the claims are from Lawrence, 23% from Andover, and 19% from North Andover. Eighty-four percent of the claims are from the so-called "Impact Zone," the 12.5 square mile area straddling

all three communities that the National Transportation Safety Board (NTSB) defined as having suffered the greatest impact. The claims rate for Class Members in the Impact Zone is 61% to 87% (the range is a function of the difficulty of determining the precise number of Class Members in the Impact Zone).

F. Claims Adjudication Process

The overwhelming majority of the claims received are lump sum claims. Class Members need only have filled out the claims form with some basic and simple information to submit a lump sum claim. Lump sum awards are intended to compensate Class Members for intangible injuries relating to disruption of their lives, inconvenience, and emotional distress. For that reason, no deductions of any lump sum award will be made because of any reimbursements or assistance that may have been provided to a claimant by any charitable organization or by Columbia Gas through its PSCP. The lump sum claims process is based on a point system and six categories of information provided by a Class Member: (1) the geographical proximity to the epicenter of the Impact Zone; (2) the number of days either away from home or without natural gas, whichever is longer; (3) the number of adults in the household; (4) the age of residents, with more points for adults over 65; (5) whether there were minor children in the household; and (6) whether there was property damage and the type. Information provided for each of the first four categories results in an assignment of points for each category. The fifth and sixth categories are treated differently. For the fifth, if there was one or more minors in a household, the point total for the first four categories is increased by 25%. Similarly with respect to the sixth category, if a Class Member has experienced property damage, a multiplier is used to increase the existing point total: 25% for smoke damage, 50% for fire or water damages, and 100% for structural or

foundational damage.

Heffler has earmarked $80 million of the $116 million of available money from the Settlement Fund for lump sum claims. After all lump sum claims have been submitted and points allotted, the $80 million fund will be divided by the total points for all lump sum claimants and a dollar value per point will be established. Awards will then be made based on that dollar value multiplied by a particular claimant's points total. It is estimated that the final value of a point is likely to be between $300 and $315 and that the average disbursement to a family of four will be in the $8,000 range. If the Settlement is approved, Heffler expects to be able to make disbursements to lump sum claimants by about June 30, 2020.

Commercial Class Members, i.e., business and property owners, cannot avail themselves of the lump sum claims process but must submit itemized claims. Residents may do so as well in lieu of filing a lump sum claim. The itemized claims process is intended to restore businesses to their pre-Event status. Accordingly, it provides an avenue for reimbursement of hard costs that either were not accepted or were not paid in full as part of the PSCP. Businesses can seek reimbursement for all manner of damages, from lost inventory, lost profits, lost good will, and carrying costs. Individuals may through the itemize claims process seek money for food spoilage, lodging costs, travel expenses, and the like. Supporting documentation is required for itemized claims, but Heffler has taken a flexible approach to what will suffice for both business and residential claimants. For residential itemized claimants, deductions from awards will be made based on prior payments, but only to avoid any duplicative compensation for the same damages.

The third claims option is a claim for extraordinary injury for individuals who seek compensation for injuries above and beyond what may be compensable under the lump sum or

itemized claims processes. An example is someone who watched her home burn down and suffered emotional distress beyond that which most Class Members suffered, or someone who suffered a radical disruption of his life. By illustration, if a Class Member suffered from significant Post-Traumatic Stress Disorder that was worse than the sleeplessness, anxiety, and headaches that have afflicted many Class Members, she may merit an extraordinary injury award. With this variety of claim as well, Heffler is flexible regarding the supporting documentation that is required.

Heffler has set aside $36 million of the Settlement Fund for itemized and extraordinary injury claims. It has received about 150 itemized claims from residents, with an average award thus far of about $7,000. Extrapolated over the total number of claims, including those yet to be adjudicated or filed, the total disbursements for residential extraordinary injury awards will likely be about $9 million. The average award to commercial claimants thus far is about $21,000. If that figure holds for the entirety of the over 600 commercial claims, those disbursements will total about $13 million. Heffler hopes to make disbursements of itemized claims awards within 30 to 60 days after the first lump sum awards are made.

It appears that after disbursement of itemized and extraordinary injury awards, there will be a surplus of about $13 million from the $36 million fund for those claims. That surplus will likely be distributed to lump sum claimants in a pro rata manner in a second disbursement to them, along with funds from uncashed checks from lump sum payments that were initially made.[2]

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[2]The court is told that it is Heffler's intention to make proactive efforts to directly contact any lump sum claimant who has received $500 or more and whose check is not timely cashed in an effort to ensure their actual receipt of the funds before making them available for redistribution to other lump sum claimants.

Should the court reduce the requested attorneys' fees by some amount, that amount would be added to the surplus fund for distribution to lump sum claimants as part of the second disbursement.

At the court's request, Class Counsel have agreed to have Heffler consider and adjudicate any claim by a Class Member that is submitted within forty-five days of the date of this order. Any claim that is filed directly with the court by that date will be deemed timely. Class Counsel predict that whatever additional number of claims that may be submitted, perhaps as a consequence of media reports about the final approval hearing, should not delay the first distribution of lump sum awards.

III. MOTION FOR FINAL SETTLEMENT APPROVAL

A. Governing Legal Principles

1. Class Certification

Mass. R. Civ. P. 23(a) provides that in order to obtain certification of a class action and to maintain such certification, "a plaintiff must show that (1) the class is sufficiently numerous to make joinder of all parties impracticable, (2) there are common questions of law and fact, (3) the claim of the named plaintiff representative is typical of the claims of the class, and (4) the named plaintiff will fairly and adequately represent the interests of the class. *See* Mass.R.Civ.P. 23(a). In addition, a plaintiff must show that common questions of law and fact predominate over individualized questions, and that the class action is superior to other available methods for fair and efficient adjudication of the controversy. *See* Mass.R.Civ.P. 23(b)." *Weld v. Glaxo Wellcome, Inc.*, 434 Mass. 81, 86 (2001) (footnote omitted). In allowing Class Counsel's motion for preliminary approval of the Settlement, the court found that the prerequisites for class

certification were satisfied. No outstanding objector to the motion for final approval has asserted otherwise. Nothing in the record as it has developed since the court granted provisional certification causes the court to revisit its prior ruling regarding the propriety of class certification.

2. Approval of a Class Action Settlement

Mass. R. Civ. P. 23(c) provides that a class action shall not be dismissed or compromised without the approval of the court. In *Sniffin v. Prudential Insurance Co. of America*, 395 Mass. 415, (1985), the Supreme Judicial Court endorsed the approach of federal courts to class action settlements under Fed. R. Civ. P. 23(e) by requiring that approval of a settlement be given only where the court " 'finds the settlement fair, reasonable and adequate.' " *Id.* at 421, quoting *Armstrong v. Board of School Directors of Milwaukee*, 616 F.2d 305, 313 (7th Cir.1980). In making that determination, the Supreme Judicial Court noted that " '[b]ecause settlement of a class action, like settlement of any litigation, is basically a bargained exchange between the litigants, the judiciary's role is properly limited to the minimum necessary to protect the interests of the class and the public. Judges should not substitute their own judgment as to optimal settlement terms for the judgment of the litigants and their counsel.' " 395 Mass. at 421, quoting *Armstrong*, 615 F.2d at 315. The court went on to provide guidance for a reviewing court, stating: "In determining whether the settlement is fair, reasonable, and adequate, a trial judge should consider various factors. 'The most important factor is the strength of the case for plaintiffs on the merits, balanced against the amount offered in settlement.' " 395 Mass. at 421-422, quoting *West Virginia v. Charles Pfizer & Co.*, 440 F.2d 1079, 1085 (2d Cir. 1971).

Courts in Massachusetts often look to federal class action case law because of the substantial similarities between Mass. R. Civ. P. 23 and Fed. R. Civ. P. 23. One list of factors

often employed by federal courts in the District of Massachusetts in conducting a final review of a proposed settlement is that provided by the Second Circuit in *Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir.1974), overruled on other grounds by *Missouri v. Jenkins*, 491 U.S. 274, 109 S.Ct. 2463, 105 L.Ed.2d 229 (1989). *Bezdek v. Vibram USA, Inc.*, 79 F.Supp.3d 325, 343-344 (2015). *See, e.g., In re Relafen Antitrust Litigation*, 231 F.R.D. 52, 72 (D. Mass.2005). "These factors include: '(1) the complexity, expense, and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.' " *Bezdek*, 79 F. Supp.3d at 343-344, quoting *Grinnell*, 495 F.2d at 463. Federal Rule 23(e)(2) recently codified a number of related or overlapping factors that a court must consider before approving a proposed class action settlement that would bind class members. Courts are to consider whether: (A) the class representatives and class counsel have adequately represented the class; (B) the proposal was negotiated at arm's length; (C) the relief provided for the class is adequate, taking into account: (I) the costs, risks, and delay of trial and appeal; (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims; (iii) the terms of any proposed award of attorney's fees, including timing of payment; and (iv) any agreement required to be identified under Rule 23(e)(3); and (D) the proposal treats class members equitably relative to each other." Fed. R. Civ. P. 23(e)(2).

B. Discussion

Applying these various criteria to the proposed Settlement, approval of it is not a close call. The amount of the Settlement is an important criterion. At $143 million, it is, apparently, about four times larger than the next largest private state court class action settlement in the Commonwealth. Indeed, it is larger than the next eight combined. In that regard, the Settlement may fairly be characterized as "historic," which is the precise term that Professor Rubenstein uses to describe it. That is but one of the components of the Settlement that the professor cites as supporting a determination that the Settlement is fair reasonable, and adequate. The court agrees with most, if not all of the others. The court briefly highlights those aspects of the Settlement that are most persuasive to it in declaring the Settlement worthy of its final approval: the resolution was achieved with impressive alacrity and will result in compensation being paid to Class Members years sooner than might otherwise have occurred had the Settlement not been reached; given that Columbia Gas had already paid more than $1 billion in repair and restoration efforts and that it had colorable, if not viable, tariff and economic loss doctrine defenses to large categories of indirect and consequential economic damages, the amount of the Settlement is not only reasonable, but it appears to the court to be a notable achievement by Class Counsel on behalf of the Class Members; the Settlement was the product of protracted and contentious arm's length negotiations by highly skilled and experienced counsel and with the assistance of an esteemed team of mediators; there was sufficient pre-Settlement investigation by Class Counsel of facts and legal issues relating to liability and damages, they retained appropriate experts, and they had access to the investigative conclusions of the NTSB and other governmental agencies; payments to Class Members will be in cash and in significant amounts; the Settlement potentially

compensates Class Members for all manner of damages, including categories of damages that were not compensable through the PSCP; there is likely to be an appreciable collateral economic stimulus to the three affected communities; the efforts to provide notice to Class Members of the Settlement and to assist them in submitting claims were truly extraordinary;[3] the payment allocation plan is fair and manageable, and it treats Class Members equitably relative to one another;[4] the majority of compensation will appropriately go to those who were most adversely impacted by the Event, i.e., those in or near the Impact Zone; the very high percentage of Class Members within the Impact Zone who have submitted claims reflects that the Settlement has largely been embraced by those who are most deserving of compensation; and, as a percentage of Class Members, the number of objectors to the Settlement is negligible.[5]

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[3]In his remarks at the hearing, Mayor Rivera expressed a concern that many affected Lawrence residents may not have been aware of the Settlement, and he expressed regret that there had not been a door-to-door campaign to advise residents in the hardest hit areas of their right to submit a claim. The Mayor's concern for those individuals is both laudable and understandable. But even Mayor Rivera acknowledged that the efforts to provide notice to notice to the denizens of Lawrence had been "Herculean." The court notes as well that Mr. Cintron, in his own statement to the court, described how he and others had engaged in door-to-door outreach to Lawrence businesses that were most impacted by the Event.

[4]Indeed, the payment allocation plan strikes the court as especially impressive in its ability to provide fair compensation to a very broad class whose members suffered a significant range and degree of damages and injuries while, at the same time, keeping the claims process relatively simple for Class Members.

[5]Only four filed objections remain outstanding. The court has given careful consideration to each of them. Only two of the four objectors argue against final approval of the settlement. One is Ms. Gonzalez, who spoke at the hearing. Among her complaints about the Settlement, she opposes the broad definition of the Class, she believes that the lump sum claims process will not fairly compensate her and others for their losses and that the attorneys' fees are too high, and she challenges Heffler's credentials to serve as Settlement Administrator. The court accepts the sincerity of those views, especially in light of Ms. Gonzalez' experience as a significantly impacted Class Member (about which Ms. Gonzalez passionately spoke at all three hearings that the court has conducted to date). But those contentions do not warrant disapproval of the

For all of the foregoing reasons, the court readily concludes that the proposed settlement is fair, reasonable, and adequate, and it will therefore allow Class Counsel's motion for final approval of the Settlement.

IV. MOTION FOR ATTORNEYS' FEES, COSTS, AND INCENTIVE PAYMENTS

A. Costs and Incentive Awards

The court has no hesitation in approving the request that each of the eight named plaintiffs be awarded $5,000. Class Counsel represent that the plaintiffs participated in interviews, attended town halls, court hearings, and mediations, and provided valuable assistance to them. The awards are fair, reasonable, and modest in amount.

The court also readily approves Class Counsel's request for reimbursement of costs. As of Class Counsel's last submission on the subject, they state that they have spent $912,000 on experts, mediation, travel, and other expenses. They seek the court's approval for reimbursement

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Settlement. The other objector contesting Settlement approval is Jeffrey Petrillo, who, along with his wife and two children, live in Lawrence. Mr. Petrillo states that his family suffered a major disruption, and he fears that a lump sum payment will be far less than their actual losses, which he estimated to be $64,000 (of that amount, $51,000 consist of Mr. Petrillo's lost wages). But under the Settlement, the Petrillos can submit an itemized claim for all such losses, and if there is sufficient documentary support for them, he can receive full compensation .

Mayor Rivera is one of the other two remaining objectors, and, as noted, he objects only to the amount of attorneys' fees requested and not to approval of the Settlement. The last objector is David Stephens, a resident of North Andover. He seeks to have the Settlement Agreement amended by expanding its references to the "court" to include both the Superior Court and the United States District Court and the references to the applicable law to include both the law of the Commonwealth and of the United States. The court's approval authority does not extend to that manner of word smithing. Mr. Stephens also wants to add a provision requiring Columbia Gas to tar seal all installed road patches. Again that is not something the court can require. Moreover, Columbia Gas notes that, as part of its $80 million settlement with the three communities, they bear the responsibility of repairing and repaving the affected streets, roadways, and sidewalks.

of costs up to $2.5 million. That is well below that cap that was established in the Settlement Agreement and preliminarily approved by the court. The court finds that figure to be fair and reasonable given the size and complexity of the litigation. Moreover, as noted, Class Counsel have stated that the final costs total is likely to be below $2.5 million and that any surplus would be returned to the Settlement Fund for disbursement in the second tranche to lump sum claimants. That further buttresses the court's determination that the costs request is reasonable.

B. Attorneys' Fees

1. Governing Legal Principles

The court must determine whether the fees and costs sought by Class Counsel and to be paid from the Settlement Fund are reasonable. That determination leaves much to the discretion of the court. *Berman v. Linnane*, 434 Mass. 301, 302–303 (2001). Relevant factors include " 'the time and labor required, the amount of damages involved, the result 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.' " *Id.* at 303, quoting *Linthicum v. Archambault*, 379 Mass. 381, 388–389 (1979). While the First Circuit Courts does not mandate consideration of any particular factors when making an award of attorneys' fees, courts in the circuit often look to factors articulated in *Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43, 50 (2d Cir.2000). These so-called *Goldberger* factors 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 In re Neurontin Marketing & Sales Practices Litigation*, 58 F.

Supp.3d 167, 170 (D. Mass. 2014).

Although the lodestar method of computation, which requires multiplying the total number of hours reasonably spent preparing and litigating a case by the fair market rate for those services, is the typical standard by which the reasonableness of attorneys' fees are measured, especially when applying fee-shifting statutes, see *Fontaine v. Ebtec Corp.*, 415 Mass. 309, 324 (1993), it is is not the favored method for class actions with settlement funds. In such cases, the preferred approach is the percentage of fund (POF) method whereby attorneys' fees are determined and awarded based on the court's determination of what is a reasonable percentage of the fund recovered for those benefitted by the litigation. *See In re Thirteen Appeals Arising Out Of the San Juan Dupont Plaza Hotel Fire Litigation*, 56 F.3d 295, 305 (1st Cir. 1995); *In re: Walgreens Item Pricing Coordinated Class Action*, 2004 WL 6036251 (Mass. Super. 2004). The POF method has become predominant in so-called "common fund" cases because of several identified advantages over the lodestar method. These include its focus on the results that have been obtained for the class, which tends to more closely align the attorneys' interest with that of the class members, its elimination of a disincentive to settle cases early, and its less burdensome administration by courts who are charged with making fee determinations. *See In re Thirteen Appeals*, 56 F.3d at 307; *In re Relafen Antitrust Litigation*, 231 F.R.D. 52, 79 (D. Mass. 2005).

In applying the POF method, courts often employ a "lodestar cross-check" to gauge the reasonableness of a particular percentage award by considering what fees figure a lodestar calculation would yield. *See Bacchi v. Massachusetts Mutual Life Insurance* Co., 2017 WL 5177610, at *4 (D. Mass. 2017); *In re Relafen*, 231 F.R.D. at 82-83. With contingency representation and the attendant risk of non-payment borne by counsel, it is typical to employ a

multiplier of the lodestar when comparing the lodestar method result to the POF method result. *See id.*

The court accepts that for this case, the POF method, with a lodestar cross-check, provides the appropriate methodology for determining the reasonableness of the requested attorneys' fees.

2. Application of the POF Standard

Class Counsel negotiated for an award of attorneys' fees not to exceed 16.5% of the Settlement Fund, and that is what they now seek. That negotiation occurred only after the $143 million settlement had been reached.[6] The court accepts that that POF is well below what is typical. Professor Silver, whom the court acknowledges to be a qualified expert on the issue of attorneys' fees awards in class action cases, notes that, in the market for legal services, claimants negotiate fees when the litigation starts. He relates that claimants in a diverse array of cases, even sophisticated ones involved in complex commercial lawsuits, typically agree to pay contingent fees of 25% to 40%. Professor Silver further states that that is the accepted range of contingent fees in personal injury class action cases, and that the percentage is often higher with mass torts, such as in asbestos litigation. In illustration of his point, Professor Silver references a study of

[6]Class Counsel contends that this fact is worth substantial weight. The court disagrees. In the court's view, there was no party to the fees negotiation that solely represented the interests of Class Members. While Columbia Gas surely had a desire to obtain court approval of the Settlement Agreement, and the attorneys' fees was one component of the agreement, whether the fees were a higher or lower percentage of the gross Settlement would not alter its bottom line: it was to pay $143 million regardless of how much of that went to Class Counsel. As for Class Counsel, the court does not question in any way their dedication to their clients, the Class Members, but they have their own vested and conflicting interest in being compensated for their work. Finally, with respect to the skilled mediator, Mr. Green has not offered any information about any role he played in the determination of the percentage of the Settlement that would be accorded for attorneys' fees. Consequently, the court takes seriously its role as a fiduciary for the Class Members and its obligation to carefully scrutinize the fees request, notwithstanding that it was the product of some negotiation between the parties.

attorneys' fees awards in class actions and shareholder derivative actions that settled in state and federal court from 1993 to 2002 which found mean and median fee-to-recovery ratios of 23% and 24% respectively, and an updated version of the study based on more recent settlements showing higher mean and median figures of 27% and 20%. The updated figure for cases in the First Circuit were 26% and 23%. In Professor Silver's own study of fee awards in securities fraud class actions from 2007 to 2012 in every federal district court, over 400 in total, the mean and median awards were 24% and 25%. Class Counsel represent that they have reviewed so-called "megafund" settlements between $100 and $300 million and that they have not found any with a fee request lower than 25%.[7] The court has no reason to question that assertion.

Unquestionably then, viewed in the abstract, the 16.5% fees request is not only reasonable but on the low side when compared to other class action cases. The court also finds that the 16.5% request to be reasonable in light of the relevant factors it is to consider. First and foremost, the court believes that Class Counsel have achieved an outstanding result for a very large group of 175,000 Class Members, for all of the reasons previously articulated, including the historic size of the Settlement. Coupled with the extraordinary speed with which compensation is being delivered to Class Members, the result is, in the court's view, exemplary. That result has been achieved through the work of especially skilled and experienced Class Counsel, who have a breadth of national experience with class action litigation and who have ably served the interests of Class Members in this case. As noted, compared to awards in other cases, the fees request here is

[7]In reviewing a chart Class Counsel have submitted that lists forty-one such cases, it appears that the lowest POF request in any of them was 30%. In none of the listed cases did the court reduce the requested award, and in several the court awarded an amount in excess of the request. Professor Silver has appended a chart to his report that contains 99 megafund cases with fees ranging from a low of 16.92% to a high of 40%.

below, and perhaps well below, the usual.

As for the risks undertaken by Class Counsel in providing their work on a continent basis, the court believes that the risk of complete non-recovery was always very low. It also believes that the likelihood of obtaining some settlement was fairly high. From the outset, Columbia Gas' liability seemed clear, and Class Counsel had the benefit of governmental investigations to expeditiously learn the cause of the Event. Columbia Gas certainly seemed immediately to recognize its exposure, as it commenced its own claims process and began providing relief services and compensation to affected residents and businesses, it agreed to a stay of litigation to pursue settlement negotiations with Class Counsel, it settled the single wrongful death claim against it, and it also settled with the three affected communities. So it seems to the court that some settlement of the aggregated class action suits was always in the cards.

Nevertheless, the court agrees with Class Counsel that the size of the Settlement they obtained was never a foregone conclusion and that they undertook a very appreciable risk that the Settlement, and their contingent compensation, would be much lower. And that is because Columbia Gas had potentially viable affirmative defenses to a large class of damages that are encompassed by the Settlement, based on both the tariff that Columbia Gas had negotiated with the Massachusetts Department of Public Utilities and on the economic loss doctrine. The plain language of the tariff limits Columbia Gas' liability for negligence to direct damages and it excludes "any indirect, consequential, or special damages." If enforced, and tariffs have routinely been upheld, see *Lebowitz Jewelers, Ltd. v New England Telephone and Telegraph Co.*, 24 Mass. App. Ct. 268, 273 (1987), that limitation would have drastically limited the compensable damages of Class Members. As for the economic loss doctrine, see *FMR Corporation v. Boston Edison*

Co., 451 Mass. 393, 395 (1993) ("economic losses are unrecoverable in tort and strict liability actions in the absence of personal injury or property damage"), Class Counsel aptly cite the *Porter Ranch* case (*Southern California Gas Leak Cases*, 7 Cal.5th 391 (2019)), a class action case from California involving a protracted natural gas leak from, a storage facility, as a cautionary tale as to how the doctrine could likewise potentially be construed to preclude the lion's share of damages that Class Members suffered. The tariff and economic loss doctrine defenses did not present illusory or hypothetical risks to a much smaller recovery, but very real ones. Class Counsel also bore a very real risk of obtaining and maintaining class certification. Despite such risks, Class Counsel expended thousands of hours of their time and about $1 million of incurred costs to pursue the Settlement.

Considering all of the pertinent factors in the aggregate, the court concludes that Class Counsel's request for an award of 16.5% of the Settlement Fund is both fair and reasonable. It concurs in that regard with Professor Silver, who opines that the request is "plainly reasonable."

3. Lodestar Cross-Check

To ensure the validity of that determination, the court will undertake a lodestar cross-check. Fourteen different law firms and sixty-five lawyers have been involved in the prosecution of the consolidated class action and the predecessor class action complaints against Columbia Gas. Class Counsel represent that, to date, they have collectively spent about 10,700 hours in those efforts and that, conservatively estimated, they expect to have performed another 500 hours of legal work by the conclusion of the litigation, for an approximate total of 11,200 hours. Based on the number of hours worked to date at a blended hourly rate of $650, Class Counsel's

so-called "lodestar" for work done thus far is $6,950,000.[8] The requested attorneys' fees of $23,595,000, 16.5% of the total $143 million Settlement Fund, is that lodestar figure with a multiplier of 3.39. The lodestar for the expected 11,200 total hours of legal work at the same blended hourly rate is $7,280,000. A multiplier of 3.24 would bring that up to approximately $23,595,000.

As a preliminary matter, the court finds the blended hourly rate of $650 to be reasonable and in keeping with the fees charged in the greater-Boston area for attorneys, both partners and associates, of the skill and experience of those involved in this case, and for the support work of paralegals and others. The hourly rates of the attorneys in this litigation, ranging from $350 to $420 an hour for associates and $550 to $900 for partners, are well within the accepted range, as are the hourly rates for paralegals of $185 to $230. Professor Silver, having surveyed hourly rates in other such cases, agrees. The court notes as well that the highest of the hourly rates in this case, those for lead counsel, have found prior approval by other courts in other litigation.

As for the lodestar multiplier, it too is well within the typical range. Based on a recent study of thirty-five cases that involved recoveries of $75 million or more, Professor Silver opines that the 3.39 mulitplier is typical. Class Counsel cite a recent fees decision by a federal district court judge in a class action case in the Northern District of Georgia, *In re Equifax Inc. Customer Data Security Breach Litigation*, 2020 WL 2561132, at **1, 39 (N.D. Ga. January 13, 2020), in which the lodestar multiplier was, as here, 3.39. In that case, the court added to the lodestar an

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[8]In their post-hearing memorandum, Class Counsel state that the current updated lodestar is $7,493,311, but they provide no affidavit support for that assertion. Consequently, the court utilizes the figure provided by Class Counsel in their motion for approval of attorneys' fees, which has record support from the submitted declarations of Class Counsel.

additional number hours it expected counsel to work to implement the settlement, which brought the multiplier down to 2.62. *Id.* But the *Equifax* court noted in parenthetical citations to other cases that multipliers in large and complicated class actions range from 2.26 to 4.5, with an average around 3, and that a multiplier of 4 falls well within the accepted range. *Id.* The multiplier in this case, whether it be 3.39 based on work done to date or 3.24 based on the total number of hours expected to be expended at the conclusion of the litigation, is squarely within the typical range in cases of this ilk, as set forth in *Equifax*.

4. Is a Reduction in Fees Warranted?

The court has carefully scrutinized the fees request in this case, mindful that it alone can fully represent the interests of Class Members on this issue. It has given consideration to whether some reduction in the fees is warranted, as result for which Mayor Rivera has, understandably, passionately advocated. But the court finds no reasoned basis for doing so.[9] Indeed, if the court

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[9]In beseeching the court to reduce the attorneys' fees, Mayor Rivera, again, speaking in his personal capacity as a Class Member, emphasizes the devastating impact that the Event has had upon the affected communities and its residents and businesses. He asserts, perhaps justifiably so, that the human impact of the Event has been greater than the harm or injuries to the class members in at least some of the class actions to which Class Counsel have made comparisons, such as *Equifax*. But there have been many mass tort class actions in which the actionable conduct of the defendant resulted in death or disease. Yet across all manner of class actions, with the notable exception of those relating to airplane crashes, the POF awarded to the attorneys has with few exceptions exceeded that sought by Class Counsel here.

Mayor Rivera also correctly notes that any reduction in attorneys' fees will result in a comparable increase in the compensation available to Class Members. But that same inverse relationship between the amount of attorneys' fees awarded and the net settlement fund is present in every class action.

The mayor further emphasizes that Columbia Gas never disclaimed its liability and that a long drawn out court battle was neither expected nor occurred. The court has already fully considered and addressed the issue of risks undertaken by Class Counsel.

reduced the fees because of some generalized sense $23,595,000 is excessive compensation for a case that went to settlement discussions early on and was settled within a year of the inception of the litigation, it would be engaging to some extent in an arbitrary exercise. This is so because by the usual POF standard the present request is not only within a typical range but appreciably below it, and the multiplier for the lodestar cross-check is solidly within the usual range and does not come close to exceeding it. Were the court, then, to reduce the fees by choosing a lower POF or mulitplier, that choice would be lacking any objective guidance.

In declining to reduce the fees award, the court notes its agreement with the observation of the Third Circuit, as cited by Professor Silver: "The goal of appointment [of class counsel] should be to maximize the net recovery to the class and to provide fair compensation to the lawyer, not to obtain the lowest attorney fee. The lawyer who charges a higher fee may earn a proportionately higher recovery for the class than the lawyer who charges a lesser fee." *Third Circuit Task Force Report*, 208 F.R.D. 340, 373 (January 15, 2002). Thus, Professor Silver urges judges to keep in mind that, for example, a claimant who nets $1 million after paying $400,000 in legal fees is

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Mayor Rivera next expresses his belief that, had he and other Class Members not been bound by the Settlement, they could have hired their own attorneys at far lower rates and obtained more favorable results. In the court's view, that is an assertion based largely on speculation. The net results of any such individual litigation, which would likely involve a one-third contingency fee for counsel, are uncertain at best.

Finally, dividing a somewhat inflated attorneys' fee total of $28 million by the number of days that elapsed between the date of the Event and the date of the final approval hearing, Mayor Rivera observes that the resulting figure of $44,000 a day is higher than the median annual household income of a Lawrence resident and about half of the yearly income of a Lawrence police officer of firefighter. While methodology has a certain superficial appeal, it is not a recognized one for the assessment of attorneys' fees in a class action. Moreover, it does not account for the actual hours worked by lawyers from fourteen different law firms. By contrast, the lodestar cross-check that the court has employed to gauge the reasonableness of the POF request of 16.5% does.

better off than one who nets $500,000 after paying only $100,000. To illustrate that point by reference to this case, the court notes that, if Class Counsel had obtained an $80 million settlement, the figure at which Columbia Gas settled the claims of all three affected communities, and if Class Counsel were not receiving any contingency fee at all but only their blended rate lodestar of about $7 million, the result would be a net to Class Members of $73 million. In that event, the attorneys would be getting less than a third of what they will receive with the present $143 million Settlement, yet the Class Members would not fare nearly so well. The net $73 million settlement fund in that scenario is only 63% of the $116 million that is available to them under the actual Settlement.

In sum, the court cannot divorce its attorneys' fees determination from the result obtained when assessing the reasonableness of the request. Here, the magnitude of the Settlement and the compensation it affords to the broad class of all of those who resided, owned property, or had a business in any of the three affected communities, regardless of whether they were even a Columbia Gas customer, justifies the full award requested.

V. ORDER GRANTING FINAL APPROVAL OF SETTLEMENT, CERTIFYING SETTLEMENT CLASS, AND AWARDING ATTORNEY'S FEES, EXPENSES AND INCENTIVE AWARDS

Plaintiffs Francely Acosta, Robert McNaughton, Irasema Zapata, Thomas Tulip, Edward Accomando, Yohanny Cespedes, Cavallo Diner & Restaurant, LLC, and Capilla Evangelica Hispana, Inc., (Plaintiffs), have submitted to the Court a Motion for Final Approval of Settlement Agreement (Motion). Class Counsel has also submitted to the Court their Motion For An Order Awarding Attorneys' Fees, Costs And Expenses And Incentive Awards To Class Representatives.

This Court preliminarily approved the Settlement Agreement by Preliminary Approval

Order dated October 11, 2019. Notice was given to all Settlement Class Members pursuant to the terms of the Preliminary Approval Order.

This Court has reviewed the papers filed in support of the Motion, including the Settlement Agreement and the exhibits thereto, memoranda and arguments submitted on behalf of the Settlement Class and the Defendants, and supporting affidavits. The Court held a hearing on February 27, 2020, at which time the Parties and all other interested persons were heard in support of the proposed Settlement.

Based on the papers filed with the Court and the presentations made by the Parties and by other interested persons at the hearing, the Court has determined that the Settlement Agreement is fair, adequate, and reasonable.

VI. ORDER FOR JUDGMENT

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED:

1. The Court has jurisdiction over the subject matter of this litigation and over all parties to this action, including all Settlement Class Members, as such term is defined in the Settlement Agreement.

2. The Court has determined that the Notice given to Settlement Class Members fully and accurately informed Settlement Class Members of all material elements of the proposed Settlement and constituted valid, due, and sufficient notice to all Settlement Class Members.

3. All Settlement Class Members are bound by the Settlement. Any Class Member plaintiff in any existing case pending case against Columbia Gas who contends that he or she is not bound by the Settlement as to one or more of his or her articulated claims in such case shall, on or before March 25, 2020, file a memorandum with the court, simultaneously served on Class

Counsel and Columbia Gas' counsel, setting forth the factual and legal basis for such contention.

4. The Court grants final approval to the Settlement of this Action in accordance with the terms of the Settlement Agreement and finds that the Settlement is fair, reasonable, and adequate in all respects. In granting final approval, the Court has not been asked to consider and thus does not find any liability or unlawful conduct on the part of the defendants by virtue of this Settlement.

5. The Court orders the Parties to the Settlement Agreement to perform their obligations thereunder pursuant to the terms of the Settlement Agreement.

6. The deadline for Class Members to file a claim with the Settlement Administrator pursuant to the established procedure for filing a claim shall be extended to April 27, 2020. Any claim filed with the Settlement Administrator or the court by that date will be deemed timely and will be given consideration in accordance with the established protocols for adjudicating claims.

7. The Court dismisses all of the Consolidated Cases, both the Aggregate Proceedings and the Individual Cases, as those terms were defined in the court's Procedural Order No. 1, and all claims and causes of action asserted therein, on the merits and with prejudice, as to all Settlement Class Members. This dismissal is without costs to any party, except as specifically provided in the Settlement Agreement.

8. The Court adjudges that the Class Representatives and all Settlement Class Members shall, to the extent provided by the Settlement Agreement, conclusively be deemed to have released and discharged Defendants and all Released Parties from any and all Released Claims by any Settlement Class Member to the extent provided in the Settlement Agreement.

9. Without affecting the finality of this Order on Final Approval in any way, the

Court retains jurisdiction over: (a) implementation and enforcement of the Settlement Agreement pursuant to further orders of the Court until the final judgment contemplated hereby has become effective and each and every act agreed to be performed by the Parties hereto shall have been performed pursuant to the Settlement Agreement; (b) any other action necessary to conclude this Settlement and to implement the Settlement Agreement; and (c) the enforcement, construction, and interpretation of the Settlement Agreement.

10. The Court approves Class Counsel's Fee Award in the amount of $23,595,000, and approves the reimbursement of up to $2,500,000 to Class Counsel for reimbursement of Costs. The Settlement Administrator shall pay these amounts to Class Counsel from the Settlement Fund as provided in the Settlement Agreement.

11. The Court approves incentive payments of $5,000 each to the Class Representatives, Francely Acosta, Robert McNaughton, Irasema Zapata, Thomas Tulip, Edward Accomando, Yohanny Cespedes, Cavallo Diner & Restaurant, LLC, and Capilla Evangelica Hispana, Inc. The Settlement Administrator shall pay these amounts from the Settlement Fund as provided in the Settlement Agreement.

12. Neither this Order on Final Approval nor the Settlement Agreement is an admission or concession by the Defendants of any fault, omission, liability, or wrongdoing.

IT IS SO ORDERED.

James F. Lang
Associate Justice of the Superior Court

March 12, 2020

EXHIBIT 2

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss

SUPERIOR COURT
CIVIL ACTION
NO. 2084CV2837

ROBERT CHAMBERS, on behalf of himself and all those similarly situated

vs.

TUFTS ASSOCIATED HEALTH MAINTENACE ORGANIZATION, INC.

MEMORANDUM OF DECISION AND ORDER ON PLAINTIFF'S MOTION FOR FINAL APPROVAL OF THE SETTLEMENT AND PETITION FOR APPROVAL OF ATTORNEYS FEES

By Order dated October 22, 2020 (Docket No. 15), this Court partially allowed Plaintiff Robert Chamber's motion for class certification. That order was upheld on interlocutory appeal. See Docket No. 18. On June 16, 2022, this Court allowed Plaintiffs' Assented-To Motion for Preliminary Class Action Settlement Approval (Docket No. 20).

Presently before the Court is Plaintiffs' Assented-To Motion for Class Action Settlement Approval (Docket No. 22) and Unopposed Motion for Award of Attorneys' Fees and Expenses, and Incentive Award to Class Representative (Docket No. 23).

In consideration of the parties' memoranda of law and oral arguments, and for the reasons that follow, Plaintiffs Assented-To Motion for Class Action Settlement Approval (Docket No. 22) is **ALLOWED** and Plaintiffs' Unopposed Motion for Award of Attorneys' Fees and Expenses, and Incentive Award to Class Representative (Docket No. 23) is **ALLOWED IN PART**.

DISCUSSION

Under Rule 23 (c), Mass. R. Civ. P., "a class action shall not be dismissed or compromised without the approval of the court." Approval hinges on whether the settlement is "fair, reasonable, and adequate." Shiffin v. Prudential Insurance Co. of America, 395 Mass. 415, 422 (1985), quoting Armstrong v. Board of School Directors of Milwaukee, 616 F.2d 305, 313 (7th Cir. 1980). In making this determination, the Court should examine a number of factors, including: "1. likelihood of recovery, or likelihood of success; 2. amount and nature of discovery or evidence; 3. settlement terms and conditions; 4. recommendation and experience of counsel; 5. future expense and likely duration of litigation; 6. recommendation of neutral parties, if any; 7. number of objectors and nature of objections; and 8. the presence of good faith and the absence of collusion." Vermont Pure Holdings, Ltd. v. Berry, No. 0601814BLS1, 2010 WL 1665258, at *10 (Mass. Super. Feb. 8, 2010); see also, e.g., 6 James Smith et al., Rules Practice § 23.13, 347-48 (2d ed. 2021) (noting the relevant factors as "(1) the absence of any opposition to the settlement; (2) the likelihood of success; (3) the legal principles supporting the settlement; (4) the recovery proposed (compared to the amount that might be recovered, less litigation costs, if the action went forward); (5) the plan for distributing the proceeds; (6) whether the representative adopted proper procedures when notifying class members; and (7) whether the settlement would surrender or ignore other tenable claims."). "The most important factor is the strength of the case for plaintiffs on the merits, balanced against the amount offered in settlement." Shiffin, 395 Mass. at 421 (1985), quoting West Virginia v. Charles Pfizer & Co., 440 F.2d 1079, 1085 (2d Cir. 1971).

As reflected in the parties' filings, the settlement here satisfies these standards. This case was litigated aggressively by competent counsel, who, after discovery, negotiated an arm's length settlement over three mediation sessions with an extraordinarily qualified mediator, former Judge Margaret Hinkle, who recommended the settlement figure to which the parties agreed. The settlement thus reflects the judgment of qualified counsel and a highly-respected third party, and represents a fair compromise of claims that were subject to sharp dispute. The result is a good one for the class; indeed, through counsel's efforts, they will receive recovery on a novel theory. Further, the recovery for the class members is substantial -- each class member is expected to receive a net payment equivalent to approximately 50% of the maximum amount of that class member's claim, which Plaintiffs' counsel estimated would amount to an average of between $300 and $500 for each claimant.

Notice was properly given to the class; indeed, the parties were able to notify an impressive 99% of the class members of the proposed settlement, and none have objected to it. The administration of the process thus has been, and promises to be, highly competent. Class members need to take no action to receive the benefit of the settlement; payments will be made automatically, ensuring that relief will get into the hands of class members. The plan for distributing the relief is well-founded, and the proposal to distribute any residual funds to a charity focused on health care, Health Care for All, is entirely appropriate under Rule 23 (e) (2), as such funds will likely benefit those similarly situated to members of the class, consistent with the purposes of the lawsuit.

The Court raised two issues with the parties.

First, the Class Action Settlement Agreement did not specify the amount of a holdback from the $5.1 million to account for disputes regarding the amount of payment to any class member, or how long the holdback would remain in place. The Court understands that the amount of the holdback will depend on a number of unpredictable factors regarding the claim settlement process, but that it would be minimal. While the Court sees no reason to require the parties to specify the amount of the holdback at this stage, it will require that all disputes for which the holdback is established to be resolved within 60 days of this Order, and that the appropriate holdback amount is distributed to class members or the designated charity by then.

Second, the total attorneys' fee and cost figure of $1,700,000 was calculated as 33.3% of the Common Fund of $5.1 million. In a Chapter 93A case such as this, legal fees are not awarded on a contingency basis; instead, the "approved" approach is the "lodestar" method, under which "the judge is to establish the time reasonably expended and multiply it by a reasonable hourly rate, taking into account factors such as 'complexity, the result obtained, and the experience, reputation, and ability of the lawyer.'" Smith v. Bell Atl., 63 Mass. App. Ct. 702, 725 (2005), quoting Borne v. Haverhill Golf & Country Club, Inc., 58 Mass. App. Ct. 306, 324 (2003). "When determining a reasonable attorney's fee, the focus is not the bill submitted … or the amount in controversy … but several factors, including 'the nature of the case and the issues presented, the time and labor required, the amount of damages involved, the result 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 v. Linnane, 434 Mass. 301, 302-03 (2001), quoting Linthicum v. Archambault, 379 Mass. 381, 388–89 (1979).

The Plaintiffs pursued a novel theory. The case was thus complex and hard-fought, and the result obtained for the class was exemplary. Plaintiffs' counsel were well-experienced in cases of this type. The number of hours expended by Plaintiffs' counsel -- a total of some 2,700 hours -- was reasonable. At counsels' current rates, those hours amounted to a total of $1,590,783 (with unreimbursed expenses of $8,005.79, the total in fees and costs is $1,598,788.89). The question is whether the billing rates -- $750 per hour for the two partners, Mr. Zavez and Mr. Adkins, $400 for associates, and $165 for paralegals -- is reasonable. On the supplemented record, the Court finds that it is. Plaintiffs submitted a declaration of Majida Ortiz, the office manager at Adkins, Kelston & Zavez, P.C., Plaintiffs' counsels' firm, who testified that she works with firm partners to monitor hourly rates charged by Boston area plaintiff's class action firms. The rates at issue here were set in 2017, at which time they were comparable to other firms, but since then, rates have generally increased where Plaintiffs' counsels' rates have not, such that the rates claimed here are likely below-market.

In addition to the hourly rate, Plaintiffs' counsel seeks a "multiplier" so as "to reflect the benefits conferred on the plaintiffs, the performance of counsel, and the risk that they were willing to assume in undertaking this case on a contingent basis. Multipliers between 1.5 and 2.0 are not uncommon in cases like this one." Schiefer v. Bain Cap., LP, No. SUCV20153599, 2018 WL 6184638, at *2 (Mass. Super. Oct. 3, 2018). But, as noted above, the fee award in this case is not based on a contingency fee; the fees due should be calculated on a lodestar basis "unless there are special reasons to depart from [it]." Fontaine, 415 Mass. at 325; see also T &D Video, Inc. v. City of Revere, 66 Mass. App. Ct. 461, 477 (2006), reversed on other grounds, 450 Mass. 107 (2007) ("After making its initial [lodestar] calculation, the court then may adjust the fee

upward or downward based on other considerations, including the results obtained."). The Court concludes that the lodestar method alone, which grants Plaintiffs' counsel all of its fees at its usual rates and all of its costs, is appropriate, and that a multiplier or other enhancement of the total fees and costs is not. However, the Court increases the total amount of fees and costs from $1,598,788.89 to $1,625,000 to reflect the unaccounted-for hours expended and costs incurred by Plaintiffs' counsel to date, and that are likely to be incurred after this Order, with respect to the final approval and settlement distribution process. The Court finds the legal fees and costs in the total amount of $1,625,000 to be reasonable.

The service award to Mr. Chambers of $10,000 is also reasonable and appropriate for the reasons provided by Plaintiffs.

Accordingly, the Court finds:

1. That notice to the class, by mailing the Notice to the last known address of each class member and by also e-mailing the Notice to all class members with email addresses on file with Defendant, has been provided in the most effective practicable manner, satisfying the requirements of due process, G. L. c. 93A, § 9, and the Preliminary Approval Order;
2. That the Class has been fairly and properly apprised of the terms and effect of the Settlement Agreement through such notice, and has had a reasonable opportunity to object;
3. That the Class has been fairly and adequately represented in this case by Plaintiff and Class Counsel; and

4. That the Settlement Agreement represents a fair, reasonable, and adequate settlement of all of the Class claims against the Defendant and should be approved in the interests of the Class, with the proviso that any disputes among Class Members about the amount of their recovery be resolved within 60 days of this Order and any holdback funds distributed by that deadline.

ORDER

For the foregoing reasons, Plaintiffs Assented-To Motion for Class Action Settlement Approval (Docket No. 22) is **ALLOWED** and Plaintiffs' Unopposed Motion for Award of Attorneys' Fees and Expenses, and Incentive Award to Class Representative (Docket No. 23) is **ALLOWED IN PART**. It is accordingly **ADJUDGED, DECLARED AND DECREED AS FOLLOWS**:

1. That the Settlement Agreement is hereby approved, with the added requirement that all disputes over claim amounts shall be resolved within 60 days of this Order and that any holdback amount distributed to class members or the designated charity, as appropriate, by that time;

2. This Action, and all counts of the Complaint, are hereby dismissed on the merits, with prejudice;

3. Plaintiff, and each other member of the Class, shall be bound by the terms of the Settlement Agreement, including its release; and

4. In accordance with this Court's February 25, 2020 Memorandum of Decision and Order on Cross-Motions for Summary Judgment (Docket No. 12) on Count V of the Complaint, which has not been certified for class treatment, and pursuant to this Court's authority under

G.L. c. 231A, § 1, the Court hereby **DECLARES** that the exhaustion of remedies provision contained in the Evidence of Coverage governing defendant's rights and responsibilities to Plaintiff under his health plan, and specifically the requirement therein of a 180-day time limit for presenting challenges to adverse coverage determinations, is valid and lawful, upon which declaration shall apply only to the Class Representative in his individual capacity.

5. The Court **ALLOWS IN PART** Plaintiff's Unopposed Motion/Petition For Approval of Attorneys' Fees, Reimbursement of Litigation Expenses, and Class Representative Incentive Award (Docket No. No. 23), and awards (i) Plaintiffs attorneys' fees and expenses payable to Plaintiffs Lead Class Counsel, Adkins, Kelston & Zavez, P.C., in the amount of $1,625,000; and (ii) Class Representative, Robert Chambers, a service award in the amount of $10,000;

6. The Court directs the Parties and their counsel to implement and consummate the Settlement Agreement according to its terms and provisions; and

7. The Court shall retain jurisdiction of all matters relating to the interpretation, administration, implementation, effectuation and enforcement of said Agreement.

SO ORDERED.

M. D. Ricciuti
MICHAEL D. RICCIUTI
Justice of the Superior Court

Dated: September 30, 2022