

COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH, ss

DANIEL GUARINO, individually and on behalf  
of all others similarly situated,

Plaintiff,

v.

RADIUS FINANCIAL GROUP, INC.,

Defendant.

SUPERIOR COURT DEPARTMENT

C.A. No. 2283CV00196

**PLAINTIFF’S MEMORANDUM IN SUPPORT OF  
MOTION FOR ATTORNEYS’ FEES, EXPENSES, AND SERVICE AWARD**

**I. INTRODUCTION**

Plaintiff’s counsel have negotiated a class settlement that provides for substantial benefits to Class members, including compensation for out of pocket losses, reimbursement for lost time, compensation for extraordinary losses, and valuable credit monitoring. The settlement also provides for payment by Defendant of the costs of settlement administration, plus attorneys’ fees of up to \$123,750, a service award to the Class representative of \$3,500, and payment of settlement administrative costs not to exceed \$56,250.

Plaintiff’s Counsel now respectfully move this Court for a combined award of attorneys’ fees and reimbursable out-of-pocket case expenses in the amount of \$123,500, which represents a 32.9% of the total maximum that Defendant will pay. The attorneys’ fees and expenses represents a much smaller percentage of the retail cost of the credit monitoring benefit (estimated at \$216 per month per Class Member – for a maximum potential retail benefit of over \$3.6 million for this Class of approximately 17,000 persons), plus the monetary benefits. The fees requested also

currently represent a lodestar multiplier of about 1.22%, but by the time of final approval will likely represent no multiplier or a negative one. Applying the relevant factors and standards, is well within the range of reasonableness.

## **II. INCORPORATION BY REFERENCE**

In the interest of judicial efficiency, for factual and procedural background on this case, Plaintiff refers this Court to and hereby incorporate Plaintiff's Memorandum in Support of the Assented to Motion for Preliminary Approval of Class Action Settlement filed on June 15, 2023, and the accompanying Exhibits, including the proposed Settlement Agreement, filed in conjunction therewith.

The Court granted preliminary approval of the Settlement on August 11, 2023.

## **III. THE SETTLEMENT**

The Settlement is structured to provide for monetary and non-monetary relief for Settlement Class Members for:

### **Monetary Losses**

Settlement Class Members may qualify and submit a Claim Form for the following monetary settlement benefits:

- **Expenses:** Each Settlement Class Member may seek reimbursement for up to three hundred and twenty-five dollars (\$325.00) of Expenses.
- **Lost Time:** Each Settlement Class Member may seek reimbursement for up to four (4) hours of Lost Time at a rate of twenty-five dollars (\$25.00) per hour; provided that no Settlement Class Member may recover for Lost Time unless the Lost Time of that Settlement Class Member exceeds at least one (1) hour.
- **Stolen Funds:** Each Settlement Class Member may seek reimbursement for up to two thousand five hundred dollars (\$2,500.00) of Stolen Funds.
- **Maximum Reimbursement:** The total amount that each Settlement Class Member may be reimbursed for Expenses, Lost Time, Stolen Funds, and any

other amount under this Agreement is two thousand five hundred dollars (\$2,500.00).

### **Credit Monitoring Services**

All Settlement Class Members will also be able to claim 2-years of single-bureau credit monitoring that includes identity-theft protection insurance of up to \$1,000,000. The least expensive single bureau credit monitoring on the market today costs approximately \$9 per month – thus, the retail value of this benefit to each Class member is \$216 (\$9 x 24 months). With all 16,988 Class Members able to claim this benefit, the potential retail value of this single benefit is thus \$3,669,408. This benefit will help ensure that Settlement Class Members are protected from the Cybersecurity Incident’s potential effects now and well into the future.

### **Other Benefits**

Finally, the Settlement also provides for Radius to pay: 1) all costs of settlement administration, including the costs of notice and claims administration, up to \$56,250; and 2) Plaintiff’s counsel’s attorneys’ fees and out-of-pocket expenses in the combined amount of \$123,750. The Settlement also provides payment of a service award to the named Plaintiff in the sum of \$3,500.

The maximum amount that Radius shall be required to pay under the terms of this Settlement is \$375,000.00. That amount includes any and all Claim Payments, the Service Award, Class Counsel Fees, Notice and Claim Administration Expenses, and the Cybersecurity Incident Identity and Credit Protection Services. Therefore, the Settlement provides substantial and immediate financial and valuable non-monetary relief (in the form of credit monitoring and identity theft protection) to Settlement Class Members as compensation for their Released Claims, and will relieve the Parties of the burdens, uncertainties, costs, and risks of continued litigation.

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

Class Counsel requests a combined award of \$123,500 in attorneys' fees and case expenses. For the reasons stated herein, this award is reasonable and appropriate under the circumstances. In their negotiations with Defendants' counsel, Plaintiff's counsel did not commence any negotiations for attorneys' fees until an agreement was reached on the settlement consideration to the Class.

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); *In re Veeco Instruments Inc. Sec. Litig.*, 2007 WL 4115808, at \*6 (S.D.N.Y. Nov. 7, 2007) (same).

For these reasons, attorney fee awards are common in class action cases, including in Massachusetts state courts, and are routinely upheld up on appeal. *See, e.g., In Re: Columbia Gas Cases*, No. 1877CV01343-G at 18-25 (Mass. Super. Mar. 12, 2020);<sup>1</sup> *Chambers v. Tufts Assoc. Health Maint. Org., Inc.*, No. 2082CV2837 at 4-6 (Mass. Super. Sept. 30, 2022);<sup>2</sup> *In re: Walgreens*

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<sup>1</sup> Copy annexed hereto as **Exhibit 1**.

<sup>2</sup> Copy annexed hereto as **Exhibit 2**.

*Item Pricing Coordinated Class Action*, 2004 WL 6036251 (Mass. Super. Sept. 13, 2004); *Salvas v. Wal-Mart Stores, Inc.*, 81 Mass. App. Ct. 1103 (2011) (affirming on appeal award of 38% of settlement fund to plaintiffs’ attorneys).

**A. Under Massachusetts Law, Counsel’s Lodestar is Presumptively Reasonable**

Under Massachusetts law, counsel’s lodestar (*i.e.*, multiplying the attorney’s reasonably spent hours by a reasonable hourly rate) is presumed to result in a reasonable fee. *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 v. Ebtac Corp.*, 415 Mass. 309, 325 (1993) (“[t]he most recent in this line of cases,<sup>3</sup> 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.*<sup>4</sup> Here, Class Counsel’s lodestar and

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<sup>3</sup> The Court here was referring to *Stratos*.

<sup>4</sup> In assessing the reasonableness of a fee based on lodestar, “the goal is to ensure that an award is reasonable as a whole, and close scrutiny of particular line items is not required.” *Mayflower Emerald Square, LLC v. Bonims II, Inc.*, 92 Mass. App. Ct. 1103 at \*3 (Aug. 10, 2017 Unpub.). *See also WHTR Real Estate Ltd. Partnership v. Venture*

hours are summarized by the following chart:

<b>FIRM</b>	<b>HOURS</b>	<b>LODESTAR</b>
Milberg, Coleman, Bryson, Phillips, Grossman PLLC	98.4	\$91,892.50
Hartman Law, P.C.	15.7	\$8,635.00
<b>TOTALS</b>	<b>114.1</b>	<b>\$100,527.50</b>

See Declaration of David K. Lietz (“Lietz. Decl.”), ¶¶ 13-24. Collectively, Plaintiff’s Counsel devoted approximately 114.1 hours prosecuting and settling this action to date. *Id.* This yields a collective lodestar of \$100,527.50. *Id.* Class counsel expects to incur another 40-50 hours of legal work in this case through final approval, processing of all claims, and distribution of settlement funds, and it is anticipated that the lodestar will ultimately equal or outstrip the fee award sought. *Id.* at ¶ 4. 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’ personally identifiable information and personal health information. It is, therefore, important to adequately compensate plaintiff’s counsel in cases like this one.

**1. The Time Expended by Plaintiff’s Counsel is Reasonable**

The parties commenced settlement discussions after defense served a motion to dismiss, and Plaintiff prepared an amended complaint in response. The settlement discussions continued over several weeks. In addition, Plaintiff’s counsel litigated the case aggressively prior to entering

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*Distrib., Inc.*, 63 Mass. App. Ct. 229, 237 (2005) (trial judge not required to make explicit findings as to a fair market hourly rate and the exact number of hours reasonably spent on the case in order to find that a fee is reasonable).

into an agreement in principle to settle the matter. The litigation involved a significant commitment of resources. The time spent by Plaintiff's counsel included, among other things: conferring with Plaintiff and performing an initial investigation; preparing the class action complaints; extensive discussions with Defendant's counsel concerning their investigation of the matter and possible settlement and settlement negotiations, culminating in an agreement to settle the case on a class-wide basis; preparing and negotiating the terms and language of the class action settlement agreement and the related settlement documents, such as the class notice and the proposed orders for settlement approval; and 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). In addition, there is 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 communications with the settlement administrator and class members regarding questions and issues relating to claims and the claims process.<sup>5</sup>

As the above summary demonstrates, the work done by Plaintiff's counsel was necessary and appropriate and the hours expended by Plaintiff's counsel are therefore reasonable.

## **2. Class Counsel's Rates are Reasonable Based on the Standards Applied by Massachusetts Courts**

Class Counsel's hourly rates are reasonable and consistent with rates charged by firms in this area for similar work by attorneys of comparable experience. *See Stratos*, 387 Mass. at 323; *O'Loughlin v. Commonwealth*, 35 Mass. L. Rptr. 371 at \*4 (Mass. Super. Dec. 19, 2018). The rates for all professionals whose time is included in the collective lodestar of Plaintiffs' counsel fall into the following ranges: from \$550 to \$997 per hour for partners; from \$450 to \$650 for

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<sup>5</sup> *Id.*, ¶ 23.

associates and senior counsel; and from \$208 to \$225 for paralegals. *See* Lietz Decl., ¶ 20.

Plaintiff's 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, including this Court.<sup>6</sup> Counsel understand the duties 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. 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. The combined abilities of Plaintiff's counsel resulted in a great settlement. Plaintiff's Counsel's rates easily fall within the standard range of hourly rates for this type of work.<sup>7</sup> These rates have been approved by state and federal courts in class action litigation and are consistent with comparable billing rates in the Boston area. Class Counsel's rates are also consistent with rates approved for plaintiffs' counsel in other Superior Court class actions. *See, e.g., In re Columbia Gas Cases (Exhibit 1 hereto)* at 24:

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.

*See also Chambers v. Tufts (Exhibit 2 hereto)* at 5 (finding billing rates of \$750 per hour for partners, \$400 for associates and \$165 for paralegals to be reasonable).

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<sup>6</sup> *See* Lietz Decl., ¶ 1 and Exhibit A.

<sup>7</sup> 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).



In addition, as demonstrated by the October 11, 2013 Lawyers Weekly article, “The Going Rate(s),” submitted herewith as an attachment to Lietz Decl, **Exh .B**, the average billing rate for partners in Boston law firms was, as of the date of that article, \$598.69. The December, 2013 National Law Journal survey of national billing rates, submitted herewith as Lietz Decl., **Exh. C**, contains rates for five Boston firms, including high, low and average partner rates and high, low and average associate rates. The average hourly partner rate (*i.e.*, the average of the average partner rates for the five Boston-based firms represented in the survey) was, as of the time of the survey, \$619.00. The hourly rates reflected in the above-referenced publications are relevant now, despite their 2013 vintage. Common sense tells us that these rates have increased in the nine years since the surveys were published.

Accordingly, the rates charged by Plaintiff’s counsel are reasonable and should be accepted by the Court.

**B. Factors Considered by Courts in Evaluating Reasonableness of Attorneys’ Fees**

In determining a reasonable attorneys’ fee, Massachusetts law employs two permissible methods, the lodestar approach (discussed above)<sup>8</sup> and a multi-factor analysis.<sup>9</sup> There is a fair amount 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.

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<sup>8</sup> Massachusetts courts have noted that “[t]he lodestar approach has the advantage of producing generally consistent results from case to case.” *Fontaine*, 613 N.E. 2d at 891.

<sup>9</sup> There is also a growing body of law in Massachusetts state courts supporting awards of attorneys’ fees in class actions on a percentage of the fund basis, but that method is not relevant to Plaintiffs’ fee application here.

*Cummings v. National Shawmut Bank of Boston*, 284 Mass. 563, 569 (1934); *see also 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”)<sup>10</sup> 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.

### **1. The Nature of the Case and the Issues Presented**

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) (“[m]any 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.*, 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, there were no assurances that any compensation would ever be received. Even if Plaintiff had proceeded and obtained a final judgment for the Class, without a

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<sup>10</sup> “Fees should be adequate to attract competent counsel, but not result in windfall.” *Stratos*, 439 N.E. 2d at 786 (internal quotation marks omitted).

settlement, an appeal was a virtual certainty, together with the risks and time delay that would accompany an appeal.

In data breach cases, such as this case, the risks may even be greater than in class actions generally. This field of litigation is evolving, and there is no guarantee of the ultimate result. *See 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 his 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.

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 above (discussing application of the lodestar method).

## **3. The Amount and Importance of the Matter Involved**

This case involved serious issues of privacy and confidentiality, with the exposure of Plaintiff’s and Class members’ personal information, including dates of birth, social security

numbers, bank and other financial information, and health insurance and medical treatment information, with the serious risk that such information would be used for identity theft and other types of fraudulent activity. While each Plaintiff's and most 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 Complaints, the monetary losses can include the loss or diminution of the value of Plaintiff's and 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 Class, with each class member eligible to claim the various valuable benefits outlined above. The retail cost of the credit monitoring benefit (estimated at \$216 per month per Class Member) has a maximum potential retail benefit of over \$3.6 million for this Class of approximately 17,000 persons. This is a real, tangible benefit to Class Members. As part of the Settlement, Defendant has also agreed to pay all of the costs of settlement administration, which exceeds \$56,000. If the monetary benefits are added to these amounts, it becomes self-evident that the results obtained here are excellent, and fully support the request for attorneys' fees.

#### **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* Lietz Decl., ¶ 1 and Exhibit A.

The Settlement negotiated with Defendant 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 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 Plaintiff's counsel faced is a further testament to the quality of Plaintiff's counsel's representation. Defendant is represented by skilled and highly regarded counsel from a prestigious firm with a reputation for vigorous advocacy in the defense of complex civil cases, and the attorneys representing Defendant 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 plaintiffs' counsel should be taken into consideration in assessing the quality of the plaintiffs' counsel's performance, and in this case, it supports approval of the requested fee. *See, e.g., In re Marsh Erisa Litig.*, 265 F.R.D. 128, 148 (S.D.N.Y. 2010) (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 referenced 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 Class and are consistent with the rates of comparably experienced attorneys in the Boston area.

#### **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) (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) ("[w]ithout 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 (same, quoting *Stowe*).<sup>11</sup> As recognized by the Appeals Court in *School Comm. Of Norton v. MCAD*, 63 Mass. App. Ct. 839, 854 (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.

(Internal quotation marks and citation omitted; ellipses in original).

The Settlement serves important public policy concerns by protecting consumers' interests in the privacy and confidentiality of their personal information. Accordingly, compensating counsel appropriately for bringing this action serves these policy important policy goals.

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<sup>11</sup> *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").

**C. A Reasonable Multiplier Indicates the Presumptive Reasonableness of the Requested Fees.**

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 (“[i]n limited circumstances, statutory 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 v. Astrazeneca Pharm. L.P.*, 2013 WL 6268236, at \*2 (Mass. Super. Aug. 5, 2013).

Here, the current lodestar multiplier is a very modest 1.22%. By the time that this Settlement is finally approved, all claims are processed, and all claimants are paid, there is likely to be no lodestar multiplier, or a negative one. This is because Class Counsel anticipates that another 40-50 hours of attorney time will be expended before this case is finally over. A review of the above-referenced factors (as demonstrated by the discussion above demonstrated that a lodestar modest multiplier of 1.22% would be warranted, and shows that the requested fee is reasonable.

**D. Plaintiff’s Counsel’s Reimbursable Expenses**

In addition to the time spent in litigating this case, Plaintiff’s counsel incurred out of pocket expenses, for which they would typically seek reimbursement, separate and apart from the attorney fee award. Plaintiff’s counsel incurred a total of \$1,146.57 in out-of-pocket expenses.<sup>12</sup> The expenses incurred by Plaintiff’s counsel are clearly reasonable and were necessary for this litigation. In this case, Plaintiff’s counsel are not seeking a separate award for expense

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<sup>12</sup> Lietz Decl., ¶ 29.

reimbursement; in other words, counsel are only seeking the sum of \$123,500 for attorneys' fees, so that any expense reimbursement will have to be paid out of that amount. After deduction for out-of-pocket expenses (and for out-of-pocket expenses yet to be incurred, in conjunction with the final fairness hearing), not more than \$122,353.43 will be left for payment of attorneys' fees, which will lower the lodestar multiplier and that further demonstrates the reasonableness of the amount.

#### **IV. THE PROPOSED SERVICE AWARD SHOULD BE APPROVED**

Defendant has also agreed to pay Plaintiff a service award of \$3500, separate from and in addition to any Class member compensation. Courts approve incentive 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. 52, 82 (D. Mass. 2005) (“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).<sup>13</sup> Here, Plaintiff has been actively involved in the litigation. Plaintiff pursued the interests of the Class by undertaking the responsibilities attendant to serving as class representatives, including, without limitation, periodically conferring with counsel,

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<sup>13</sup> *See Chambers v. Tufts* at 6 (approving a service award to the named plaintiff of \$10,000 as “reasonable and appropriate”); *In re Columbia Gas* at 17 (“[t]he court has no hesitation in approving the request that each of the eight named plaintiffs be awarded \$5,000”);



providing relevant documents and information, and reviewing pleadings and other documents in the case. Accordingly, given Plaintiff's efforts in supporting the litigation, combined with the risks and burdens of serving as class representatives, the application for a \$3,500 service award to Plaintiff should be granted.

### **CONCLUSION**

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

Date: October 27, 2023

Respectfully Submitted,

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DANIEL GUARINO, individually and on behalf of  
all others similarly situated,

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