COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
C.A. NO.1684-CV-03611-BLS2

MATTHEW PERLOW, on behalf of himself and others similarly situated,

Plaintiff,

v.

ABC FINANCIAL SERVICES, INC. and SEAS & ASSOCIATES, LLC,

Defendants.

PLAINTIFF'S COUNSEL, SHAPIRO HABER & URMY LLP'S APPLICATION FOR AN AWARD OF ATTORNEYS' FEES AND EXPENSES

This application for an award of attorneys' fees and expenses is respectfully submitted by the law firm of Shapiro Haber & Urmy LLP ("Shapiro Haber"), which served as counsel for the Plaintiff and the Settlement Class in the above-captioned action. This fee application is supported by the Declaration of Adam M. Stewart filed herewith.

As detailed in the memorandum in support of Plaintiff's unopposed motion for final approval of the Settlement, the parties have settled this action, subject to the Court's final approval, for $1,800,000 to be paid by Defendants under the Settlement (the "Settlement Fund"). As compensation for their successful prosecution of this action, Shapiro Haber respectfully seeks an award of attorneys' fees and expenses of $600,000 to be paid from the Settlement Fund.

As set forth below, this request is reasonable and indeed represents less than 80% of Shapiro Haber's lodestar and expenses expended by Shapiro Haber in prosecuting this action on behalf of the Plaintiff and the class. For the reasons set forth herein, Shapiro Haber's Application for an Award of Attorneys' Fees and Expenses should be granted.

A. **BACKGROUND**

This Action was brought by Plaintiff on November 22, 2016, alleging that Defendants ABC Financial Services, Inc. ("ABC") and Seas & Associates LLC ("Seas") violated G.L. c. 93A by engaging in unlawful debt collection practices in Massachusetts, including allegations that (i) Seas attempted to collect alleged debts from him and other Massachusetts consumers without a debt collection license between May 1, 2013 through August 5, 2014 and from January 1, 2016 through December 31, 2016 in violation of G.L. c. 93, §24A, (ii) ABC facilitated and participated in Seas' unlicensed debt collection activities, and (iii) ABC separately attempted to collect the alleged debts from him and other consumers in Massachusetts without making the mandatory disclosures required by 940 C.M.R. §7.08(1) and/or 209 C.M.R. §18.18(1). Defendants have denied any wrongdoing.

The parties agreed to bifurcate discovery into class certification discovery and merits discovery. The operative Rule 16 conference agenda and tracking order provided that following the completion of class certification discovery, Plaintiff would move for class certification. The tracking order also sets a coterminous schedule for briefing on Defendants' motion for summary judgment as to whether Plaintiff could demonstrate an injury under c. 93A.

Beginning in May 2017, the parties conducted discovery relating to the issue of class certification as well as Defendants' motion for summary judgment. Defendants' produced, among other things, documents regarding their policies and procedures, their form communications with consumers in Massachusetts and over a thousand Excel spreadsheets containing data regarding their communications with Massachusetts' consumers. Plaintiff conducted a deposition of ABC and Seas' respective Rule 30(b)(6) corporate representatives, and Defendants took Mr. Perlow's deposition. Mr. Perlow also responded to Defendants' interrogatories and produced documents.

On March 23, 2018, Plaintiff served his motion for class certification and Defendants served their motion for summary judgment. The parties exchanged opposition briefs on April 17, 2018.

The parties' served their reply briefs and filed the Rule 9A packets with the Court on May 11, 2018. A hearing on the parties' motions was held on June 7, 2018.

On June 15, 2018, the Court issued its Memorandum and Order, allowing Defendants' motion for summary judgment, denying Plaintiff's motion for class certification and dismissing the claims with prejudice. Paper No. 16.

B. MEDIATION AND THE PROPOSED SETTLEMENT

On May 9, 2018, in advance of the hearing on the motions for class certification and summary judgment, the parties participated in mediation with Attorney John Ryan. Although the parties were unable to reach a settlement during the mediation session, they continued to engage in negotiations with the assistance of Attorney Ryan. The parties subsequently reached an agreement in principle to resolve this action using a High-Low Agreement that would determine the amount of the Settlement based upon the Court's rulings on Plaintiff's motion for class certification and Defendants' motion for summary judgment. On June 6, 2018, the evening before the hearing on the parties' respective motions, the parties executed the High-Low Agreement, setting forth their agreement to resolve this action based on the Court's resolution of the motion for class certification and the motion for summary judgment.[1]

Under the parties' agreement and based upon the Court's Memorandum and Order dated June 15, 2018, Defendants agreed to pay $1,800,000 to settle this putative class action. Plaintiff and Shapiro Haber believe that the Settlement of the case on the terms reflected in the accompanying Settlement Agreement is fair, reasonable, adequate and in the best interest of the putative Settlement Class, and Defendants, without admitting any liability, have concluded that it is desirable that the claims against them be settled and dismissed on the terms reflected in the Settlement Agreement.

[1] A copy of the High-Low Agreement is attached to the parties' Settlement Agreement as Exhibit 1, which was submitted to the Court's in connection with preliminary approval.

The parties reached this agreement based on the risks relating to the pending motions as well as the time and cost that would be associated with any further litigation, including appeals, following the Court's ruling. In light of the Court's order denying class certification and granting summary judgment for Defendants and dismissing the claims in this Action with prejudice, the Settlement represents a considerable recovery for the Settlement Class, who otherwise would not have received any recovery in this case.

From the Settlement Fund, Shapiro Haber requests a fee and expense award of $600,000, payment of the costs of the settlement administration, including notice and distribution of the Settlement and payment of a Service Award to Mr. Perlow for his efforts in bringing and prosecuting this case and obtaining the Settlement. After the award of these forgoing amounts from the Settlement Amount, as approved by the Court, the remaining Net Settlement Amount will be distributed to the Settlement Class Members in a manner such that each Settlement Class Member who made a payment to ABC and received an LD0 letter will be entitled to receive a pro rata share of the Net Settlement Amount in proportion to the number of LD0 letters they received in relation to the total number of LD0 letters received by all Settlement Class Members.

There will be a *de minimis* threshold of $10 for any payments to the Settlement Class Members under the Settlement. Any Settlement Class Member whose pro rata share would result in a distribution amount from the Net Settlement Amount of less than $10, shall not receive a Settlement payment because the cost of administration and processing of such payments would not be economical.

The distribution of the Net Settlement Amount will be paid without the Settlement Class Members having to submit a claim form. Each Settlement Class Member's portion of the Net Settlement Amount, if any, will be distributed by check to their most recent mailing address.

ARGUMENT

A. Shapiro Haber Is Entitled To A Fee From The Common Fund They Obtained.

For over a century, the U.S. Supreme Court has recognized the "common fund" exception to the general rule that a litigant bears his or her own attorneys' fees. *See Trustees v. Greenough*, 105 U.S. 527 (1882).[2] The Supreme Court has explained the rationale for awarding attorneys' fees from common funds as follows:

> [T]his Court has recognized consistently that a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole . . . . Jurisdiction over the fund involved in the litigation allows a court to prevent . . . inequity by assessing attorney's fees against the entire fund, thus spreading fees proportionately among those benefited by the suit.

Boeing Co. v. Van Gernert, 444 U.S. 472, 478 (1980); *see also see In re Thirteen Appeals Arising Out of the San Juan Dupont Plaza Hotel Fire Litig.*, 56 F.3d 295, 305 (1st Cir. 1995); *In re Tyco Int'l, Ltd. Multidistrict Litig.*, 535 F. Supp. 2d 249, 265 (D.N.H. 2007). Awards of reasonable attorneys' fees from a "common fund" provide compensation that "encourages capable plaintiffs' attorneys to aggressively litigate complex, risky cases like this one" and spread the costs of the litigation "proportionately among those benefitted by the suit." *Tyco*, 535 F. Supp. 2d at 265.

Courts have long recognized that fee awards in successful cases like this encourage the prosecution of other actions on behalf of individuals with valid claims, and thereby promote private enforcement of, and compliance with, important areas of federal and state law, including the federal securities laws. *See, e.g., Ressler v. Jacobson*, 149 F.R.D. 651, 657 (M.D. Fla. 1992) ("Attorneys who bring class actions are acting as 'private attorneys general' and are vital to the enforcement of the

[2] The Supreme Judicial Court in *Sniffin* looked to Federal law on class action settlements and found it to be persuasive. *Sniffin v. Prudential Ins. Co.*, 395 Mass. 415, 420-21 (1985) ("The standard applied by the [trial] Court in its order is similar to that adopted by the Federal courts when reviewing proposed settlements of class actions under Fed. R. Civ. P. 23(e), the Federal provision analogous to Mass. R. Civ. P. 23(c)."). For this reason, Plaintiff also cites to Federal cases with respect to the standards to be applied by the Court in considering whether to grant this motion.

securities laws. Accordingly, public policy favors the granting of counsel fees sufficient to reward counsel for bringing these actions and to encourage them to bring additional such actions."); *Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43, 51 (2d Cir. 2000) ("[t]here is also a commendable sentiment in favor of providing lawyers to bring common fund cases that serve the public interest"). "In order to attract well-qualified plaintiffs' counsel who are able to take a case to trial, and who defendants understand and are able and willing to do so, it is necessary to provide appropriate financial incentives." *In re Worldcom, Inc. Sec. Litig.*, 388 F. Supp. 2d 319, 359 (S.D.N.Y. 2005).

The First Circuit has approved of the percentage method in common fund cases, noting that it is the prevailing method and that it "offers significant structural advantages in common fund cases, including ease of administration, efficiency, and a close approximation of the marketplace." *In re Thirteen Appeals Arising Out of the San Juan Dupont Plaza Hotel Fire Litig.*, 56 F.3d 295, 308 (1st Cir. 1995). Additionally, the percentage method "appropriately aligns the interests of the class with the interests of the class counsel." *Duhaime v. John Hancock Mut. Life Ins. Co.*, 989 F. Supp. 375, 377 (D. Mass. 1997). For these reasons, courts assessing fee awards in class actions generally apply the percentage method, with or without consideration of lodestar as a "cross-check." *See, e.g., Hill v. State St. Corp.*, 2014 U.S. Dist. LEXIS 179702, at *43-44 (D. Mass. Nov. 26, 2014) (noting that lodestar cross-check is sometimes used but would not be "particularly helpful or appropriate" to assess fees in that securities fraud action).

The requested fee and expense award of one third of the Settlement Fund is well within the typical range of fees awarded by courts in class actions. "[N]early two-thirds of class action fee awards based on the percentage method were between 25% and 35% of the common fund." *Harden Mfg. v. Pfizer, Inc (In re Neurontin Mktg. & Sales Practices Litig.)*, 58 F. Supp. 3d 167, 172 (D. Mass. 2014). In fact, awards of 30%-33 1/3% are common. *See Crandall v. PTC Inc.*, No. 16-cv-10471-WGY, 2017 U.S. Dist. LEXIS 217581, at *16 (D. Mass. July 14, 2017) (awarding 33 1/3%); *Roberts v.*

TJX Cos., Inc., No. 13-CV-13142-ADB, 2016 U.S. Dist. LEXIS 136987, at *45 (D. Mass. Sept. 30, 2016) (awarding 33 1/3%); *Courtney v. Avid Tech., Inc.*, No. 1:13-cv-10686-WGY, 2015 U.S. Dist. LEXIS 67952, at *3 (D. Mass. May 12, 2015) (awarding 30%); *In re Satcon Tech. Corp. Sec. Litig.*, No. 1:11-cv-11270-DPW, slip op. at 1 (D. Mass. May 19, 2014), ECF No. 127 (awarding 30%); *Medoff v. CVS Caremark Corp.*, No. 09-cv-554-JNL, 2016 U.S. Dist. LEXIS 19135, at *26-29 (D.R.I. Feb. 17, 2016) (awarding 30%).

B. The Requested Fee Award Is Also Reasonable Given the Time Expended By Shapiro Haber To Recover The Settlement On a Fully Contingent Basis

Ultimately, an award of attorneys' fees is measured by "the standard of reasonableness." *Heller v. Silverbranch Constr. Corp.*, 376 Mass. 621, 629 (1978). "What constitutes a reasonable fee is a question that is committed to the sound discretion of the judge." *Berman v. Linnane*, 434 Mass. 301, 302-03 (2001); *see also Di Marzo v. Am. Mut. Ins. Co.*, 389 Mass. 85, 106 (1983). "A fair market rate for time reasonably spent preparing and litigating a case is the basic measure of a reasonable attorneys' fee under State law . . ." *Fontaine v. Ebtec Corp.*, 415 Mass. 309, 326 (1993). The typical starting point for the analysis involves "multiplying the number of hours reasonably spent on the case times a reasonable hourly rate." *Id.* at 324.

> Under the lodestar method, attorneys' fees are calculated by "determining the number of hours productively spent on the litigation and multiplying those hours by reasonable hourly rates." *In re Thirteen Appeals Arising out of the San Juan Dupont Plaza Hotel Fire Litig.*, 56 F.3d 295, 305 (1st Cir.1995). The resulting figure can then be enhanced through the application of a multiplier to account for the contingent nature of the action or other factors. *See, e.g., Boston & Maine Corp. v. Sheehan, Phinney, Bass & Green, P.A.*, 778 F.2d 890, 894 (1st Cir.1985). See also 4 NEWBERG ON CLASS ACTIONS § 13:80 (4th ed. 2008).

In re TJX Companies Retail Sec. Breach Litig., 584 F. Supp. 2d 395, 398 (D. Mass. 2008).

Shapiro Haber's summary lodestar information is set forth in the Declaration of Adam M. Stewart filed herewith. As set forth in that declaration, Shapiro Haber's total lodestar in this case through November 2, 2018, is $752,923.50 along with out-of-pocket expenses of $15,545.80. The

time and expenses were expended on a fully contingent basis over the past two plus years of litigation.

i. The Requested Fee Award is Below Shapiro Haber's Lodestar

In class action litigation, the courts generally approve of a lodestar enhancement in awarding attorneys' fees to compensate plaintiff's counsel for, among other things, the risk inherent in contingency cases and the results achieved for the class. *See, e.g., In re Volkswagen & Audi Warranty Extension Litig.*, 89 F. Supp. 3d 155, 171 (D. Mass. 2015) (awarding a multiplier of two based on multifactor assessment of nature of the litigation); *In re Amicas, Inc. Shareholder Litig.*, 2010 Mass. Super. LEXIS 325 at *10 (Mass. Super. Ct. Dec. 4, 2010) (applying a multiplier of five to compensate for "risk of nonpayment, and of significant financial loss"); *Walsh v. Carney Hosp. Corp.*, 1998 Mass. Super. LEXIS 89, at *8-9 (Mass. Super. Ct. June 10, 1998) (awarding 20% enhancement in light of the "legal and factual complexity of the case," "the strength" of the opponent, and the risk that "the entire effort would be for naught"); *Comput. Sys. Eng'g, Inc. v. Qantel Corp.*, 740 F.2d 59, 70-71 (1st Cir. 1984) (finding that the district court did not err in awarding a "multiplier of 1.25 for 'exceptionally meritorious' representation" on c. 93A claim) *TJX*, 584 F. Supp. at 408-10 (awarding multiplier of 1.97); *In re Tyco Int'l, Ltd. Multidistrict Litig.*, 535 F. Supp. 2d 249, 271 (D.N.H. 2007) (applying lodestar multiplier of 2.697); *In re Relafen Antitrust Litig.*, 231 F.R.D. 52, 82 (D. Mass. 2005) ("A multiplier of 2.02 is appropriate."); *Krausz ex rel. Principal Protection Fund VI*, 2008 U.S. Dist. LEXIS 4657, *2 (D. Mass. Jan. 23, 2008) ("court will apply a multiplier of two (2) times the lodestar"); *In re Lupron Marketing and Sales Practices Litig.*, 2005 U.S. Dist. LEXIS 17456, at *22 (D. Mass. Aug. 17, 2005) ("multiplier of 1.41, [was] a reasonable bonus justified by the satisfactory outcome").

Here, however, the requested fee and expense award of $600,000 not only does not include any multiplier, it is in fact considerably less than Shapiro Haber's $768,469.30 total lodestar and out

of pocket expenses. Indeed, the requested fee and expense award of $600,000 only compensates Class Counsel for 78% of the lodestar and expenses they have expended through November 2, 2018. And there will be considerable additional work involved in connection with overseeing the administration of the Settlement.

ii. **The Results Obtained Support the Fee Requested**

"The amount recovered is one factor in determining what fee is reasonable..., but is by no means 'the fundamental factor.'" *Haddad Motor Grp., Inc. v. Karp, Ackerman, Skabowski & Hogan, P.C.*, 603 F.3d 1, 10 (1st Cir. 2010) (quoting *Homsi v. C. H. Babb Co.*, 10 Mass. App. Ct. 474, 481 (1980)); *see also Peckham v. Cont'l Cas. Ins. Co.*, 895 F.2d 830, 841 (1st Cir. 1990). As set forth in detail in the accompanying memorandum in support of final approval of the Settlement, Shapiro Haber's efforts over the past two plus years have resulted in a substantial recovery on behalf of the Settlement Class even though Court's Memorandum and Order on summary judgment found that the claims should be dismissed. In other words, absent Shapiro Haber's efforts during mediation and the resulting Settlement, the Settlement Class would have received no recovery. Thus, the results obtained for the Settlement Class support awarding Shapiro Haber the fee and expense award requested.

iii. **The Experience, Reputation, and Ability of Shapiro Haber**

The experience, reputation, and ability of Shapiro Haber further support the fee request. The Settlement Class was represented by highly qualified attorneys who have substantial experience in litigating complex class actions and have an excellent reputation in the Boston legal community. *See* Steward Decl., Ex A.

Shapiro Haber & Urmy has "a national reputation for litigating a variety of national class actions." *Davis v. Footbridge Eng'g Servs., LLC*, 2011 U.S. Dist. LEXIS 93645, at *8 (D. Mass. Aug. 22, 2011). Judges have widely praised Shapiro Haber & Urmy's experience, skills, excellent lawyering, and high quality and zealous representation. Stewart Decl., Ex. A.

iv. The Favorable Reaction of Class Members Also Supports the Attorneys' Fee Request

As of the date of this filing, no Settlement Class Member has objected to any aspect of the Settlement, including the requested fee and expense award. Pursuant to the Preliminary Approval Order, the Notice was emailed to 208,385 (or about 82%) of the Settlement Class, and the Summary Notice was sent to the remaining 44,388 (or 18%) Settlement Class Members for whom Defendants did not have an email address but only a mailing address. The Notice and Summary Notice also directed Settlement Class Members to a page on Class Counsel's website where they could view and download the Summary Notice, the full Notice, a copy of the Complaint, Plaintiff's Unopposed Motion for Entry of Preliminary Approval Order, the Memorandum in Support of Plaintiff's Motion for Entry of Preliminary Approval and the Preliminary Approval Order entered by the Court. A copy of the memorandum in support of final approval of the Settlement and this fee application will also be posted on the website page. Lastly, if the Court grants final approval to the Settlement, a copy of the Final Order and Judgment will be posted to the Settlement website as well.

Based on the Notice being sent to all Settlement Class Members by November 1, 2018, the deadline for objections is December 6, 2018. As of the date of this filing, there have been no objections received from any Settlement Class Members.

CONCLUSION

For all the foregoing reasons, Shapiro Haber respectfully submit that the Court should grant the requested fee and expense award of $600,000 to Shapiro Haber to be paid from the Settlement Fund.

Dated: November 20, 2018

Respectfully submitted,

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Certificate of Service

I hereby certify that a true copy of the above document was served upon counsel of record for Defendants by e-mail on November 20, 2018.

Adam M. Stewart