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IN THE COURT OF COMMON PLEAS OF MONROE COUNTY, PENNSYLVANIA – CIVIL DIVISION

JOHN DOE 1, *et al,*	:	Civil Action No. 6384 cv 2015
	:	
Plaintiffs,	:	**Class Action Complaint** – Pursuant
v.	:	to 18 PA.C.S. § 6111, Breach of
	:	Confidentiality, Invasion of Privacy,
MONROE COUNTY, *et al*,	:	and Declaratory and Injunctive
	:	Relief
Defendants.	:	

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' UNCONTESTED MOTION FOR FINAL APPROVAL OF SETTLEMENT, AN AWARD OF INCENTIVE PAYMENT FOR THE CLASS REPRESENTATIVE, AND AN AWARD OF ATTORNEYS' FEES AND COSTS

The named Plaintiffs in this action (the "Plaintiffs"), by and through their attorney, hereby file their Memorandum of Law in Support of their Motion for Final Approval of Settlement, an Award of Incentive Payments for the Class Representatives, and an Award of Attorneys' Fees and Costs, as follows:

I. INTRODUCTION.

Pursuant to this Court's Order of February 7, 2019 and the stipulation of the Parties,[1] the Class is

> Those individuals, who allegedly had their confidential license to carry firearms applicant information disclosed by Defendants in violation of their right to privacy and 18 Pa.C.S. § 6111(i) from September 8, 2009 through March 11, 2016, as a result of un-enveloped communications, including, but not limited to, postcards that were (1) sent to the

[1] The stipulation of the Parties refers to the Parties' stipulation that the Defendants' practice of sending un-enveloped postcards ceased on March 11, 2016.

applicant/licensee and the applicant/licensee's references containing information submitted by the applicant/licensee and (2) sent by the applicant/licensee's references to the Defendants.

On November 25, 2019, this Court granted Plaintiffs' partial Motion for Summary Judgment and scheduled a damages hearing, which, due to COVID-19, was continued and scheduled for July 17, 2020. In preparation for the damages hearing, the Parties entered into substantial, adversarial settlement negotiations, during which the Parties discussed their respective positions and Defendants informed Plaintiffs of the issues they intend to raise at the damages hearing and on appeal after any judgment is made final and provided copies of the Pennsylvania Counties Risk Pool coverage document, which reflects that Defendants have a maximum coverage of $5,000,000.00, which is eroded by attorney fees incurred. After extensive arm's length settlement negotiations involving competent and experienced counsel for the Parties, the Parties entered into the Settlement Agreement, which was attached as Exhibit "1" to Plaintiffs' Uncontested Motion for Preliminary Approval of Settlement and Notice Program.

On July 15, 2020, after a hearing, this Court preliminarily approved the settlement and notice program. Consistent therewith, the Class Administrator was ordered to send out all Notices by August 6, 2020; all opt-outs and objections were to be filed no later than September 7, 2020; the Class Administrator was ordered to notify counsel of any exclusions or objections by September 13, 2020, to report to the Court of any returned Notices by September 20, 2020, and to file an Affidavit that the Notices were issued consistent with the Court's July 15, 2020 Order; Class Counsel was ordered to file a Motion for Final Approval by September 25, 2020; and the Final Approval Hearing was scheduled for October 8, 2020, at 1 P.M.

By August 6, 2020, the Class Notices were mailed to the class members advising them about, *inter alia*, the lawsuit, the Settlement, and other pertinent information, including how to

opt out of or object to the Settlement. *See* Declaration of RSM US LLP in Connection with Notice Dissemination at ¶¶ 2-7. Class Members had until September 7, 2020 to file objections to the Settlement or to opt out of the proposed settlement. Only twelve Class Members have opted out of the settlement.[2] *Id.* ¶ 13. Moreover, no Class Member has filed an objection to the proposed settlement.

II. THE SETTLEMENT SHOULD BE FINALLY APPROVED.

A. Summary of the Applicable Law and the Process.

Under Pennsylvania law, a class action may not be settled without a hearing and court approval. Rule 1714(a). In *Dauphin Deposit Bank and Trust Co. v. Hess*, 556 Pa. 190, 727 A.2d 1076 (1999), the Pennsylvania Supreme Court noted that "settlements are favored in class action lawsuits" and held that the following seven factors should be considered when evaluating the propriety of a proposed class action settlement:

(1) The risks of establishing liability and damages;
(2) The range of reasonableness of the settlement in light of the best possible recovery;
(3) The range of reasonableness of the settlement in light of all the attendant risks of litigation;
(4) The complexity, expense and likely duration of the litigation;
(5) The state of the proceedings and the amount of discovery completed;
(6) The recommendations of competent counsel; and
(7) The reaction of the class to the settlement.

Dauphin Deposit, 556 Pa. at 197, 727 A.2d at 1076 (citing, *Buchanan v. Century Fed. Sav. & Loan Ass'n*, 259 Pa. Super. 37, 393 A.2d 704 (1978)). In considering these factors, there is no exact calculus or formula for the court to use:

[2] The reason why any of the twelve Class Members excluded themselves from the Settlement is unknown; however, several are Monroe County employees/elected representatives.

> In effect the court should conclude that the settlement secures an adequate advantage for the class in return for the surrender of litigation rights. As with valuation problems in general, there will usually be a difference of opinion as to the appropriate value of a settlement. For this reason, judges should analyze a settlement in terms of a "range of reasonableness" and should generally refuse to substitute their business judgment for that of the proponents.

Buchanan, 259 Pa. Super. at 46-47, 393 A.2d at 709. Given these factors, it is clear that the Court may not make a final determination as to the propriety of any settlement plan without waiting to hear and weighing the class members' positions.

Thus, the class action settlement approval process requires two steps: (1) a preliminary evaluation and, if appropriate, approval of the settlement followed by notice to the class members; and (2) a formal fairness hearing where arguments for and against the settlement are put forth. *Milkman v. American Travellers Life Ins. Co.*, 2002 WL 778272 at *11-12 (Pa. Com. Pl. Phila. Apr. 1, 2002). In the case at bar, the Court has already granted preliminary approval of the settlement. Thus, the Court must now determine, after reviewing any objections from Class members, and after holding a fairness hearing, whether to finally approve the settlement.

B. <u>The Settlement and Application of the Seven Dauphin Deposit Factors.</u>

The proposed Settlement is set forth in detail in Section III of the Settlement Agreement between the Parties, which was attached as Exhibit 1 to Plaintiffs' Uncontested Motion for Preliminary Approval of Settlement and Notice Program. In sum, Defendants have agreed to pay the total sum of $4,000,000.00, including attorneys' fees and expenses. Of that sum, Class Counsel, consistent with his fee agreement with the Representative Plaintiffs and other previously approved class actions (*e.g. A.R., et al. v. City of Philadelphia, et al.*, Docket No. 151201740, (Pa. Com. Pl. Philadelphia, October 12, 2018) -

http://www.philaltcfclassaction.com/default.aspx), seeks attorneys' fees and expenses in the sum of 40% of the Settlement Fund. Each of the Representative Plaintiffs will also receive an incentive payment of $2,500.00 on top of their settlement payment. The remaining funds will be distributed *pro rata* to the Class members. Class Administration is expected to cost approximately $72,000. If the Court approves the Settlement after the Final Approval Hearing, the Class members should each expect to receive approximately $201.68. In addition, the Defendants have agreed to certain permanent injunctive relief in the form of certain valuable policy changes that are set forth in Section III(A) of the Settlement Agreement.

1. The Risks of Establishing Liability and Damages.

Although Plaintiffs have successfully established liability of the Defendants before this Court, Defendants have informed Plaintiffs of the issues they intended to raise at the previously scheduled damages hearing and on appeal after any judgment is made final. Moreover, Defendants provided copies of the Pennsylvania Counties Risk Pool coverage document, reflecting that Defendants have a maximum coverage of $5,000,000.00, which is eroded by attorneys' fees incurred. Thus, even setting aside any issues Defendants would raise on appeal and their likelihood of success, even if Plaintiffs are completely successful in relation to any appeal, the amount of coverage to pay the Class will likely be at or below the Settlement Amount, with years of delay.

Therefore, this first factor favors final approval of the proposed Settlement.

2. The Range of Reasonableness of the Settlement in Light of the Best Possible Recovery.

In comparing a proposed settlement's value with the best possible recovery, "[t]he trial court should not make a proponent of a proposed settlement justify each term of settlement

against a hypothetical or speculative measure of what concessions might have been gained; inherent in compromise is a yielding of absolutes and an abandoning of highest hopes." *Milkman*, 2002 WL 778272 at *16 (citing, *Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977)). Rather, a court should focus on "the economic valuation of the proposed settlement" and whether the "settlement represents a compromise in which the highest hopes for recovery are yielded in exchange for certainty and resolution and courts should guard against demanding too large a settlement based on the court's view of the merits of the litigation." *Id.* (citing, *In re Safety Components, Inc. Sec. Litig.*, 166 F.Supp.2d at 92 (in turn quoting, *In re Aetna Sec. Litig.*, No. MDL 1219, 2001 WL 20928, at *11 (E.D. Pa. Jan. 4, 2001))).

Under the circumstances, although the Court has ruled in Plaintiffs' favor in relation to 18 Pa.C.S. § 6111(i) and as a result, each Class member would likely be entitled to a minimum of $1,000.00 for the disclosure of their confidential LTCF information, since there is less than $5,000,000 in coverage available and approximately 12,000 Class members, this is practically the best possible recovery and in the best interest of the Class members, without any consideration being given to the value of the injunctive relief and policy changes agreed to by the Defendants. In this day and age of "coupon settlements," a settlement for more than 80% of the reasonably available recovery, plus an agreement for injunctive relief and extensive policy changes, is extraordinary.

In addition, the administration of this class action is superior to that of most other class action settlements since Class Members in this case will not need to submit a claim form to receive payment, as payments will be automatically sent to Class Members who do not opt out. This is significant because, in class actions where a claim form must be submitted to receive payment, most class members do not choose to participate and, therefore, do not receive

payment. The automatic payment process being utilized in this case is therefore expected to substantially increase the number of class members who ultimately receive payment under the settlement as compared to class actions requiring the submission of a claim form.

Therefore, this factor also weighs in favor of a final approval the proposed Settlement.

3. The Range of Reasonableness of the Settlement in Light of All the Attendant Risks of Litigation.

In deciding whether the settlement falls within a "range of reasonableness," a court must examine whether the proposed settlement secures an "adequate" (and not necessarily the best possible) advantage for the class in exchange for the surrender of the members' litigation rights. *Dauphin Deposit*, 556 Pa. at 196. A court should not inquire into whether the "best possible" recovery has been achieved. Rather, in view of the stage of the proceedings, complexity, expense and likely duration of further litigation, as well as the risks of litigation, the court is to decide whether the settlement is reasonable. *Id.*

Given the risks of further litigation, which will further erode any coverage, and given the extraordinary settlement reached in this case, the proposed settlement is certainly within the range of reasonableness for the reasons set forth hereinabove In fact, this Court already decided that the proposed settlement is within the range of reasonableness. Therefore, this factor also weighs in favor of a final approval of the proposed Settlement.

4. The Complexity, Expense, and Likely Duration of the Litigation.

The complexity, expense, and duration factor "captures the probable costs, in both time and money, of continued litigation." *Milkman*, 2002 WL 778272 at *17 (citing, *In re Cedant*

Corp. Litig., 264 F.3d 201, 233 (3d Cir. 2001) (in turn quoting, *General Motors Corp.*, 55 F.3d 768, 812 (3d. Cir. 1995))). This factor "weighs heavily" in the Court's analysis of the fairness of a class action settlement. *Id.* (citing, *Klein v. PDG Remediation, Inc.*, No. 95 Civ. 4954, 1999 WL 38179, at *2 (S.D.N.Y. Jan. 28, 1999)). Most class actions are inherently complex and settlement avoids the costs, delays and multitude of other problems associated with them. Id. (citing, *In re Nasdaq Market-Makers Antitrust Litig.*, 187 F.R.D. 465, 477 (S.D.N.Y. 1998) ("[C]lass actions have a well-deserved reputation as being most complex.")). Settlements of such complex matters are favored by courts. *Id.* (citing, *In re Medical X-Ray*, No. 93 Civ. 5904, 1998 WL 661515, at *3 (E.D.N.Y. Aug. 7, 1998)).

This litigation is novel in nature and the complexities of it have resulted in five and half years of litigation, thus far. Should this litigation continue through a damages hearing and appeals, during which the coverage would further erode, it would take several more years and cost hundreds of thousands, if not millions, of additional dollars of attorneys' fees, plus the additional attendant expenses, which ultimately would be borne by the Class members.

In addition, previously, there was a lawsuit filed in the Berks County Court of Common Pleas and involved the publication on the Internet, for about thirty hours, of the names, birth dates, social security numbers and other vital information of approximately 25,000 LTCF holders by an information technology company hired by Berks County. *See*, *Jerry Schaeffer v. Berks Count Sheriff's Department, et al.*, docket no. 99-9158. That case settled in 2007 for only $150,000, which roughly equates to only $6 per class member, far less than the amount the Class members will receive in this case. It also appears that the class members in the Berks County lawsuit had to submit claim forms to receive money from the settlement. However, the submission of claim forms is not required in this case.

Thus, this factor weighs heavily in favor of final approval of the proposed Settlement.

5. The State of the Proceedings and the Amount of Discovery Completed.

The purpose of the state of the proceedings and discovery completion factor is to ascertain the "degree of case development that class counsel has accomplished prior to settlement. *Milkman*, 2002 WL 778272 at *18. Through this lens, courts can determine whether counsel had an adequate appreciation of the merits of the case before negotiating." *Id.* (*citing*, *Gen. Motors Corp.*, 55 F.3d at 813). This ensures that "a proposed settlement is the product of informed negotiations" by providing for "an inquiry into the type and amount of discovery the parties have undertaken." *Id.* (citing, *In re Prudential Ins. Co. America Sales Practice Litig. Agent Actions*, 148 F.3d 283, 319 (3d. Cir. 1998)).

As discussed *supra*, although Plaintiffs have successfully established liability of the Defendants before this Court, Defendants have informed Plaintiffs of the issues they intended to raise at the damages hearing and on appeal after any judgment is made final. Moreover, Defendants provided copies of the Pennsylvania Counties Risk Pool coverage document (*i.e.* insurance policy), which reflects that Defendants have a maximum coverage of $5,000,000.00, which is eroded by attorneys' fees incurred. Thus, even setting aside any issues Defendants would raise and their likelihood of success, even if Plaintiffs are completely successful in relation to any appeal, the amount of coverage to pay the Class will likely be at or below the Settlement Amount, with years of delay.

From the foregoing, it is clear that Class Counsel had an adequate appreciation of the merits of the case before and during settlement negotiations. Therefore, this factor also weighs in favor of final approval of the proposed Settlement.

6. The Recommendations of Competent Counsel.

As the Court explained in *Milkman*, "It is difficult to overestimate the substantial weight courts have accorded the position taken by counsel for the class when evaluating a settlement." *Milkman*, 2002 WL 778272 at *19 (citing, *Williams v. Vukovich*, 720 F.2d 909, 922-23 (6th Cir. 1983) ("The court should defer to the judgment of experienced counsel who has competently evaluated the strength of his proofs."); *Austrian and German Bank*, 80 F.Supp.2d 164, 173-74 (S.D.N.Y. 2000) ("If the Court finds that the Settlement is the product of arm's length negotiations conducted by experienced counsel knowledgeable in complex class litigation, the Settlement will enjoy a presumption of fairness."); *Fischer v. Madway*, 336 Pa. Super. 289, 297, 485 A.2d 809, 813 (1984) ("The opinion of experienced counsel is entitled to considerable weight" when considering proposed class action settlement.).

Counsel for the Parties strongly recommend that the Court finally approve the proposed Settlement. The Settlement was reached after arm's length negotiations involving competent and experienced counsel for the Parties. Thus, this factor weights strongly in favor of approving the Settlement.

7. The Reaction of the Class to the Settlement.

The class's reaction to the proposed settlement "is perhaps the most significant factor to be weighed in considering its adequacy...." *Milkman*, 2002 WL 778272 at *20 (citing, *In re Microstrategy, Inc. Sec. Litig.*, 150 F.Supp.2d 896, 905 (E.D.Va.2001)); *see also*, *Dauphin Deposit Bank and Trust Co. v. Hess*, 698 A.2d 1305, 1308 (Pa. Super. 1997). The purpose of examining the reaction of the class to the proposed settlement is "to gauge whether members of

the class support the settlement." *Milkman*, 2002 WL 778282 at *20 (citing, *In re Safety Components, Inc.*, 166 F.Supp.2d at 85). Courts considering a class's response to a settlement proposal look not only at the merit of the objections raised, but also at "the number and vociferousness of the objectors." Id. (citing, *Neuberger v. Shapiro*, 110 F.Supp.2d 373, 378 (E.D. Pa. 2000)). However, the number of objectors should be evaluated relative to the size of the class. *Id.* (citing, *In re NASDAQ Market-Makers Antitrust Litigation*, 187 F.R.D. 465, 478 (S.D.N.Y. 1998) (explaining, "The small number of objections necessarily must be evaluated relative to the size of this Class of over 1.0 million members.")). Even where there is some resistance to the settlement among class members, a court may nevertheless approve the settlement. *Id.* (citing, *Brotherton v. Cleveland*, 141 F.Supp.2d 894, 906 (S.D. Ohio 2001) (holding, "The fact that some class members object to the Settlement does not by itself prevent the court from approving the agreement.")).

The notices were mailed to the members of the Class by August 6, 2020. The class members were afforded a period of thirty-two (32) days to: (1) file an objection to the Settlement; (2) opt out of the Settlement; or (3) do nothing. Those who choose to opt out of the Settlement would not be subject thereto and would receive nothing from the settlement. Those who do nothing are bound by the Settlement and will be entitled to receive compensation from the Settlement Fund. Only twelve Class Members (or .001%) have chosen to opt out of the Settlement. Moreover, no Class Member has filed an objection to the Settlement or to Class Counsel's application for fees and expenses.

Therefore, Class Members' reaction to the Settlement also strongly favors approval thereof and the Settlement should be finally approved by the Court.

III. THE REQUESTED CLASS REPRESNTATIVE INCENTIVE AWARDS SHOULD BE APPROVED BY THE COURT.

Incentive awards for class representatives are appropriate and permitted by Pennsylvania law. *Milkman*, 2002 WL 778282 at *29. As the Court in Milkman explained:

> There are a number of valid reasons for granting class representative awards. The class representatives' role in these cases is to protect the interests of the class and foot the bill for litigation. However, the public policy favoring private civil litigation as a means to promote certain important social values often fails to provide adequate compensation or incentive for plaintiffs to take on this burden simply on principle. The representative assumes substantial risk, not just of losing the time and costs of litigation, but also of retaliation or collateral notoriety.

Id. At *30 (citing, Clinton A. Krislov, Scrutiny of the Bounty: Incentive Awards for Plaintiffs in Class Litigation, 78 Ill. B.J. 286, 286 (1990)). For these reasons, incentive awards "are not uncommon in class action litigation and particularly where ... a common fund has been created for the benefit of the entire class." *Id.* (citing, *Cullen v. Whitman Med. Corp.*, 197 F.R.D. 136, 145 (E.D. Pa. 2000)); *see also*, *In re S. Ohio Correctional Facility*, 175 F.R.D. 270, 272 (S.D. Ohio 1997) ("Courts routinely approve incentive awards to compensate named plaintiffs for the services they provided and the risks they incurred during the course of the class action litigation.").

Whether to grant incentive awards is in the discretion of the trial court. *Id.* (citing, *Montgomery v. Aetna Plywood, Inc.*, 231 F.3d 399, 408 (7th Cir. 2000)). In determining whether to grant an award and the size of such awards, courts have relied on five factors: (1) the risk to the class representative in commencing suit, both financial and otherwise; (2) the notoriety and personal difficulties encountered by the class representative; (3) the amount of time and effort spent by the class representative; (4) the duration of the litigation and; (5) the personal benefit (or

lack thereof) enjoyed by the class representative as a result of the litigation. *Id.* (citing, *Van Vranken v. Atlantic Richfield Co.*, 901 F.Supp. 294, 299 (N.D. Cal. 1995).

Depending on the involvement of the class representative, courts, including federal courts sitting in Pennsylvania, have allowed incentive awards in substantial amounts. *See, e.g.*, *In re SmithKline Beckman Corp. Sec. Litig.*, 751 F.Supp. 525 (E.D. Pa. 1990) (approving award of $5,000 to each of several class representative); *In re First Jersey Sec., Inc. Litig.*, MDL No. 681, 1989 WL 69901 (E.D. Pa. June 23, 1989) (approving award of $24,000 to class representative); *Bogosian v. Gulf Oil Corp.*, 621 F.Supp. 27 (E.D. Pa. 1985) (approving award of $20,000 to each of two class representative). Awards to named plaintiffs are appropriate compensation for the time and expense they incur in serving as class representatives. These cases teach that those who fight on behalf of an entire class should be reasonably compensated for their efforts when those efforts are successful.

In this case, Class Counsel requests only $2,500.00 incentive awards for each of the Class Representative. The involvement of the Class Representative included providing information to Class Counsel that permitted Class Counsel to draft the complaint filed in this action, more than five years worth of discussions with Class Counsel regarding the status and strategy involved in this case, attendance at several hearings, during which they testified or observed testimony of other witnesses, and attendance at the Preliminary Approval Hearing. In addition, it should be noted that these Class Representatives risked public disclosure of ttheir identity (which is confidential by statute), in the event the Court ordered such disclosure. The foregoing warrants the very modest incentive payment requested, especially given that the requested incentive awards total only $10,000.00 (or .0025%), of the $4,000,000.00 Settlement amount. *See*, *Milkman*, 2002 WL 778282 at *32 (Approving incentive payment that totaled less than 0.1% of

the overall settlement value); *In re Lorazepam & Clorazepate*, Nos. MDL 1290(TFH) and 99MS276 (TFH), 2002 WL 246664, at *27 (D.D.C. Feb. 1, 2002) (approving incentive awards representing approximately 0.3 percent of each class's recovery); *Dornberger v. Metropolitan Life Ins. Co.*, 203 F.R.D. 118, 124 (S.D.N.Y. 2001) (approving incentive awards that were "small" in relation to the value of the settlement reached).

Therefore, the Court should approve the requested incentive payments of $2,500 to each of the four Class Representatives.

IV. THE ATTORNEYS' FEES AND EXPENSES SOUGHT BY CLASS COUNSEL SHOULD BE APPROVED BY THE COURT.

Where class counsel secure a benefit for the class they should be awarded reasonable attorneys' fees and costs. *Milkman*, 2002 WL 778282 at *23; *see also*, 42 Pa.C.S. 2503(8) (codifying the "common fund" excepting to the "American Rule," and stating, "The following participants shall be entitled to a reasonable counsel fee as part of the taxable costs of the matter … (8) Any participant who is awarded counsel fees out of a fund within the jurisdiction of the court pursuant to any general rule relating to an award of counsel fees from a fund within the jurisdiction of the court.") A trial court's award of attorneys' fees is subject to an abuse-of-discretion standard of review. *Signora v. Liberty Travel, Inc.*, 886 A.2d 284, 292 (Pa. Super. 2005).

The right to charge a fund with attorneys' fees and expenses depends on whether the litigation in which the costs and expenses were incurred was in promotion of the interests of those eventually found to be entitled to the fund." *Id.* (citing, *Schwartz v. Keystone Oil Co.*, 164 Pa. 415, 418, 30 A. 297, 298 (1894)); *see also*, *In re Fine Paper Antitrust Litig.*, 751 F.2d 562, 596 (3d Cir. 1984) ("[T]he burden is on the fee applicant in an equitable fund case to demonstrate to the court's satisfaction that the work for which compensation is sought benefitted

the class."); *Fitzgerald v. City of Philadelphia*, 87 Pa. Commw. 482, 487, 487 A.2d 485, 488 (1985) (citing, *International Org. Master, Mates & Pilots of Amer., Local No. 2 v. International Org. Masters, Mates & Pilots of Amer., Inc.*, 497 Pa. 102, 439 A.2d 621 (1981), for the principle that "[o]ne must compensate his counsel in the absence of an express statutory authorization or some established exception"). In awarding attorneys' fees in a class action, a court should estimate what each class member would have paid for counsel's service, had negotiations with an awareness of what was to come been possible. *Milkman*, 2002 WL 778282 at *24. As the Court explained in *Matter of Continental Insurance Securities Litigation*, 962 F.2d 566, 572 (7th Cir. 1992):

> The object in awarding a reasonable attorney's fee, as we have been at pains to stress, is to give the lawyer what he would have gotten in the way of a fee in an arm's length negotiation, had one been feasible. In other words the object is to simulate the market where a direct market determination is infeasible. It is infeasible in a class action because no member of the class has a sufficient stake to drive a hard-or any-bargain with the lawyer. So the judge has to step in and play surrogate client.

Pennsylvania Rule of Civil Procedure 1717 ("Rule 1717") sets forth a set of factors, among others, to be considered when an award of attorneys' fees is appropriate in a class action:

(1) the time and effort reasonably expended by the attorney in the litigation;
(2) the quality of the services rendered;
(3) the results achieved and benefits conferred upon the class or upon the public;
(4) the magnitude, complexity and uniqueness of the litigation; and
(5) whether the receipt of a fee was contingent on success.

In addition to this five-factor test, courts in Pennsylvania and elsewhere have used two other methods for evaluating a proposed award of attorneys' fees: the lodestar method and the percentage of recovery method. *Milkman*, 2002 WL 778282 at *24. Courts will often use more than one method as a cross-check to ensure that an award that would be acceptable under one approach is not entirely inappropriate under another approach. *Id.* In determining the

reasonableness of a class action counsel fee request, Pennsylvania courts typically look to federal cases for guidance. *In re Bridgeport Fire Litig.*, No. 05-20924, 2008 7826243 (Pa. Com. Pl. Montg. Aug. 29, 2008), aff'd, 8 A.3d 1270 (2010).

Here, Class Counsel request attorneys' fees and expenses in the sum of $1,600,000.00.

A. The Proposed Attorneys' Fees Meet the Requirements of Rule 1717.

1. Time and Effort Reasonably Expended by the Attorney in the Litigation.

Class Counsel has expended a great deal of time and effort on this matter over more than five years. Class Counsel in this matter, which consisted of Joshua Prince, Esq. and Adam Kraut, Esq. of Prince Law Offices, P.C and, to a much lesser extent, certain colleagues associated with Prince Law Offices, P.C., spent approximately 976 hours on this case through September 24, 2020, with a time value of approximately $488,000 at the hourly rate of $500. Declaration of Joshua Prince, Esq. at ¶¶ 7 and 9. In addition, staff and paralegals have spent more than 72 hours of time, resulting in an additional time value of $9,000.00 at an hourly rate of $125. *Id*. at ¶¶ 8 and 10. Furthermore, during the more than five years of litigation, Class Counsel have expended $4,385.82 in costs and expenses. [3] *Id*. at ¶ 11. Therefore, through September 24, 2020, Class Counsels' total billings, plus costs and expenses, are in excess of $133,000. *Id*. at ¶¶ 9-11. These sums do not include the additional time spent working with the Class Administrator and drafting/finalizing this Memorandum of Law and accompanying documents, or for preparing for and appearing at the Final Approving Hearing and, therefore, Class Counsel expect that the total time value will be in excess of $520,000 by the conclusion for the Final Approval Hearing, plus cost and expenses of approximately $4,385.82. *Id.* at ¶¶ 12-13.

The efforts of Class Counsel and staff included drafting pleadings and discovery requests, conducting extensive legal research, conferring with class members, co-counsel and opposing counsel, taking numerous depositions, drafting and litigating the motion for a preliminary injunction, researching and responding to preliminary objections, drafting multiple motions for contempt and appearing at the hearing therefor, participating in extensive negotiations with Defendants' counsel, appearing at hearings and conferences with the court, reviewing documents, drafting the settlement documents, drafting a motion for preliminary approval of the settlement, reviewing objections, drafting the instant motion, compiling time/billing records, and appearing at the fairness hearing.

2. Quality of the Services Rendered.

Class Counsel believe that their legal representation in this matter has been excellent. The attorneys involved have substantial legal experience, as reflected by their work product and resolution of this matter. At all times, Class Counsel have acted professionally and have demonstrated their skill through their litigation management, legal research, and legal writing skills.

3. Results Achieved and Benefits Conferred upon the Class or upon the Public.

The value of the Settlement to the Class has been discussed extensively hereinabove and is substantial, especially when considering the additional injunctive relief that was obtained by Class Counsel.

[3] This amount does not include the $72,000 paid to the Class Administrator by the Defendants from the Settlement Fund.

In addition to the Settlement's specific awards, it is not difficult to infer that others will be less likely to disclose confidential LTCF information in the future, as a result of this settlement. Thus, although the benefit to the public is difficult to assess, it is certainly not negligible.

4. Magnitude, Complexity and Uniqueness of the Litigation.

This case is essentially one of first impression given that there was no published case law interpreting Section 6111(i), at the time this case was initiated. In addition, the policy and procedural changes being effectuated by the Monroe County are groundbreaking changes to the way things have been conducted for decades in Monroe County and are certainly favorable to LTCF applicants and holders beyond the Class. Moreover, this action appears to be only the fifth one of its kind filed in Pennsylvania, with the prior Berks County action having important factual differences and a much less favorable settlement terms, as discussed *supra*.

5. Whether the Receipt of a Fee Was Contingent on Success.

Prior to the filing of this action, each of the Representative Plaintiffs entered into a contingent fee agreement with Class Counsel providing for a 40% attorney fee, in the event Class Counsel was successful. The risk to Class Counsel in this matter was great, as receiving attorneys' fees was entirely contingent on a successful outcome of the litigation. This risk was magnified by the novelty of the claims. Were Class Counsel to fail, the result would be no compensation for the Class or Class Counsel, and Class Counsel would have been required to absorb all of the accrued expenses, in addition to all the time spent litigating this matter.

6. Whether the Defendants Consent to the Request for Attorneys' Fees and Costs.

Although not set forth in Rule 1716, the Court in *Milkman* held that "the agreement of the Defendants to the proposed amount of attorneys' fees through arm's-length negotiations is an 'other factor' that can be considered in the context of a Rule 1716 analysis." *Milkman*, 2002 WL 778282 at * 25, n. 41. Here, Defendants agree that Class Counsel may request attorneys' fees and expenses of up to forty percent of the Settlement Fund.

7. Whether There Were Objections to the Request for Attorney Fees and Costs.

Lastly, even though it is not an explicit Rule 1716 factor, it should be noted that none of the Class Members have objected to the attorneys' fees and costs requested by Class Counsel despite the fact that it was fully disclosed in the Settlement Agreement and the Class Notices that Class Counsel would be seeking up to forty percent of the Settlement Fund to compensate Class Counsel for attorneys' fees and expenses.

Thus, each of the factors in Rule 1716 weigh heavily in favor of awarding the requested attorneys' fees to Class Counsel.

B. The Proposed Attorneys' Fees Are Appropriate under the Lodestar Method.

The lodestar method of calculating attorneys' fees is frequently used in federal class actions and can be used as a cross-check of reasonableness this case. Under this approach, "[t]he initial estimate of a reasonable attorney's fee is properly calculated by multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate. Adjustments to that fee then may be made as necessary in the particular case." *Milkman*, 2002 WL 778282 at *26

(citing, *Blum v. Stenson*, 465 U.S. 886, 888 (1984) (in turn citing, *Hensley v. Eckerhart*, 461 U.S. 424 (1983))). The reasons for using this approach were enunciated in *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 565-66 (1986):

> A strong presumption that the lodestar figure-the product of reasonable hours times a reasonable rate-represents a "reasonable" fee is wholly consistent with the rationale behind the usual fee-shifting statute, including the one in the present case. These statutes were not designed as a form of economic relief to improve the financial lot of attorneys, nor were they intended to replicate exactly the fee an attorney could earn through a private fee arrangement with his client. Instead, the aim of such statutes was to enable private parties to obtain legal help in seeking redress for injuries resulting from the actual or threatened violation of specific federal laws …. Moreover, when an attorney first accepts a case and agrees to represent the client, he obligates himself to perform to the best of his ability and to produce the best possible results commensurate with his skill and his client's interests. Calculating the fee award in a manner that accounts for these factors, either in determining the reasonable number of hours expended on the litigation or in setting the reasonable hourly rate, thus adequately compensates the attorney, and leaves very little room for enhancing the award based on his post-engagement performance. In short, the lodestar figure includes most, if not all, of the relevant factors constituting a "reasonable" attorney's fee, and it is unnecessary to enhance the fee for superior performance in order to serve the statutory purpose of enabling plaintiffs to secure legal assistance.

The United States Supreme Court has established "a strong presumption that the lodestar represents the reasonable fee, and [has] placed upon the fee applicant who seeks more than that the burden of showing that such an adjustment is necessary to the determination of a reasonable fee." *Milkman*, 2002 WL 778282 at *26 (citing, *City of Burlington v. Dague*, 505 U.S. 557, 562 (1992)).

When calculating the lodestar, the calculation of a reasonable fee should begin with the actual number of hours spent in pursuing the claim multiplied by a reasonable rate. Both the number of hours and the rate per hour shall be calculated on a basis reasonably reflective of the

relevant market and the magnitude, complexity and uniqueness of the claim and the related task. *Id.* The court may also consider a fee enhancement to reflect the contingent risk. *Id.* At *27 (citing, *Birth Center v. St. Paul Cos*., 727 A.2d 1144, 1160-61 (Pa. Super. 1999); *Jones v. Muir*, 511 Pa. 535, 551, 515 A.2d 855, 864 (1986); *Logan v. Marks*, 704 A.2d 671, 674 (Pa. Super. 1997); *Commonwealth, Dept. of Envtl. Resources v. PBS Coals, Inc.*, 677 A.2d 868, 874 (Pa. Commw. 1997) (stating that "[o]ur United States Supreme Court has noted that the lodestar approach is used for all federal fee-shifting statutes and applying lodestar approach to award attorneys' fees to intervenors in state environmental suit)).

As explained above, applying the simple lodestar method here yields an initial estimate of approximately $497,000 in attorneys' fees, not including the expenses incurred by Class Counsel. It should be noted that $500 per hour is less than many attorneys in the Philadelphia metropolitan area. Moreover, as explained above, Class Counsel expect that their costs and expenses will total approximately $4,400 by the conclusion of this case. However, the simple lodestar calculation is not the end all of calculating an appropriate and reasonable attorneys' fee award in a class action. Given the contingent risk assumed by Class Counsel, even applying a modest multiplier of four-to-one would cause the lodestar to exceed the attorneys' fees requested in this case.

According to the Court in *Milkman*, "the risk of winning or losing should be considered in all cases. Plaintiffs' attorneys always face the prospect of receiving no compensation in statutory fee cases. Accordingly, even modest risks in cases in which liability is reasonably certain to be established should be recognized in the fee-setting process." *Milkman*, 2002 WL 778282 at *27. In addition, according to the Court in *Milkman*, other factors that should be considered in adjusting the basic lodestar amount are: (1) the result obtained in the action; (2)

the petitioning attorney's contribution to a prompt or a delayed resolution of the action; and (3) the delay in receiving attorneys' fees. *Id.*

The risk of bringing this action, including the fact that this case was brought on a contingency basis, as well as the relief obtained for the Class and Class Counsel's involvement in and contribution to Settlement negotiations, are discussed hereinabove and support the application of a considerable multiplier. In the case at bar, Class Counsel's proposed award of attorneys' fees of $1,600,000.00 is approximately 3.21 times the lodestar amount of $497,000. Similar, and even larger, lodestar multipliers are commonly found to be reasonable and appropriate. *Milkman*, 2002 WL 778282 at *28 (ordering that attorneys' fees of $1.5 million be factored by a multiplier of 3.0 for a final amount of $4.5 million); *In re Rite Aid Corp. Sec. Litig.*, 146 F.Supp.2d 706, 736 n. 44 (E.D. Pa. 2001) (approving multiplier "in the range of 4.5 to 8.5"); *In re Chambers Development Securities Litigation*, 912 F.Supp. 852 (W.D. Pa. 1995) (approving multiplier of 3.2); *Muchnick v. First Fed. Sav. & Loan Ass'n*, Civ. A. No. 86-1104, 1986 WL 10791 (E.D. Pa. Sep. 30, 1986) (approving award of attorneys' fees using multiplier of 8.33 where "[t]he lawsuit raised several significant and novel legal issues, and the history of related litigation indicated that the contest would likely be lengthy and hard-fought"); *Hinckley v. E.I. DuPont de Nemours & Co.*, 583 F.Supp. 11, 14 (E.D. Pa. 1983) (applying multiplier of 3.0 in securities litigation action); *Municipal Authority of Bloomsburg v. Commonwealth of Pennsylvania*, 527 F.Supp. 982, 1000 (M.D. Pa. 1981) (approving multiplier of 4.5); *Conley v. Sears, Roebuck & Co.*, 222 B.R. 181 (D.Mass.1998) (approving award of attorneys' fees using multiplier of 8.9); *In re NASDAQ Market–Makers Antitrust Litig.*, 187 F.R.D. 465, 489 (S.D.N.Y.1998) (approving multiplier of 3.97); *In re Computron Software, Inc.*, 6 F.Supp.2d 313, 323 (D.N.J. 1998) (multiplier of approximately 2.5 is "fair, considering the professional

efforts extended and fair and adequate settlement reached by counsel."); *Cosgrove v. Sullivan*, 759 F.Supp. 166 (S.D.N.Y. 1991) (approving a multiplier of 8.84); *In re Fernald Litigation*, 1989 WL 267038 (S.D. Ohio 1989) (approving multiplier of 5.0); Newberg § 14.03 (Lodestar multipliers of up to 4 are frequently awarded in common fund cases).

Thus, the lodestar method supports awarding the attorneys' fees requested by Class Counsel.

C. Class Counsel's Request for Attorneys' Fees Is Reasonable Using the Percentage of Recovery Method.

Under the percentage of recovery method, a court must first made a reasonable estimate the value of recovery made, including proposed fees, from which it can determine the relationship between the recovery and the attorneys' fees. *Milkman*, 2002 WL 778282 at *28 (citing, *In re Prudential*, 148 F.3d at 333). Awards in the range of thirty to thirty-five percent are quite common, while an award of fifty percent is usually the upper limit on a reasonable fee ward from a common fund. *Id.* At *28-29 (citing, *In re Ikon Office Solutions*, 194 F.R.D. 166 (E.D. Pa. 2000) (approving attorneys' fees of 30 percent of settlement); *In re Bioscience Sec. Litig.*, 155 F.R.D. 116 (E.D.Pa.1994) (same); *In re Warner Communications*, 618 F.Supp. 735, 749 (S.D.N.Y.1984) ("Traditionally, courts in this Circuit and elsewhere have awarded fees in the 20%-50% range in class actions.")); *see also*, *In re Bridgeport Fire Litig.*, No. 05-20924, 2008 WL 7826243 (Pa. Com. Pl. Montg. Aug. 29, 2008) (approving attorneys' fees of one-third of $35 million settlement, exclusive of costs), *aff'd*, 8 A.3d 1270 (Pa Super. 2010); *In re: Automotive Refinishing Paint Antitrust Litig.*, 2008 WL 63269 (E.D. Pa. 2008) (approving attorneys' fees of one-third of $35 million settlement fund, exclusive of costs); *Bradburn Parent-Teacher Store, Inc. v. 3M*, 513 F.Supp.2d 322 (E.D. Pa. 2003) (approving attorneys' fees of 35% of $39.75

million settlement fund); *In re: Coral Corp.*, 293 F.Supp.2d 423 (E.D. Pa. 2001) (approving attorneys' fees of one-third of $7 million settlement fund, exclusive of costs). It should be noted that where the recovery is more modest, the percentage of attorneys' fees is often higher, and where the recovery is larger (*e.g.* in the $100 million range), the percentage is often lower. *Id.*

Courts have weighed the percentage of recovery against a set of seven factors:

(1) the size of the fund created and the number of persons benefitted;
(2) the presence or absence of substantial objections by members of the class to the settlement terms and/or fees requested by counsel;
(3) the skill and efficiency of the attorneys involved;
(4) the complexity and duration of the litigation;
(5) the risk of nonpayment;
(6) the amount of time devoted to the case by plaintiffs' counsel; and
(7) the awards in similar cases.

Id. at *29 (citing, *Cullen*, 197 F.R.D. at 147 (in turn citing, *Gunter v. Ridgewood Energy Corp.*, 223 F.3d 190, 201 n. 6 (3rd Cir. 2000))). These factors have been discussed hereinabove and, in Class Counsel's opinion, warrant the requested attorneys' fees award.

Here, Class Counsel's request of $1,600,000.00 amounts to forty percent of the $4,000,000.00 Settlement. This is well within the range of awards authorized under the percentage of recovery method. *See*, *Pavlidis v. New England Patriots Football Club, Inc.*, 675 F.Supp. 707 (D. Mass. 1987) (considering contingent fee agreement when awarding attorneys' fees). Furthermore, Class Counsel has obtained injunctive benefits for not only the Class, but also for the public at large, which has a non-quantifiable value.

Thus, given the work done by Class Counsel for the Class, as well as the agreement of the Defendants, the contingent fee agreement with the Representative Plaintiffs, and the lack of objections by Class Members, regarding the requested attorneys' fees and expenses, and after evaluating the various factors and methods discussed hereinabove, Class Counsel believe that it

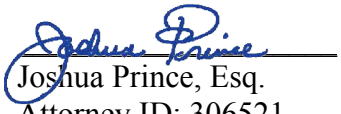
is appropriate to award to Class Counsel attorneys' fees and expenses of $1,600,000.00 from the Settlement Fund.

V. CONCLUSION

Based upon the foregoing, and based upon the argument to be offered at the Fairness Hearing scheduled for October 8, 2020, the Settlement should be finally approved by the Court, the requested incentive payments to the Class Representative should be approved, and the attorneys' fees and costs requested by Class Counsel should be approved by the Court.

Respectfully Submitted,

Date: September 23, 2020



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