UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

MICHAEL HAYES , BRIAN HICKEY and all others similarly situated,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 08-10700-RWZ
ARAMARK SPORTS, LLC	)	
Defendant	)	

PLAINTIFFS' MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT

On June 25, 2009, the Court granted preliminary approval of the proposed class action settlement in this case, which was brought primarily on behalf of food service employees who have worked for Aramark Sports LLC ("Aramark") at Fenway Park. In this case, the plaintiffs alleged primarily that food service employees were entitled, under the Massachusetts Tips Law, Mass. Gen. L. c. 149 § 152A (and related common law claims), to receive the total proceeds of charges that have been added to food and beverage bills. Plaintiffs contended that these charges qualified as "service charges" under § 152A and therefore should not have been retained by Aramark[1] but instead should have been remitted to food service employees.[2] Aramark contended primarily

[1] Plaintiffs originally named the Boston Red Sox as a defendant in this case, but dismissed their claims against the Red Sox upon a showing that the Red Sox did not retain a portion of the charges at issue.

[2] Plaintiffs' claim regarding what they contended were "service charges" under the Tips Law related primarily to private catered events at Fenway Park. Plaintiffs also contended that fees labeled as "administrative fees" on food and beverage bills in Fenway Park suites should have been distributed to employees as well, although they recognized this claim would have been more difficult to prove, given that patrons typically leave sizeable gratuities for suite attendants. Plaintiffs also raised a claim that concession workers are not always able to retain cash tips that are left for them by patrons. (Aramark

that these charges did not qualify as "service charges" under § 152A, and thus did not need to be remitted to employees, because the charges were labeled as "administrative fees" on customer documents and because customer documents also contained written disclaimers that expressly notified customers that these fees were not tips, gratuities, or service charges to be paid to employees.[3]

After extensive arms-length negotiations facilitated by an experienced mediator and the informal exchange of thousands of pages of documents, the parties reached a negotiated settlement of this case for $1.5 million. Following preliminary approval of the settlement, notices were sent to class members, and close to 1,500 class members have submitted claims to receive a share of the settlement. No class members have objected to the settlement.[4]

As described earlier in Plaintiffs' motion for preliminary approval[5], Plaintiffs' counsel believes that this settlement is a favorable resolution of this case. Given the challenges Plaintiffs would have faced in this litigation, including overcoming the disclaimers that Aramark included on customer documents stating that the charges

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denies these allegations and maintains that all tips provided to concessions workers have been retained by those employees in their entirety.)

[3] Plaintiffs also raised claims related to other alleged wage and hour and wage payment violations affecting Aramark employees at Fenway Park, including claims related to overtime, failure to pay all wages, and late payment of wages. (Aramark denies these allegations and contends that it properly and timely paid all wages owed to employees at Fenway Park.) In ruling on Aramark's motion to dismiss, the Court ruled that the majority of these claims were preempted by the Labor Management Relations Act. Aramark sought reconsideration of, and leave to appeal, the portions of the Court's ruling that denied Aramark's motion.

[4] Approximately 25 class members opted out of the case, so they may pursue individual claims against Aramark if they choose.

[5] For the Court's convenience, Plaintiffs have repeated here the background of the case and the discussion from the preliminary approval motion regarding the fairness of the settlement; they have added to this motion information regarding the results of the notice and claim process in this case.

were not tips, gratuities, or service charges, this settlement will allow the class to avoid the risk of pursuing this case further, as well as risks and delay inherent in any litigation. The Court should therefore grant its final approval of this proposed settlement.

I. THE PROPOSED SETTLEMENT IS FAIR, REASONABLE, AND ADEQUATE

It is well-established that courts favor settlements of lawsuits over continued litigation. *See, e.g.*, *Williams v. First Nat'l Bank*, 216 U.S. 582, 595 (1910); *Durett v. Housing Auth. of Providence*, 896 F.2d 600, 604 (1st Cir. 1990); *In re Viatron Computer Sys. Corp.*, 614 F.2d 11, 15 (1st Cir. 1980). Before granting approval of a proposed class action settlement, the Court must find that the settlement is fair, reasonable, and adequate. *See* Mass. R. Civ. P. 23(c); *Sniffin v. Prudential Ins. Comp*., 395 Mass. 415 (1985).

A presumption of fairness of a settlement is established where the parties can show that: (1) the settlement was the product of arms-length bargaining; (2) sufficient investigation has been taken to enable counsel and the court to act intelligently; (3) the proponents of the settlement are counsel experienced in similar litigation; and (4) the number of objectors or interests they represent is not large when compared to the class as a whole. 4 Herbert B. Newburg and Alba Conte, *Newburg on Class Actions* § 11:41 (3rd ed. 1992-2002). In addition, courts consider the amount of the settlement compared to the amount at issue in the case and the plaintiffs' likelihood of succeeding on the merits and recovering damages on their claims. *See, e.g., M. Berenson Co. v. Faneuil Hall Marketplace, Inc.,* 671 F. Supp. 819, 822-23 (D. Mass. 1987).[6]

[6] However, in considering these factors and determining whether to approve a settlement, the Court "does not resolve the legal and factual issues that are the basis of the underlying lawsuit." *Bronson v. Board of Educ. of City School Dist.,* 604 F. Supp. 68, 74 (S.D. Oh. 1984); *see also DeBoer v. Mellon*

In the case at bar, an examination of these factors demonstrates that the proposed settlement is fair, reasonable, and adequate to the members of the class, and should receive final approval from the Court. Notably, settlements in similar cases brought by Plaintiffs' counsel under the Massachusetts Tips Law, Mass. Gen. L. c. 149 § 152A, have been approved in more than twenty cases; these settlements contained similar terms to the proposed settlement in this case, including a similar method for notifying putative class members and distributing the settlement proceeds and the same provision for attorneys' fees.[7]

Mortg. Co., 64 F.3d 1171, 1178 (8th Cir. 1995) ("[W]hile it is incumbent on the district court to determine the propriety of the settlement, it need not resolve all of the underlying disputes."). A settlement "is a compromise which has been reached after the risks, expense, and delay of further litigation have been assessed." *Williams v. Vukovich,* 720 F.2d 909, 922 (6th Cir. 1983).

[7] These cases include: *Scatto v. Fine Hotels Corp.*, C.A. No. 07-1823 (Bristol Superior Ct. 2009); *Karag v. State Room, Inc.*, C.A. No. 07-4190 (Suffolk Superior Ct. 2009); *Mouiny v. Commonwealth Flats Dev. Corp. d/b/a Seaport Hotel and World Trade Center*, C.A. No. 06-1115 (Suffolk Superior Ct. 2009); *Shea et al. v. Weston Golf Club*, C.A. No. 02-1826 (Middlesex Superior Ct. 2009); *Rose et al. v. Ruth's Chris Steak House Boston*, C.A. No. 07-5081 (Suffolk Superior Ct. 2008); *Verrecchia et al. v. DT Management, Inc. d/b/a Hotel @ MIT*, C.A. No. 08-0127 (Middlesex Superior Ct. 2008); *Perry et al. v. Woodman's, Inc.*, C.A. No. 08-1218 (Essex Superior Ct. 2008); *Roth v. Vesper Country Club*, C.A. No. 07-1231 (Middlesex Sup. Ct. 2008); *Cooney et al. v. Compass Group Foodservice and Northeastern University*, C.A. No. 02-3159 (Middlesex Superior Ct. 2008); *Paratore et al. v. F-1 Boston Café, LLC*, C.A. No. 02-2162 (Norfolk Superior Ct. 2008); *Byrne et al. v. Elephant and Castle Group, LLC*, C.A. No. 06-4732 (Suffolk Superior Ct. 2008); *Tucker et al. v. Halifax Investments, Inc.*, C.A. No. 07-154 (Plymouth Superior Ct. 2008); *Ng et al. v. Jin Restaurant Group LLC*, C.A. No. 07-333 (Essex Superior Ct. 2008); *Fernandez et al. v. Four Seasons Hotel*, C.A. No. 02-4689 (Suffolk Superior Ct. 2008) (banquets) (Muse, J.); *Banks et al. v. SBH Corp. (Grill 23)*, C.A. No. 04-3515 (Suffolk Superior Ct. 2007) (Connolly, J.); *Frye et al. v. Columbia Sussex Corp.*, C.A. No. 06-4622 (Middlesex Superior Ct. 2007) (Billings, J.); *Calcagno et al. v. High Country Investor, Inc. (Hilltop)*, C.A. No. 03-0707 (Essex Superior Ct. 2006) (Murtagh, J.); *Ellison, et al. v. NPS, LLC*, C.A. No. 05-01105 (Middlesex Sup. Ct. 2006) (Hamlin, J.); *Meimaridis, et al. v. Brae Burn Country Club*, C.A. No. 04-3769 (Middlesex Superior Ct. 2006) (Fremont-Smith, J.); *Hough et al. v. Select Restaurants, Inc. d/b/a Top of the Hub*, C.A. No. 05-1258 (Suffolk Sup. Ct. 2006) (Brassard, J.); *Bullock et al. v. Ritz-Carlton Hotel Co.*, C.A. No. 04-04379 (Suffolk Sup. Ct. 2005); *Michalak et al. v. Boston Palm Corporation*, C.A. No. 03-1334 (Suffolk Sup. Ct. 2004) (White, J.); *Williamson et al. v. DT Management Co. d/b/a Boston Harbor Hotel, Inc*., C.A. No. 02-01827 (Middlesex Sup. Ct. 2004) (Neel, J.); *Fernandez et al. v. Four Seasons Hotel, LTD*, C.A. No. 02-4689 (Suffolk Sup. Ct. 2004) (Walker, J.); *Keyo et al. v. Seaport Hotel and World Trade Center Boston, et al.*, C.A. No. 02-3339 (Suffolk Sup. Ct. 2004) (Murphy, J.); *Licari et al. v. Meridien Hotels, Inc.*, C.A. No. 02-3340 (Suffolk Sup. Ct. 2003) (McEvoy, J.); and *Latta et al. v. The Nashawtuc Country Club, Inc.*, C.A. No. 01-4185 (Middlesex Sup. Ct. 2003) (Giles, J.).

In this case, Defendant agreed to a settlement early in the litigation process for what Plaintiffs' counsel believes is a fair resolution of these claims. Plaintiffs' counsel was provided with voluminous sample documents for various time periods and data that was used to compute a reasonable estimation of potential damages. The documents and information provided to Plaintiffs also demonstrated to them the risks they would face in proceeding with this litigation.[8] After a 17-hour mediation, this settlement was clearly reached as a result of arm's-length negotiations.

When sufficient discovery has been provided and the parties have bargained at arm's-length, there is a presumption in favor of the settlement. *See City Partnership Co. v. Atlantic Acquisition*, 100 F.3d 1041, 1043 (1st Cir. 1996); *United States v. Cannons Engineering Corp.*, 720 F. Supp. 1027, 1036 (D. Mass. 1989); *Berenson*, 671 F. Supp. at 822 (where a proposed class settlement has been reached after meaningful investigation into the facts, after arm's length negotiation, conducted by capable counsel, it is presumptively fair).

Plaintiffs' counsel is highly experienced in similar litigation.[9] Over the last eight years, Plaintiffs' lead counsel, Attorney Shannon Liss-Riordan, has represented waitstaff in more than fifty cases brought under state and federal tips laws very similar to this one, in which the waitstaff claim they have not been permitted to retain the total

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[8] The voluminous documents produced by Aramark revealed that the vast majority of documents provided to customers contained an express disclaimer that the administrative fees were not tips, gratuities, or service charges to be distributed to service employees. Prior to filing this case, Plaintiffs' counsel had obtained documents showing that in some places, Aramark had referred to the charges as "service fees" or "gratuities", but even the documents Plaintiffs' counsel had obtained also contained the disclaimer.

[9] Not only is Plaintiffs' counsel highly experienced in similar litigation, but this precise type of case has been her specialty for much of the past decade.

proceeds of charges added to food and beverage bills or tips given to them by patrons. Many of these cases have settled, and others remain in various stages of litigation. Along with her co-counsel Attorney Schwab, she has taken three tips cases to trial and has won all three before juries: *Calcagno et al. v. High Country Investor, Inc., d/b/a Hilltop Steak House*, C.A. No. 03-0707, Mass. Sup. Ct. (Essex 2006) (banquet coordinators not entitled to share in gratuities); *Benoit et al. v. The Federalist, Inc.*, C.A. No. 04-3516, Mass. Sup. Ct. (Suffolk 2007) (coordinators not entitled to portion of banquet service charges); and *DiFiore et al. v. American Airlines, Inc.*, C.A. No. 07-10070, U.S. Dist. Ct. (D. Mass. 2008) (airline's policy of collecting $2 per bag charge for curbside check-in that was not distributed to skycaps violated Mass. Tips Law and rendered airline liable for tortious interference with advantageous relations). She and Attorney Schwab have also handled two tips cases on appeal, both of which they also won: *DiFiore et al. v. American Airlines, Inc.*, 454 Mass. 486 (2009) (Massachusetts Supreme Judicial Court decided on certified question that non-employers are covered by Mass. Tips Law, affirming jury verdict for plaintiff skycaps); *Cooney et al. v. Compass Group Foodservice,* 69 Mass. App. Ct. 632 (2007) (reversing trial court's denial of summary judgment for plaintiff servers, holding that Massachusetts Tips Law should be strictly construed against establishment that did not distribute proceeds of "service charges" to waitstaff employees). Attorney Liss-Riordan, with her co-counsel, has prevailed on summary judgment on behalf of plaintiff waitstaff in at least seven tips cases. She has been appointed class counsel for a national class of waitstaff employees in a case against a national steakhouse chain, *Johnson et al., and Morton's Restaurant Group, Inc.,* AAA Case No. 11 160 01513 05 (confirmed by the federal

district court, Judge Mark Wolf, C. A. No. 07-11808 (D. Mass. 2008)). Along with her New York co-counsel, Attorney Liss-Riordan has been appointed lead interim class counsel on behalf of Starbucks baristas across New York State by the federal district court (Judge Laura Swain) in the case of *In re Starbucks Employee Gratuities Litigation*, C.A. No. 08-3318-LTS (S.D.N.Y. 2008).

For profiles of Attorney Liss-Riordan's work on behalf of tipped employees, *see* Exhibit 1 (*Boston Globe*, front page, Apr. 29, 2008, "Skycaps and waiters find a legal champion"), and Exhibit 2 (*Lawyers and Settlements*, Apr. 9, 2008, "Attorney Shannon Liss-Riordan: Challenging Corporate Power and Tips Abuse").

Plaintiffs' counsel is thus well aware of the law in this area. Her experience in this area provided the putative class members with a high degree of expertise, which clearly contributed to such a prompt and favorable resolution of this case. Plaintiffs' counsel used the knowledge derived from these other cases in determining what would be a fair settlement for Plaintiffs in this case.

In this case, given Plaintiffs' counsel's review of the evidence, as well as her extensive background in this area of law, counsel recognized the very difficult challenges the plaintiffs would have faced in attempting to prove that the "administrative fees" added to Aramark's food and beverage bills were service charges under the Tips Law, given that they have been called "administrative fees" within the statutory period and given the express disclaimers included on bills and other customer documents.[10]

[10] As explained in the preliminary approval motion, from the sample documents and information provided by Aramark to Plaintiffs' counsel, it appears to Plaintiffs' counsel that the total "administrative fees" likely at issue for Fenway catering events during the statutory period is approximately $1.8 million. While the amount of "administrative fees" that appears to be at issue for Fenway suites during the statutory period is larger (approximately $3.2 million), as described above, Plaintiffs would have faced an even more difficult challenge proving that these fees appeared to patrons to be gratuities, given that suite

Moreover, the Massachusetts Appeals Court is poised to rule on the question of whether charges that are called "administrative fees" can *ever* qualify as service charges under the Tips Law (even without the disclaimers that were present on Aramark's bills).[11] In light of the fact that Aramark offered a substantial settlement of this case without the plaintiffs having to take these risks, Plaintiffs' counsel determined that it was in the best interests of the class to accept it.

II. THE PROPOSED PLAN OF DISTRIBUTION OF THE SETTLEMENT FUNDS

As described in the preliminary approval motion, notice of the settlement and claim form were sent to the last known addresses of all employees who worked in non-supervisory positions related to food and beverage service for Aramark Sports, LLC or another Aramark-related entity at Fenway Park (including in the Catering, Concessions, Pavilion, Suites, Restaurant, In-Seat, and Private Dining components), but excluding individuals who worked only in the Retail component, in the Facilities Services component, as exempt supervisors/managers, or as office personnel (i.e. accountants, secretaries) during the entire putative class period,[12] at any time between February 14,

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attendants receive substantial gratuities from patrons. They would have also faced significant challenges in proving, on a class-wide basis, that concessions workers' tips were taken away and, if they were, calculating the amount.

[11] A heated current topic of litigation surrounding the Tips Law is whether charges that are expressly called "administrative fees" can even be covered by the Tips Law at all, given that the statute contains an explicit exception for "administrative fees." §152A(d). In a recent state law case, another court has recently granted summary judgment for a defendant employer in a very similar case in which food service employees contended that charges labeled "administrative fees" could be misconstrued by customers to be service charges. That case, *Bednark et al. v. Catania Hospitality Group, Inc. et al.,* Barnstable County Sup. Ct. Civil Action No. BACV2008-00301, (attached here as Exhibit 3) is now going to the Appeals Court.

[12] Aramark's payroll records do not indicate which employees have worked for catering events, so the notice was sent to all employees categorized in these departments. On the claim form, class members were asked to self-report how often they worked for catering events and whether, and in what seasons during the class period, they worked as suite attendants.

2002 and June 25, 2009.[13] The class settlement fund is being distributed pursuant to the formula described in the preliminary approval motion. All class members will receive a minimum payment ($100), suite attendants will receive $100 per season that they worked at Fenway, and the remainder of the fund will be distributed to employees who worked in catering events, in proportion to the category of the estimated number of events they worked (i.e. 0-10, 10-25, 25-50, or more than 50).[14]

Similar methods of distributing settlement funds in tips law class actions have been approved and used in more than two dozen other settlements reached by Plaintiffs' counsel. This method will provide each participating class member with Plaintiffs' counsel's best estimate of a fair distribution of damages, given the records Aramark has kept regarding which employees have worked catering events.[15]

In addition, as discussed at the preliminary approval conference, the settlement includes enhancement payments of $25,000 for each of the two lead Plaintiffs who brought this case forward and assisted counsel with pursuing it on behalf of a class. Enhancement payments have been routinely approved by the courts in class action

[13] This settlement class period negotiated by the parties covers the period six years prior to the filing of this case, pursuant to the six-year statute of limitations for the contract-based common law claims included in the Amended Complaint. Aramark disputed that Plaintiffs appropriately could have pursued this common law claim on behalf of the putative class members but agreed to include that claim and the associated six-year limitation period in this settlement in the interest of resolving this action avoiding risks, costs, and delays associated with continued litigation.

[14] Counsel are still finalizing the calculation of the settlement distribution and will file their proposed distribution prior to the approval hearing.

[15] For employees who have disputes about their settlement distribution, counsel will work cooperatively to try resolve these disputes and will bring them to the Court's attention if they are not able to resolve them amicably. The parties have agreed to set aside a portion of the settlement fund (which Plaintiffs propose to be $75,000) to pay late-filed claimants and resolve any disputes that may arise regarding the distribution. After twelve months, any remaining funds (as well as the proceeds of uncashed checks) will be donated as *cy pres* to Greater Boston Legal Services.

settlements as a way of compensating class representatives who have lent their names and efforts to the prosecution of litigation on behalf of others. Courts have also recognized that such payments can serve an important function in promoting class action settlements. *See Sheppard v. Consolidated Edison Company of New York, Inc.*, 2002 WL 2003206, *5-6 (E.D.N.Y. 2002) (collecting cases approving enhancement payments).[16]

III. THE REQUESTED ATTORNEYS' FEE IS FAIR AND REASONABLE AND SUPPORTED BY THE APPLICABLE PRECEDENT

Finally, the proposed distribution of the settlement proceeds provides for a one-third share for attorneys' fees and expenses. The named plaintiffs signed retainer agreements providing for a one-third contingency arrangement, and the notice of settlement (including the cover letter) explicitly informed class members that one-third of the total settlement proceeds would be used to pay for attorneys' fees. No plaintiff or class member has raised any objection to this payment.

Plaintiffs' counsel accepted this case on a fully contingent arrangement, with no payment at all made up front. As noted above, Plaintiffs' counsel has been a pioneer in the development of the law protecting tipped employees and is widely recognized as having developed the law surrounding this statute in Massachusetts. Since 2001, she has been pursuing Tips Law claims against restaurants, hotels, and other food and beverage establishments, and it is because of her work that this law is now so well known (and likely due to her work that this area of litigation has spread in recent years

[16] *See also Ingram v. The Coca-Cola Co*., 200 F.R.D. 685, 694 (N.D. Ga. 2001) (awarding $300,000 to each of four representative plaintiffs); *In re Dun & Bradstreet Credit Servs. Customer Litig.*, 130 F.R.D. 366, 373-74 (S.D. Ohio 1990) (citing cases in support of enhancement payments and awarding payments ranging from $35,000 to $50,000 for named plaintiffs); *Yap v. Sumintomo Corp. of Am*., 1991 WL 29112, *9 (S.D.N.Y. 1991) (awarding $30,000 additional compensation to representative plaintiffs).

around the country).[17] Having handled more than fifty such cases, including three that resulted in successful jury verdicts, two that have resulted in favorable state appellate rulings, more than a dozen that have been heard on summary judgment, and more than two dozen that have settled, counsel was able in this case to draw from the benefit of this experience.

The proposed attorneys' fee is the same standard one-third share that has been approved by all the judges who have ruled on the fairness of the other settlements achieved by Plaintiffs' counsel in tips law cases, listed above in note 12. This Court, as well, should also preliminarily approve this fee as fair and reasonable.

Courts generally favor awarding fees from a common fund based upon the percentage of the fund method. As the Supreme Court has explained:

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

Boeing Co. v. Van Gemert, 444 U.S. 472, 478 (1980) (citations omitted.) *See also Blum v. Stenson*, 465 U.S 886, 900 n.16 (1984); *In re Thirteen Appeals Arising Out of the San Juan Dupont Plaza Hotel Fire Lit.*, 56 F.3d 295 (1st Cir. 1995) (awarding attorneys' fees of $68 million out of a $220 million settlement fund).[18]

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[17] Briefly put, had it not been for Plaintiffs' counsel's agreement to take on this case, and indeed her work taking on this area of the law over the last eight years, there would be no payments being made now to any of the class members. This case really was her creation.

[18] Among the advantages recognized by the First Circuit in *Thirteen Appeals*, was the fact that the percentage method is less burdensome to administer than the lodestar method. *See id*. at 307. The court also endorsed the percentage of recovery approach because it is result-oriented, and hence it promotes the more efficient use of attorney time, and because the percentage method also better reflects

A one-third attorneys' fee in a common fund case has been consistently approved as reasonable. Examples of cases in which a one-third fee was approved include: *In Re: Lithotripsy Antitrust Litigation,* No. 98 C 8394, 2000 U.S. Dist. LEXIS 8143 at *6-7 (N.D. Ill. June 12, 2000) (noting that 33.3% of the fund plus expenses is well within the generally accepted range of the attorneys fee awards in class-action lawsuits); *In re: Medical X-Ray Film Antitrust Litigation*, CV-93-5904, 1998 U.S. Dist. LEXIS 14888 at *21 (E.D.N.Y. Aug. 7, 1998) (awarding a fee of $13 million, which represented one-third of the settlement); *In re Crazy Eddie Securities Litig.*, 824 F. Supp. 320, 325-26 (E.D.N.Y. 1993) (awarding 34% of a $42 million fund); *City National Bank v. American Com. Financial Corp.*, 657 F. Supp. 817 (W.D.N.C. 1987); *In re Franklin Nat'l Bank*, [1980 Transfer Binder] Fed. Sec. L. Rep. (CCH) &97,571 (E.D.N.Y. 1980) (34% of settlement fund); *Hwang v. Smith Corona Corp.*, B.89-450 (D. Conn. Mar. 12, 1992) (awarding one-third of $24 million fund); *Chalverus v. Pegasystems, Inc.*, C.A. No. 97-12570-WGY (December 19, 2000) (awarding as an attorneys' fee one-third of a more than $5 million recovery); *In re: Peritus Software Services, Inc. Sec. Litig.*, C.A. No. 98-10578-WGY (February 28, 2000); *In re: Copley Pharmaceutical, Inc. Sec. Litig.*, C.A. No. 94-11897-WGY (D. Mass. Feb. 8, 1996) (awarding one-third of a $6.3 million settlement fund); *Morton v. Kurzweil Applied Intelligence, Inc.*, C.A. No. 10829-REK (D. Mass. Feb. 4, 1998); *In re Gillette Securities Litigation*, C. A. No. 88-1858-REK (D. Mass. Mar. 30, 1994); *Wilensky v. Digital Equipment Corporation*, C.A.

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the market value of counsel's services. In *Thirteen Appeals*, the First Circuit noted that other Courts of Appeals have *required* the use of percentage awards in common fund cases. *See, e.g., Camden Condominium Ass'n v. Dunkle*, 946 F.2d 768, 771 (11th Cir. 1991); *Swedish Hospital Corp. v. Shalala*, 1 F.3d 1261, 1271-72 (D.C. Cir. 1993). *See also* Report of Third Circuit Task Force, *Court Awarded Attorney Fees*, 108 F.R.D. 237, 255 (1985) and Federal Judicial Center, *Awarding Attorneys' Fees and Managing Fee Litigation*, 63-64 (1994).

No. 94-10752-JLT (D. Mass. July 11, 2001); *In re Picturetel Corporation Sec. Litig.*, C.A. No. 97-12135-DPW (D. Mass. Nov. 4, 1999) (approving award of one-third of a $12 million settlement fund); *Zeid v. Open Environment Corp.*, C.A. No. 96-12466-EFH (D. Mass. June 24, 1999) (awarding a fee of one-third of a $6 million settlement). Given this precedent approving one-third recovery for attorneys' fees in class action cases, the Court should recognize that a one-third recovery in this case is reasonable.

IV. CONCLUSION

For the reasons set forth above, the class action settlement in this case is fair and reasonable. Plaintiffs therefore respectfully request that this Court grant final approval to the settlement (which was attached as Exhibit 1 to Plaintiffs' preliminary approval motion).

Respectfully submitted,

MICHAEL HAYES, BRIAN HICKEY,
and all others similarly situated,
By their attorneys,

_/s/ Shannon Liss-Riordan_____
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Dated: September 25, 2009

CERTIFICATE OF SERVICE

I hereby certify that this document was served on all counsel of record by electronic filing on September 25, 2009.

/s/ Shannon Liss-Riordan
Shannon Liss-Riordan, Esq.