UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

HERNAN MATAMOROS, SHARON SAM CHAN, KATE PETERSEN, and SHAUN HENNESSEY, on behalf of themselves and all others similarly situated,	)	
Plaintiffs,	)	Civil Action No. 08-10772-NMG
v.	)	
STARBUCKS CORPORATION,	)	
Defendant.	)	

PLAINTIFFS' ASSENTED-TO MOTION FOR
PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

Plaintiffs brought this action five years ago, claiming that Starbucks had violated the Massachusetts Tips Law, Mass. Gen. L. c. 149 § 152A, by allowing employees with managerial responsibility, known as "shift supervisors," to participate in tip pools with baristas. This Court granted summary judgment in Plaintiffs' favor on that claim. See docket no. 57. It also certified a class consisting of all baristas who have worked for Starbucks in Massachusetts between March 25, 2005, and February 8, 2011. See id. Both of those decisions were later affirmed by the First Circuit. See Matamoros v. Starbucks Corp., 699 F.3d 129 (1st Cir. 2012).

After several months of arms-length negotiations, the parties have agreed to settle both this case and its companion case, Black v. Starbucks Corp., Civ. A. No. 12-10961, which was filed after the Court issued its decision on class certification in order to assert the same claims for baristas who had worked for Starbucks after the end of the

Matamoros class period, February 2011.[1] The total amount of the agreed upon settlement for both cases is $23.5 million, and in addition Starbucks will pay all additional costs associated with administering the settlement.

This settlement will compensate all baristas who worked at Starbucks from the beginning of the class period, March 2005, until January 2013 when, following the First Circuit's affirmance of the decision in this case, Starbucks changed its policy in Massachusetts and removed shift supervisors from the tip pool.

Plaintiffs now request that the Court preliminarily approve this settlement and allow the parties to issue notice to the class members. A copy of the parties' settlement agreement is attached as "Exhibit A." A copy of the proposed notice to be sent to the class members is attached as "Exhibit B." Upon approval by the Court, this notice will be issued by a settlement administrator to all eligible class members, namely, all baristas who have worked for Starbucks in Massachusetts between March 25, 2005, and January 7, 2013.

In addition, Plaintiffs request that the Court schedule a fairness and final approval hearing to take place in July 2013.[2] At that hearing, Plaintiffs will report on the results of the notice process, including the number of class members whose notices were undeliverable, the number of class members who have opted out of the settlement, and whether any class members have objected to the settlement. Also at that hearing,

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[1] Black was stayed upon joint request by the parties pending resolution of this case. See Black, Civ. A. No. 12-10961, docket no. 8.

[2] The Class Action Fairness Act, 28 U.S.C. § 1332 et seq., requires that one hundred days elapse between the date of the parties' filing of the settlement agreement with the Court and final approval of the settlement. Scheduling a date for final settlement approval in July would accommodate this statutory requirement.

Plaintiffs will ask the Court for final approval of the settlement so that payments may be distributed to the class. Under the parties' agreement, and assuming Court approval of the settlement, a final judgment will then be entered and the settlement proceeds will be distributed within 30 days.

Plaintiffs submit that the proposed settlement is a highly favorable resolution of this matter. The settlement amount agreed upon by the parties exceeds the judgment awarded by the Court and affirmed by the First Circuit, which came to approximately $14 million before prejudgment interest. Moreover, resolution of the case now will provide an immediate and substantial monetary benefit for the class, an outcome that is preferable to prospect of continued litigation over such issues as the calculation of prejudgment interest, attorneys' fees, and the damages for the period following the class period in this case. Accordingly, for all the reasons set forth herein, Plaintiffs request that the Court grant preliminary approval of the proposed class settlement, allow the parties' designated settlement administrator to issue notice and claim forms, and schedule a final approval and fairness hearing for a date in July 2013.

I. THE PROPOSED PLAN OF DISTRIBUTION.

Upon preliminary approval by the Court, the settlement administrator selected by the parties will mail the attached notice to the last known addresses of every barista who worked for Starbucks in Massachusetts between March 25, 2005, and January 7, 2013. The notice informs class members about the allegations in this case and the terms of the settlement. It also informs the class members of their right to object to the settlement, or to opt out of the settlement if they would prefer not to be bound by it, and

will identify the date, time, and location of the final approval hearing to be scheduled by the Court.

The settlement administrator will be responsible for calculating the distribution of the proceeds of the settlement fund to the class members. Payments to class members will be calculated based on the number of eligible hours worked by each class member between March 25, 2005, to January 7, 2013, with hours worked after July 11, 2008, counting three times as much as hours worked prior to that date.[3] This method of calculation will ensure that baristas will receive payments in approximate proportion to their actual damages, as baristas who worked more hours will necessarily have sustained greater damages. Starbucks will produce payroll data for the class members to the settlement administrator in order to conduct these calculations.

Under the terms of the parties' agreement, class members will have 45 days from the date of notice to opt-out of the settlement or submit objections to the settlement. Class members who do not opt out of the settlement will receive their payment from the settlement fund 30 days after the final approving hearing, assuming the Court approves the proposed settlement.[4] Class members who have not cashed their checks within 60 days will receive a reminder notice, and new checks will be issued for class members who request them. Any unclaimed funds (including the value of uncashed checks) shall

[3] As of July 11, 2008, Mass. Gen. L. c. 149 § 150 was amended to provide for mandatory treble damages. Due to that amendment, the Court in this case ordered that damages were to be trebled for class members after that date.

[4] The settlement administrator will make efforts to locate updated addresses for notices that are returned as undeliverable. For any class members whose notice is returned as undeliverable and for whom an updated address cannot be located, those class members will not receive settlement payments. However, for any such class members who come forward to provide their current address to the settlement administrator within 120 days of the Court's Final Approval of the Settlement, those class members will receive settlement checks.

be redistributed to class members who received an initial distribution (in proportion to their initial distribution, but not including class members for whom the residual distribution would be less than $25).[5]

Finally, the proposed settlement provides for incentive payments to lead plaintiffs Hernan Matamoros, Sharon Sam Chan, and Kate Petersen, the plaintiffs who initiated this litigation and underwent discovery, in the amount of $25,000 each, as well as to Shaun Hennessey and Ericka Black, the plaintiffs who served important roles in joining the litigation at later dates, in the amount of $15,000 each. It also provides for a one-third share for attorneys' fees, which has been approved routinely in cases of this nature in Massachusetts. As discussed in Section III, infra, these payments are fair and reasonable, and should be approved. The courts have long recognized the judicial and public value of incentive payments for lead plaintiffs who undergo the efforts, public attention, and risks of retaliation (including from current or future employers) of pursuing claims on behalf of their co-workers, and have routinely approved payments in the range of, and in excess of, the payments requested here. Similarly, the courts have consistently endorsed one-third payments for attorneys' fees in common fund cases. Indeed, the First Circuit has endorsed the percentage-of-recovery approach, like the one used in this proposed settlement, finding that it is less burdensome to administer, promotes efficient use of attorney time and resources, and rewards counsel for the result achieved. See In re Thirteen Appeals Arising Out of the San Juan Dupont Plaza Hotel Fire Litig., 56 F.3d 295 (1st Cir. 1995).

[5] During this process, the unclaimed funds may also be used to resolve disputes that may arise from class members regarding their allocations from the settlement pool. The parties will bring these disputes to the Court's attention only if they cannot be resolved amicably.

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

It is well established that the courts favor settlements. See, e.g., E.E.O.C. v. Astra U.S.A., Inc., 94 F.3d 738, 744 (1st Cir. 1996) ("We do not doubt that public policy strongly favors encouraging voluntary settlement"); Durett v. Housing Auth. of Providence, 896 F.2d 600, 604 (1st Cir. 1990) (recognizing the "clear policy in favor of encouraging settlements"); Newberg on Class Actions, §11:41 ("The compromise of complex litigation is encouraged by the courts and favored by public policy"). "All settlements spare the judicial system and the litigants the expense and time associated with the full panoply of pretrial, trial and post-trial proceedings." 2 McLaughlin on Class Actions § 6:3. The advantages of settlements are particularly apparent in the compromise of class actions, which are "often complex, drawn out proceedings demanding a large share of finite judicial resources," Mayfield v. Barr, 985 F.2d 1090, 1092 (D.C. Cir. 1993), and "where one proceeding can resolve many thousands . . . of claims that might otherwise threaten to swamp the judiciary," 2 McLaughlin on Class Action § 6:3.

The Federal Rules of Civil Procedure require court approval of class action settlements, and mandates approve of such settlements if they are "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e); see also In re Relafen Antitrust Litig., 360 F. Supp. 2d 166, 195 (D. Mass. 2005). However, at the preliminary approval stage, courts need not come to a final conclusion as to whether the proposed settlement is fair, reasonable, and adequate. Rather, in preliminarily approving a class settlement, courts determine "whether a proposed settlement is 'within the range of possible approval' and whether or not notice should be sent to class members." True v. American Hondo

Motor Co., 749 F. Supp. 2d 1052, 1063 (C.D. Cal. 2010), quoting In re Corrugated Container Antitrust Litig., 643 F.2d 195, 205 (5th Cir. 1981); see also In re Prudential Security Litig., 163 F.R.D. 345, 355 (E.D.N.Y. 2006) (same).

"When sufficient discovery has been provided and the parties have bargained at arms-length, there is a presumption in favor of the settlement." In re M3 Power Razor System Marketing & Sales Practice Litig., 270 F.R.D. 45, 62-63 (D. Mass. 2010); see also City Partnership Co. v. Atlantic Acquisition, 100 F.3d 1041, 1043 (1st Cir. 1996). More specifically, there is a "presumption that the settlement is within the range of reasonableness" when "(1) the negotiations occurred at arm's length; (2) there was sufficient discovery; (3) the proponents of the settlement are experienced in similar litigation; and (4) only a small fraction of the class objected." Id., quoting In re Lupron Marketing & Sales Practices Litig., 345 F. Supp. 2d 135, 137 (D. Mass. 2004). An examination of these factors demonstrates that the proposed settlement in this case is fair, reasonable, and adequate, and should be preliminarily approved by the Court.[6] Notably, settlements in similar cases brought by Plaintiffs' counsel under the Tips Law, Mass. Gen. L. c. 149 § 152A, have been approved in more than forty cases. These settlements contained terms similar to the proposed settlement in this case, including a similar method for notifying class members, distributing the settlement fund, allocating incentive payments, and providing for the same one-third provision for attorneys' fees.[7]

[6] Because notice has not yet issued, no class member has filed an objection to the proposed settlement. Thus, Plaintiffs will address the fourth factor, concerning the percentage and nature of any objections, after the notice period has concluded.

[7] These cases include: Bertrand et al. v. Harvard Club of Boston, Suffolk Civ. A. No. 2011-04100 (Mass. Super. 2012); Enemark et al. v. Cadete Enterprises, Inc., Suffolk Civ. A. No. 2011-0574-BLS1 (Mass. Super. 2012); Masiello et al. v. Marriott International, Inc., Suffolk Civ. A. No. 2006-05109 (Mass. Super. 2012); Myers et al. v. Dean Serpa Co., Inc., Suffolk Civ. A. No. 11-0710-BLS1 (Mass. Super.

The proposed settlement in this case comes after five years of vigorous litigation by the parties, including full-blown discovery, numerous rounds of briefing on class certification and summary judgment, an attempted interlocutory appeal, extensive

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2011); Foley et al. v. Speakeasy Group, Inc., Suffolk Civ. A. No. 09-01740 (Mass. Super. 2011); LaChance et al. v. South Shore Restaurant Group, Inc., Plymouth Civ. A. No. 10-1166 (Mass. Super. 2011); Parker et al. v. The Wayside Inn, Middlesex Civ. A. No. 10-01534 (Mass. Super. 2011); Parker v. Hudson Golf LLC, Middlesex Civ. A. No. 10-01533 (Mass. Super. 2011); Abla et al. v. Brinker Restaurant Corp., Civ. A. No. 10-10373 (D. Mass. 2011); Perry et al. v. Boston Duck Tours, Ltd. Partnership, Suffolk Civ. A. No. 10-01534 (Mass. Super. 2011); Ramsay et al. v. McCormick & Schmick Restaurant Corp., Suffolk Civ. A. No. 09-01846 (Mass. Super. 2011); Dilorio et al. v. The Ritz-Carlton Hotel Company, LLC and IHMS (Boston) LLC d/b/a Taj Boston, Suffolk Civ. A. No. 07-0131 (Mass. Super. 2010); Farrier et al. v. Back Bay Restaurant Group, Inc., Suffolk Civ. A. No. 09-01741 (Mass. Super. 2010); Maliniski et al. v. Starwood Hotels, Civ. A. No. 08-11859 (D. Mass. 2010); Hayes et al. v. Aramark Sports Service LLC, Civ. A. No. 08-10700 (D. Mass. 2009); Johnson et al. v. Morton's Restaurant Group, Civ. A. No. 05-11058 (D. Mass. 2009); Noons et al. v. Flemings/Boston Ltd. P'ship, Suffolk Civ. A. No. 09-0167 (Mass. Super. 2009); Scatto et al. v. Fine Hotels Corp., Bristol Civ. A. No. 07-1823 (Mass. Super. 2009); Mouiny et al. v. Commonwealth Flats Dev. Corp. d/b/a Seaport Hotel and World Trade Center, Suffolk Civ. A. No. 06-1115 (Mass. Super. 2009); Shea et al. v. Weston Golf Club, Middlesex Civ. A. No. 02-1826 (Mass. Super. 2009); Godt et al. v. Anthony's Pier Four, Inc., BLS Civ. A. No. 07-3919 (Mass. Super. 2009); Williams et al. v. Hard Rock Café International, Inc., Suffolk Civ. A. No. 08-1783 (Mass. Super. 2009); Karag et al. v. State Room, Inc., BLS Civ. A. No. No. 07-4190 (Mass. Super. 2009); Rose et al. v. Ruth's Chris Steak House Boston, LLC, Suffolk Civ. A. No. 07-5081 (Mass. Super. 2008); Verecchia et al. v. DT Management, Inc. d/b/a Hotel @ MIT et al., Middlesex Civ. A. No. 08-0127 (Mass. Super. 2008); Perry et al. v. Woodman's, Inc., Essex Civ. A. No. 08-1218 (Mass. Super. 2008); Roth v. Vesper Country Club, Middlesex Civ. A. No. 07-1231 (Mass. Super. 2008); Cooney et al. v. Compass Group Foodservice and Northeastern University, Middlesex Civ. A. No. 02-3159 (Mass. Super. 2008); Paratore et al. v. F-1 Boston Café, LLC, Norfolk Civ. A. No. 02-2162 (Mass. Super. 2008); Byrne et al. v. Elephant and Castle Group, LLC, Suffolk Civ. A. No. 06-4732 (Mass. Super. 2008); Tucker et al. v. Halifax Investments, Inc., Plymouth Civ. A. No. 07-154 (Mass. Super. 2008); Ng et al. v. Jin Restaurant Group LLC, Essex Civ. A. No. 07-333 (Mass. Super. 2008); Fernandez et al. v. Four Seasons Hotel, Suffolk Civ. A. No. 02-4689 (Mass. Super. 2008); Banks et al. v. SBH Corp. (Grill 23), Suffolk Civ. A. No. 04-3515 (Mass. Super. 2007); Frye et al. v. Columbia Sussex Corp., Middlesex Civ. A. No. 06-4622 (Mass. Super. 2007); Calcagno et al. v. High Country Investor, Inc. (Hilltop), Essex Civ. A. No. 03-0707 (Mass. Super. 2006); Ellison, et al. v. NPS, LLC, Middlesex Civ. A. No. 05-01105 (Mass. Super. 2006); Meimaridis, et al. v. Brae Burn Country Club, Middlesex Civ. A. No. 04-3769 (Mass. Super. 2006); Hough et al. v. Select Restaurants, Inc. d/b/a Top of the Hub, Suffolk Civ. A. No. 05-1258 (Mass. Super. 2006); Bullock et al. v. Ritz-Carlton Hotel Co., Suffolk Civ. A. No. 04-04379 (Mass. Super. 2005); Michalak et al. v. Boston Palm Corporation, Suffolk Civ. A. No. 03-1334 (Mass. Super. 2004); Williamson et al. v. DT Management Co. d/b/a Boston Harbor Hotel, Inc., Middlesex Civ. A. No. 02-01827 (Mass. Super. 2004); Fernandez et al. v. Four Seasons Hotel, LTD, Suffolk Civ. A. No. 02-4689 (Mass. Super. 2004); Keyo et al. v. Seaport Hotel and World Trade Center Boston, et al., Suffolk Civ. A. No. 02-3339 (Mass. Super. 2004); Licari et al. v. Meridien Hotels, Inc., Suffolk Civ. A. No. 02-3340 (Mass. Super. 2003); Latta et al. v. The Nashawtuc Country Club, Inc., Middlesex Civ. A. No. 01-4185 (Mass. Super. 2003).

briefing on the calculation and ascertainment of damages, and a post-judgment appeal to the First Circuit. Thus, the parties are well versed in the facts of this case and the state of the law. They have achieved this proposed settlement in order to resolve the final remaining issues (largely, the method of calculating prejudgment interest and ascertaining damages for the period following the class period in this case) after clearly arms-length bargaining conducted by experienced counsel. Indeed, lead counsel for the plaintiff class in this case, Shannon Liss-Riordan, is recognized as the pioneer in this type of litigation, and is widely credited as having developed the case law surrounding the Massachusetts Tips Law. Since 2001, she has been pursuing Tips Law claims against numerous restaurants, hotels, and other food and beverage establishments, including prevailing in three such cases at trial, winning numerous summary judgment rulings, and winning appeals of tips cases before the Massachusetts Appeals Court and the Massachusetts Supreme Judicial Court.[8] Attorney Liss-Riordan was able to draw on this substantial experience in order to provide the plaintiff class

[8] Attorney Liss-Riordan represented the plaintiffs at trial in Calcagno v. High Country Investor, Inc., d/b/a Hilltop Steak House, Essex Civ. A. No. 03-0707 (Mass. Super. 2006) (employer violated Tips Law by allowing banquet coordinators to receive shares of service charges); Benoit et al. v. The Federalist, Inc., Suffolk Civ. A. No. 04-3516 (Mass. Super. 2007) (employer violated Tips Law by not paying out full proceeds of service charges to waitstaff employees); and DiFiore v. American Airlines, Inc., Civ. A. No. 07-10070 (D. Mass. 2008) (defendant airline violated Tips Law by collecting $2 per bag for curbside check, but not paying it to skycap employees, which jury found was perceived by passengers to be tips for the skycaps), affirmed, 454 Mass. 486 (2009), reversed on federal preemption grounds, 646 F.3d 81 (1st Cir. 2011). With her co-counsel Hillary Schwab, she also prevailed on appeals in Cooney v. Compass Group Foodservice, 69 Mass. App. Ct. 632 (2007) (service charges must be paid out to waitstaff employees, regardless of customer expectations and pay rate for those employees); Bednark v. Catania Hospitality Group, Inc., 78 Mass. App. Ct. 806 (2011) (charges that may reasonable appear to be service charges or gratuities, even if labeled "administrative fee", must still be paid out to waitstaff employees); and DiFiore v. American Airlines, Inc., 454 Mass. 486 (2009) (airline liable under Tips Law even if it did not directly employ the plaintiff skycaps), reversed on federal preemption grounds, 646 F.3d 81 (1st Cir. 2011).

with a high degree of expertise in this field, which led to such a favorable result for the class in this case.

Finally, the proposed settlement calls for incentive payments of $25,000 to Hernan Matamoros, Sharon Sam Chan, and Kate Petersen, and $15,000 to Shaun Hennessey and Ericka Black. These incentive payments are fair and reasonable and should be approved, given that it was the plaintiffs who initiated these lawsuits on behalf of their fellow baristas and because it was through their initiative and risk that this recovery was obtained. The named plaintiffs provided invaluable assistance to counsel. Plaintiffs Matamoros, Chan, and Peterson took the risk of initiating this case and making their names public on a highly publicized lawsuit against one of the nation's largest employers. They participated in discovery (including day-long videotaped depositions) and worked with counsel to prepare for a trial on damages. Likewise, Plaintiffs Hennessey and Black, who joined the lawsuit later, also took the risk of putting their names on highly publicized litigation. They served important functions for the class and were necessary to the result achieved.[9]

Courts have routinely approved incentive payments in class settlements as a way of compensating class representatives for lending their names, reputations, and efforts to the prosecution of litigation on behalf of others, and to promote class settlements while encouraging plaintiffs to act as "private attorneys general" in the enforcement of

[9] Starbucks had argued that the original lead plaintiffs, who no longer worked at Starbucks as of July 2008, could not represent the class with respect to the claim of mandatory treble damages, which went into effect after that date. Though Plaintiffs disputed this argument, they were able to avoid it by amending the case to add Shaun Hennessey as a named plaintiff, who had worked at Starbucks after that date. Following the conclusion of the Matamoros case in the district court, Plaintiff Ericka Black came forward to represent the class of baristas who worked at Starbucks following the Matamoros class period, so that damages could continue to accrue for the class following that time period and while the case was on appeal.

state and federal law. See In re Relafen Antitrust Litig., 231 F.R.D. 52, 82 (D. Mass. 2005) ("Incentive awards are recognized as serving an important function in promoting class action settlements, particularly where, as here, the named plaintiffs participated actively in the litigation"), quoting In re Lupron, 228 F.R.D. 75, 98 (D. Mass. 2005); In re Compact Disc Min. Adver. Price Antitrust Litig., 292 F. Supp. 2d 184, 189 (D. Me. 2003) ("Because a named plaintiff is an essential ingredient of any class action, an incentive award can be appropriate to encourage or induce an individual to participate in the suit"); Savett, et al., "Consumer Class Actions: Class Certification Issues, Including Ethical Considerations and Counsel Fees and Incentive Payments to Named Plaintiffs," 936 PLI / Corp. 321, 340 ("It has become commonplace for the named representatives to request a special payment for having borne the flag and headed a class action. Most courts are receptive to this because they feel that private attorneys general should be encouraged, and such incentives further the goals of federal and state laws"); see also, e.g., Sheppard v. Consol. Edison Co. of New York, Inc., 2002 WL 2003206, at *5-6 (E.D.N.Y. 2002) (collecting cases approving incentive payments).

It is not uncommon for courts to approve incentive payments in the range of those requested in this case, and in even higher amounts. See, e.g., 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 incentive payments and awarding payments ranging from $35,000 to $50,000 for named plaintiffs); Yap v. Sumintomo Corp. of America, 1991 WL 29112, *9 (S.D.N.Y. 1991) (awarding $30,000 additional compensation to representative plaintiffs). Significantly, the courts in a

number of the cases cited at footnote 7, supra, have approved incentive payments to lead plaintiffs in the range requested here.[10] As in those cases, the proposed incentive payments are reasonable.

III. THE REQUESTED ATTORNEYS' FEES ARE FAIR AND REASONABLE.

The proposed distribution of the settlement proceeds provides for a one-third share for attorneys' fees and expenses. That share, which has been consistently approved by the courts in all of the cases listed above in footnote 7, is fair and reasonable, and should be approved in this case as well. As with all cases of this nature handled by Plaintiffs' counsel's firm, Plaintiffs' counsel accepted this case on a fully contingent arrangement, with no payment up front, and has borne all the expenses, costs, and risks associated with litigating this case.[11] The lead plaintiffs support this request for attorneys' fees, and the notice will inform class members that one-third of the settlement proceeds would be used to pay for attorneys' fees.

As noted above, Plaintiffs' counsel have been the primary employee-side firm litigating cases under the Tips Law. Indeed, lead counsel Shannon Liss-Riordan has practically single-handedly developed the law in this field over the last decade. Having

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[10] See, e.g., Abla v. Brinker Restaurant Corp., Civ. A. No. 10-10373 (D. Mass. 2011) (approving $25,000 incentive payments for lead plaintiffs in Tips Law action); Hayes v. Aramark Sports Service LLC, Civ. A. No. 08-10700 (D. Mass. 2009) (same); Apana v. Fairmont Hotels & Resorts, Inc., Civ. A. No. 08-00528 (D. Haw. 2011) (same); Shea v. Weston Golf Club, Middlesex Civ. A. No. 02-1826 (Mass. Super. 2009) (same); Fernandez v. Four Seasons Hotel, Suffolk Civ. A. No. 02-4689 (Mass. Super. 2008) (same); Banks v. SBH Corp. (Grill 23), Suffolk Civ. A. No. 04-3515 (Mass. Super. 2007) (same); Frye v. Columbia Sussex Corp., Middlesex Civ. A. No. 06-4622 (Mass. Super. 2007) (same); Meimaridis v. Brae Burn Country Club, Middlesex Civ. A. No. 04-3769 (Mass. Super. 2006) (same).

[11] Plaintiffs' counsel's firm operates on an almost all contingent fee basis. It is through the award of these one-third contingent fees when they do prevail or successfully resolve a case that the firm is able to pursue litigation for years, advance hundreds of dollars in case expenses, and take risks in representing clients who cannot afford to pay for legal services.

handled more than sixty such cases, including three that resulted in successful jury verdicts, three that resulted in favorable appellate rulings, dozens that have been heard on summary judgment, and more than forty that have successfully settled, Plaintiffs' counsel was able in this case to draw from the benefit of this experience. Their experience with this statute and this type of litigation provided the class a high degree of expertise in this area. The proposed attorneys' fee here 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 footnote 7. A one-third attorney's fee in a common fund case has been consistently approved as reasonable. See, e.g., 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)[12]; Johnson et al. v. Morton's Restaurant Group, Civ. A. No. 05-11058 (D. Mass. 2009) (approving award of one-third attorneys' fee for a $12 million settlement in a Tips Law class action); 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

[12] 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).

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); Hwang v. Smith Corona Corp., B.89-450 (D. Conn. Mar. 12, 1992) (awarding one-third of $24 million fund); Chalverus v. Pegasystems, Inc., Civ. A. No. 97-12570 (D. Mass. 2000) (awarding as an attorneys' fee one-third of a more than $5 million recovery); In re: Peritus Software Servs., Inc. Sec. Litig., Civ. A. No. 98-10578 (D. Mass. 2000); In re Copley Pharm., Inc. Sec. Litig., Civ. A. No. 94-11897 (D. Mass. 1996) (awarding one-third of a $6.3 million settlement fund); Morton v. Kurzweil Applied Intelligence, Inc., Civ. A. No. 10829 (D. Mass. Feb. 4, 1998); In re Gillette Securities Litigation, Civ. A. No. 88-1858 (D. Mass. Mar. 30, 1994); Wilensky v. Digital Equipment Corporation, Civ. A. No. 94-10752 (D. Mass. 2001); In re Picturetel Corporation Sec. Litig., Civ. A. No. 97-12135 (D. Mass. Nov. 4, 1999) (approving award of one-third of a $12 million settlement fund); Zeid v. Open Environment Corp., Civ. A. No. 96-12466 (D. Mass. 1999) (awarding a fee of one-third of a $6 million settlement).

Courts 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).

Among the advantages of the percentage approach recognized by the First Circuit in Thirteen Appeals was the fact that it is less burdensome to administer than the lodestar method. See Thirteen Appeals, 56 F.3d at 307. The court in that case also endorsed the percentage of recovery approach because it is result-oriented, thereby promoting the more efficient use of attorney time and resources, rather than encouraging attorneys prolong litigation in order to inflate their recoverable hours. See id. ("[U]sing the [percentage of fund] method . . . enhances efficiency, or, put in the reverse, using the lodestar method in such a case encourages inefficiency. Under the latter approach, attorneys not only have a monetary incentive to spend as many hours as possible (and bill for them) but also face a strong disincentive to early settlement"). Similarly, the Court observed that the percentage method better approximates the workings of the marketplace by ensuring that attorneys receive compensation for the true value of their services and skills. See id. ("Another point is worth making: because the [percentage of fund] technique is result-oriented rather than process-oriented, it better approximates the workings of the marketplace. . . . the market pays for the result achieved"), quoting In re Continental Ill. Sec. Litig., 962 F.2d 566, 572 (7th Cir. 1992).

Finally, awarding a percentage of the common fund, such as the one-third fee in this case, recognizes and encourages the vital role that contingency arrangements play in making legal counsel available to individuals who cannot afford hourly fees.[13] Unlike

[13] In approving one-third contingency fees for such cases, courts have recognized that plaintiffs' counsel who take cases on contingency, including the undersigned, often spend years litigating cases vigorously without receiving any payment at all for their work. The system of permitting attorneys to accept work on a contingency basis recognizes that in many cases, attorneys will not receive any payment for years (if at all), and in some cases they will receive earlier larger payments. See, e.g., Hensley v. Eckerhart, 461 U.S. 424, 448 (1983) (noting that "[a]ttorneys who take cases on contingency, thus deferring payment of their fees until the case has ended and taking upon themselves the risk that they will receive no payment at all, generally receive far more in winning cases than they would if they

traditional firms that receive hourly fees on a monthly basis, plaintiffs' attorneys who take cases on contingency often spend years litigating cases (typically while incurring significant out-of-pocket expenses for experts, transcripts, document production, and so forth), without ever receiving any ongoing payment for their work. Sometimes fees and expenses are recovered; other times, despite hundreds or even thousands of hours of work, nothing is recovered. This type of practice is viable only if attorneys, having received nothing for their work on some cases, receive more in other cases than they would if they charged hourly fees. Courts have long recognized this reality. See, e.g., Hensley v. Eckerhart, 461 U.S. 424, 448 (1983) (noting that "[a]ttorneys who take cases on contingency, thus deferring payment of their fees until the case has ended and taking upon themselves the risk that they will receive no payment at all, generally receive far more in winning cases than they would if they charged an hourly rate"). For that reason, courts have routinely approved one-third fee awards in class settlements, recognizing "the attorneys' fees requested [are] entirely contingent upon success. Proposed Class Counsel risk[s] time and effort and advance[s] costs and expenses, with no ultimate guarantee of compensation." Macedonia Church v. Lancaster Hotel, LP, 2011 WL 2360138, at *14 (D. Conn. June 9, 2011).

By permitting clients to obtain attorneys without having to pay hourly fees, this system provides critical access to the courts for people who otherwise would not be able to find competent counsel to represent them. That access is particularly important for the effective enforcement of public protection statutes, such as the wage laws at issue in this case. It is well recognized that "private suits provide a significant

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charged an hourly rate"). Such a system allows parties access to the courts who would not otherwise be able to find competent, and successful, counsel to represent them.

supplement to the limited resources available to [government enforcement agencies] for enforcing [public protection] laws and deterring violations." Reiter v. Sonotone Corp., 442 U.S. 330, 344 (1979) (addressing anti-trust laws). This reasoning applies with equal force to wage and hour claims. See Skirchak v. Dynamics Research Corp., Inc., 432 F. Supp. 2d 175, 179 (D. Mass. 2006) ("Allowing private attorneys to prosecute [wage] actions in the aggregate effectively ensures enforcement of the wage laws by motivating employers to comply or face potentially large-scale litigation, and by providing counsel with an incentive to pursue such claims"), aff'd 508 F.3d 49 (1st Cir. 2007).[14]

Here, Plaintiffs' counsel has litigated this case for, quite literally, years, and has achieved a significant result for the plaintiff class. By comparison, however, Plaintiffs' counsel has spent just as long litigating other cases on behalf of workers without compensation—and, indeed, at considerable expense. In the practice of their contingency work, Plaintiffs' counsel have advanced hundreds of thousands of dollars in out-of-pocket expenses, which has not been repaid, to pursue litigation on behalf of workers in various types of employment cases, including wage, tips, and discrimination cases. To name just one example, Plaintiffs' counsel spent five years litigating the skycaps tips case against American Airlines, which they successfully tried to a jury in federal court and succeeded in getting the verdict affirmed by the Supreme Judicial

[14] In addition, given Plaintiffs' counsel's history with the Tips Law, this case can be seen in many ways as the culmination of a decade's worth of work developing the law in this area. While some courts have expressed concern over attorneys' fee awards based on a percentage of a common fund where the attorney involved has essentially "piggybacked" the case on the success of other attorneys in other similar cases, that is clearly not the case here. See, e.g.,Mazola v. The May Department Stores Co., 1999 WL 1261312, at *2 (D. Mass. 1999) (Gertner, J.) (noting that the "percentage of the common fund" approach "may be appropriate for the counsel that innovated the cause of action, and took all the risks," but "it is not entirely appropriate for counsel that takes advantage of the efforts of others who have . . . done the 'spadework'").

Court, see DiFiore v. American Airlines, Inc., 454 Mass. 486 (2009), only to have the verdict reversed by the First Circuit based on a federal preemption issue, see DiFiore v. American Airlines, Inc., 646 F.3d at 81 (1st Cir. 2011). With that reversal, hundreds of thousands of dollars of fees were lost, and thousands of hours of attorney work went unpaid. Likewise, the firm has spent more than eight years litigating independent contractor misclassification cases on behalf of workers such as janitors, truck drivers, and exotic dancers, and in the process has advanced hundreds of thousands of dollars in expenses. Many of those cases have lasted years; some, such as Awuah v. Coverall North America, Inc., Civ. A. No. 2007-10287, are going into the seventh year of litigation (and sixth appeal). In addition to wage and hour cases, the firm has also advanced hundreds of thousands of dollars in expert expenses and incurred hundreds of hours of attorney time for cases challenging discrimination in promotional exams for police officers in the Commonwealth, including a case that has gone to trial and has now been pending for more than six years, Lopez v. City of Lawrence et al., Civ. A. No. 07-11693, with still no end in sight.

In sum, a plaintiffs-side contingency practice on behalf of low wage workers who could not afford to pay out-of-pocket for counsel, such as Plaintiffs' counsel's firm, is made possible by the nature of contingency fee work. Thus, in considering the fairness and reasonableness of the proposed attorneys' fees in this case, the Court should consider the nature of Plaintiffs' counsel's practice, which is only made possible by this contingency fee structure. For these reasons, and given this precedent approving one-third recovery for attorneys' fees in class action cases just like this one, the Court should award the requested one-third recovery in this case as well.

IV. CONCLUSION.

For the reasons set forth herein, Plaintiffs respectfully request that the Court grant preliminary approval of this proposed settlement and allow the parties' agreed-upon settlement administrator to issue the attached notices to the class members. Plaintiffs also request that the Court schedule a final approval and fairness hearing in July 2013, at which time Plaintiffs will request that the Court grant final approval of the settlement.

Respectfully submitted,

HERNAN MATAMOROS, SHARON SAM CHAN, KATE PETERSEN, and SHAUN HENNESSEY, on behalf of themselves and all others similarly situated,

By their attorneys,

/s/ Shannon Liss-Riordan

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DATED: April 15, 2013

CERTIFICATE OF SERVICE

I hereby certify that on April 15, 2013, a copy of this document was served by electronic filing on all counsel of record.

/s/ Shannon Liss-Riordan
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