UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

MICHAEL CALNAN, WILLIAM MACNEIL, MICHAEL DWELLEY, WILLIAM ROGG, RUSSELL BOWDEN, NICK GALLAGHER, DON ELKINS, STEPHEN HORGAN, and MARTIN HERATY, Individually and on Behalf of All Others Similarly Situated, Plaintiffs, v. VEOLIA ENERGY NORTH AMERICA, L.L.C., Defendant.	Civil Action No. 12-cv-11412-WGY

MEMORANDUM IN SUPPORT OF JOINT MOTION FOR FINAL APPROVAL OF FLSA COLLECTIVE ACTION SETTLEMENT AND MASSACHUSETTS WAGE CLAIMS CLASS ACTION SETTLEMENT AND AWARD OF ATTORNEYS' FEES AND COSTS

This Court granted preliminary approval of the parties' Settlement on March 1, 2013. (*See* Dkt. 40; Declaration of David G. Abbott ("Abbott Decl.") ¶ 8, Ex. 5). Plaintiffs Michael Calnan, and others[1] on behalf of themselves and all others similarly situated ("Plaintiffs") and Defendant Veolia Energy North America, L.L.C. (hereinafter "Veolia" or "Defendant")(collectively the "Parties") respectfully submit this Memorandum in Support of their Joint Motion for Final Approval of Class Action

[1]Don Elkins, Martin Heraty, Michael Calnan, Michael Dwelley, Nick Gallagher, Richard Clancy, Russell Bowden, Stephen Horgan, Michael A. MacNeil, and William Rogg. Others have subsequently filed consents to join as plaintiffs.

Settlement and Award of Attorneys' Fees and Costs in advance of the Settlement Fairness Hearing scheduled to be held before this Court on Wednesday, June 5, 2013, pursuant to Fed. R. Civ. P. 23(e) and 29 U.S.C. 216(b).

In this case, Plaintiffs alleged that Defendant improperly calculated overtime pay by failing to include certain premiums in the regular rate of pay formula, and thereby violated the Massachusetts Overtime Law, Mass. Gen. L. ch. 151, §§ 1A ("State Law Claims") and the Fair Labor Standards Act of 1938, 29 U.S.C. 207(a) and (e)("FLSA Claims").

The Court granted the Parties' motion for conditional collective action certification under 29 U.S.C. § 216 (b), and notice was sent to thirty-three (33) potential plaintiffs. (Abbott Decl. ¶ 4, Ex. 3). Thirty (30) individuals opted in as plaintiffs to the FLSA Claims collective action. (Abbott Decl. ¶ 6). The Court subsequently granted the parties' joint motion for permission to send further notice of proposed settlement and a second notice and claim form was sent to the same thirty-three (33) potential plaintiffs who had State Law Claims informing them of the proposed settlement of their claims under the Massachusetts wage laws pursuant to Fed. R. Civ. P. 23(c). (Abbott Decl. ¶ 8, Ex. 5). As of May 15, 2013 (the conclusion of the opt-out period), no objections or opt-out notices have been received by the filed. (Abbott Decl. ¶ 10). The proposed settlement of $64,544.35 ($46,544.35 plus $18,000 in incentives) is intended to resolve both the FLSA Claims and the State Law Claims of all of the 35 Plaintiffs who have worked for Defendant in Boston during the relevant time period. (Abbott Decl. ¶ 11).

The Parties now respectfully request that the Court approve the proposed settlement as fair, reasonable, and adequate, and enter a Final Approval Order in a form substantially similar to their proposed order.

Background

This action was brought by Plaintiffs Michael Calnan, and others on behalf of themselves and all others similarly situated against Veolia. Plaintiffs alleged that Veolia improperly calculated their overtime pay by not including certain premiums in the regular rate of pay formula, and thereby violated the Massachusetts Overtime Law, Mass. Gen. L. ch. 151, §§ 1A and the Fair Labor Standards Act of 1938, 29 U.S.C. 207(a) and (e). Defendant denies that it violated any federal, state or local law, regulation or ordinance and asserts that it consistently provided Plaintiffs overtime pay whenever they worked more than forty (40) hours in a week. The Court has conditionally certified this case as a class action under Fed. R. Civ. P. 23(c), and as an FLSA collective action under 29 U.S.C. §216(b) for purposes of settling all claims.

Following litigation, voluntary disclosures, discovery and mediation, on December 18, 2012, the Plaintiffs and Veolia (hereinafter collectively the "Parties") agreed to settle their dispute. This followed the Parties' participation in a lengthy mediation session with Maria Walsh, Esq., of JAMS-Endispute, a prominent mediator with significant experience in employment law matters, and wage and hour cases in particular. The Parties reached a preliminary settlement, which was reduced to a five-page written agreement (the "MOU") under which the Parties agreed that Defendant would pay all overtime premiums claimed by Plaintiffs, which were estimated to be

approximately $16,000.00, plus treble and liquidated damages. This agreement was made subject to Defendant's disclosure and Plaintiffs' counsel's review and approval of privileged expert work papers containing calculation of overtime liability. Plaintiffs' counsel reviewed these materials at length with a substantial number of class Plaintiffs and approved the calculation as contemplated under the MOU.

Preliminary Approval and Notice

The Parties filed a Joint Motion for Conditional Certification of Settlement Classes (the "Class Certification Motion") as to both the State Law Claims and FLSA Claims on January 11, 2013. On January 14, 2013, the Court certified a settlement class under Fed. R. Civ. P. 23(a) and 23(b)(3) and certified a settlement collective class under the Fair Labor Standards Act of 1938, 29 U.S.C. §201 et seq., and authorized the Parties to send notices to the appropriate individuals. (Dkt. No. 37; Abbott Decl. ¶ 4, Ex. 3). Thereafter, on or about January 28, 2013, notices were sent to thirty-three (33) class members as authorized, which generally described the preliminary settlement, invited class members to opt-in to the FLSA Class, and provided a form for same. Two (2) additional notices were sent to the final class members on April 24, 2013. Thirty (30) individuals have opted into the settlement and their signed opt-in forms have been lodged with the Court. (Abbott Decl. ¶ 6).

On or about February 22, 2013, the Parties sought preliminary approval of the Settlement. They requested that the Court certify the Class as to the State Law Claims defined in the Class Certification Motion, pursuant to Fed. R. Civ. P. 23(c), and as to the FLSA Claims that the Court Certify the collective action as to all opt-in plaintiffs, pursuant to 29 U.S.C. § 216(b). The Parties sought authorization to mail a notice of

settlement, notice of right to opt-out and/or object and deadline for same, and notice of hearing. On March 1, the Court granted preliminary approval of the terms of the Parties' Settlement Agreement (the "Settlement"), scheduled a fairness hearing to take place on June 5, 2013 to review and approve the class settlement as to both the State Law Claims and the FLSA Claims, pursuant to Fed. R. Civ. P. 23(3)(e), and approved of a second notice to all class members. (Dkt. No. 40; Abbott Decl. ¶ 8, Ex. 5). Court-approved notices were sent to all class and collective action members and, as of May 15, 2013, the close of the court-certified opt-out period, there have been no opt-outs or objections. (Abbott Decl. ¶ 10).

The Settlement Should Be Granted Final Approval

In support of their Joint Motion for Preliminary Approval of the Settlement, the Parties filed a detailed memorandum explaining the terms of the Settlement and why it should be approved as a fair and reasonable compromise of the claims at issue here. (*See* Dkt No. 39). The Parties incorporate those points by reference herein. However, to summarize, the proposed settlement represents a fair result for the class and will result in 100% of the damage recovery, including treble damages under Massachusetts law, representing the maximum applicable two year period and liquidated damages for a third year as permitted, but not mandated by 29 U.S.C. §255(a).

I. THE PLAN OF DISTRIBUTION OF THE SETTLEMENT FUNDS

As of May 15, 2013, the close of the opt-out and objection period, 30 individuals have opted into the FLSA Claims and none of the class members has opted out or filed an objection to the settlement of the State Law Claims. (Abbott Decl. ¶¶ 6,10).

Plaintiffs propose that the settlement funds be distributed as follows:

Class Settlement Funds	$46,544.35
Attorneys' Fees and Costs	$90,000.00
Incentive Fees	$18,000.00
Costs Advanced by Plaintiffs	$2,491.00

Settlement payments to class members will be paid in accordance with the attached schedule. (*See* Abbott Decl., ¶ 11, Exhibit 6).

This settlement distribution is somewhat unusual in that Class settlement funds represent 100% of the estimated overtime pay liability, plus the maximum treble and liquidated damages recoverable under applicable state and federal law. See M.G.L. c. 149, §150, 29 U.S.C. §255(a). The Parties have good reason to believe that the proposed settlement may actually exceed maximum recovery after trial.

Each class member who opted into the FLSA Claims and who did not opt-out or object to the State Law Claims is eligible for a fixed share of settlement proceeds based on a calculation performed by a third party expert accountant, retained by Defendant. (*See* Abbott Decl., ¶ 11, Ex. 6). Settlement payments to class members will be paid in accordance with the attached schedule. (Id.)

Of the Class settlement funds, Plaintiffs propose to distribute incentive class representative payments of $18,000 as follows: $9,000.00 to Michael Calnan (as an incentive payment for the lead Plaintiff who brought this case forward and assisted counsel with pursuing it on behalf of the Class), $5,000.00 to Richard Clancy, and $500.00 each to the other named Plaintiffs, William MacNeil, Michael Dwelly, William Rogg, Russell Bowden, Nick Gallagher, Don Elkins, Stephen Horgan, and Martin Heraty.

The Settlement Agreement defines the "Effective Date" as that close of the appeal period. Settlement checks will be distributed by First Class U.S. Mail within 30 days of the "Effective Date" but no sooner than July 1, 2013. (*See* Abbott Decl., ¶ 2, Exhibit 1). 180 Days after distribution of the settlement funds, the Parties will file with this Court, a Joint Certification of Completion. (*See* Abbott Decl., ¶ 2, Ex. 1).

II. 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); *Durettv. 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 discovery and 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 (3d ed. 1992-2002). *See also, In re Pharm. Indus. Average Wholesale Price Litig.*, 588 F.3d 24, 32-33 (1st Cir.2009); *M. Berenson Co. v. Faneuil Hall Marketplace, Inc.*, 671 F. Supp. 819, 822 (D. Mass. 1987) (where a proposed class settlement has been reached after meaningful discovery, after arm's length negotiation,

conducted by capable counsel, it is presumptively fair). 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. *Berenson*, 671 F. Supp. at 822-23.

Here, an examination of these factors demonstrates beyond question that the proposed settlement is fair, reasonable, and adequate to the members of the class, and should be approved by the Court. Notably, Plaintiffs are receiving 100% if of the estimated overtime liability, plus the maximum recoverable treble and liquidated damages under federal law, plus their attorneys' fees and costs.

A. The Settlement Followed Sufficient Discovery and Resulted From Arms-Length Negotiations.

In this case, the Parties reached a settlement agreement after a full-day mediation session with prominent mediator Maria Walsh, Esq. of JAMS, who has significant experience in wage and hour cases like this one. The mediation lasted over twelve hours. That mediation occurred after preliminary discovery, including automatic disclosures, over 14,000 pages' document production by Defendant in response to Plaintiffs' Requests for Production of Documents per Fed. R. Civ. P. 34 and 26, as well as initial disclosures pursuant to Fed. R. Civ. P. 26 (a)(1). Using the information provided in discovery, and through voluntary disclosure of privileged, verifiable expert analysis performed by international consulting firm of Grant Thornton, LLP, a division of Grant Thornton International, Ltd., Plaintiffs' counsel was able to analyze the scope of liability, the risks of litigation, and the potential damages. The mediation session allowed for an intensive discussion of all of the possible risks of continued litigation. Defendant contested liability and raised legitimate issues about the maximum recoverable damages. The settlement

was intensively negotiated and resulted in a total settlement amount that will constitute 100% of treble damages within the Massachusetts two-year statute of limitations and liquidated damages for the third year recoverable under the Fair Labor Standards Act, according to estimates based on Veolia's records and available information. In short, the settlement was clearly reached as a result of arm's-length negotiations.

B. Plaintiffs' Counsel Are Highly Experienced in Similar Litigation.

Plaintiffs' lead class counsel of Blau, Brown & Leonard has an established track record of litigating complex litigation including mass torts and class actions from inception to verdict. Jason T. Brown has been appointed by courts nationwide as Lead Counsel in Class and Collective Actions in Federal and State Courts resulting in many millions of dollars of recovery for the class and the collective. Mr. Brown has also served his country admirably as a Legal Advisor and Special Agent for the Federal Bureau of Investigation (FBI).

Plaintiffs' counsel are well versed in this area of law, and their experience has provided the class in this case with a high quality of representation, which clearly contributed to a favorable resolution of this case. Plaintiffs' counsel used the knowledge derived from these other cases in determining what would be a fair settlement for the plaintiffs in this case and under the law the Plaintiff's were granted maximum relief.

Numerous settlements in similar cases brought by Plaintiffs' counsel Blau, Brown & Leonard, LLC under federal and state overtime law have been approved by Federal District Courts. These cases include, but are not limited to: *Eshelman, et al. v. Client Services, Inc., et al.*, No. 0822-CC-00763 in the Twenty-Second Judicial District of the Missouri Circuit Court (a wage and hour class action), *Miller, et al. v. Aon Risk Services*

Companies, Inc., et al., No. 1:08-CV-05802 in the United States District Court, Northern District of Illinois (A wage and hour Multi-District Litigation with multiple classes and collectives)and most recently the Court approved the settlement led by Mr. Brown in in *Lambert, et al. v. Sykes Enterprises, Incorporated.*, No. 4:11-CV-00850-BSM in the United States District Court, Eastern District of Arkansas (a wage and hour class action). Blau Brown & Leonard LLC has invested significant amount of time in investigating, identifying, preparing, and pursuing the claims of named Plaintiffs as well as members of the proposes class, and is ready and willing to devote the necessary time, effort, and resources to vigorously and effectively prosecute the instant case. These settlements contained terms similar to the proposed settlement in this case, including the same provision for attorneys' fees and the same basic method for notifying class members and distributing the settlement proceeds. While class members may have little basis from which to judge independently the fairness of a proposed settlement, Plaintiffs' counsel take very seriously their obligation and duty to these unnamed class members and will agree to a settlement only when they are convinced that it is in the best interest of the class. In this case as well, the named plaintiffs were deeply committed to obtaining a fair resolution of the case for all fellow class members, and have supported class counsel's commitment to negotiating on behalf of the interest of the entire class which included maximum permissible relief under the law.

C. <u>The Proposed Incentive Payment Is Fair And Reasonable</u>.

The proposed incentive payment for the named Plaintiffs is fair. By all indications, this case would not have been brought if the named Plaintiffs had not come

forward to challenge Veolia's pay practices. He actively assisted counsel at all stages of the litigation, including spending a full day at the mediation.

Courts have recognized that such incentive payments can serve an important function in promoting class action settlements. *See Sheppard v. Consolidated Edison Company of New York, In*c., 2002 WL 2003206, *6 (ED. N.Y. 2002) (collecting cases approving incentive payments); *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 Sews. 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 Am.*, 1991 WL 29112, *9 (S.D.N.Y. 1991)(awarding $30,000 additional compensation to representative plaintiffs).

Courts in many Massachusetts State Court cases have approved comparable (and even higher) incentive payments for lead plaintiffs in wage and hour cases. *See, e.g., Godt et al. v. Anthony's Pier Four, Inc*., C.A. No. 07-3919-BLS1 (Suffolk Superior Ct. 2009) ($25,000 incentive payment for lead plaintiff); *In re Janney Montgomery Scott LLC Fin. Consultant Litig.*, 2009 U.S. Dist. LEXIS 60790 at *34-36 (E.D. Pa. July 16, 2009) (approving $20,000 award); *Shea et al. v. Weston Golf Club*, C.A. No. 02-1826 (Middlesex Superior Ct. 2009) ($25,000 incentive payments for lead plaintiffs);

Incentive payments serve a particularly important role in employment class actions, where lead plaintiffs may believe that their livelihoods could be affected when they bring a case forward on behalf of their fellow co-workers. In this way, lead Plaintiffs

in a case such as this take a significant risk in order to bring these claims forward on behalf of their co-workers.

Courts have recognized the important role of class actions in the employment context. *See, e.g., Overka et al. v. American Airlines, Inc.*, D. Mass. Civil Action No. 08-10686-WGY (Docket No. 50, at 22) (the Court noted that "class adjudication is superior in the employment context because fear of employer retaliation may have a chilling effect on employees bringing claims on an individual basis" and held that class action "is a superior method for adjudication of the controversy"); *see also Perez v. Safety-Kleen Systems, Inc.*, 253 F.R.D. 508, 520 (N.D. Cal. 2008) (concluding class action was superior because, inter alia, "some class members may fear reprisal"); *Guzman v. VLM, Inc.*, 2008 WL 597186, at*8 (E.D.N.Y. 2008) (noting "valid concern" that "many employees will be reluctant to participate in the action due to fears of retaliation"). This same consideration makes incentive payments even more crucial in employment class action settlements as well.

D. <u>The Requested Attorneys' Fee Is Fair And Reasonable</u>.

The proposed distribution of the settlement proceeds provides for a $90,000 payment for attorneys' fees and expenses. Defense counsel warrants that as of this writing its fees are comparable and may exceed that amount. The named plaintiffs support this payment, and the Notice of Settlement informed class members that a separate payment would be used to pay for attorneys' fees. Plaintiffs' counsel accepted this case on a contingent fee arrangement, bearing the full risk of the litigation. As noted above, Plaintiffs' counsel have extensive experience in Overtime cases and have been

able to draw on this experience, thereby providing the class with a high degree of expertise in this area.

Significant fees have been consistently approved as reasonable. Examples of cases in which substantial fees were approved include *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. KurzweilApplied Intelligence, Inc.*,C.A. No. 10829-REK (D. Mass. Feb. 4, 1998); I*n re GilletteSecurities Litigation,* C. A. No. 88-1 858-REK (D. Mass. Mar. 30, 1994); *Wilensky v.Digital Equipment Corporation,* C.A. No. 94-1 0752-JLT (D. Mass. July 11, 2001); *In rePicturetel 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. OpenEnvironment Corp.*, C.A. No. 96-12466-EFH (D. Mass. June 24, 1999) (awarding a fee of one-third of a $6 million settlement).

E. <u>The Collective Action Settlement is the product of a Bona Fide Dispute.</u>

The settlement resolves a bona fide dispute over the proper application of FLSA provisions concerning the calculation of overtime premiums. A *bona fide* dispute exists when an employee makes a claim that he or she is entitled toovertime payment. To settle such a dispute, there must be a resolution of the number of hoursworked or the amount due. *Hohnke v. United States*, 69 Fed. Cl. 170 (Ct. Fed. Cl. 2005)(discussing cases). In this Lawsuit, the Plaintiffs allege that the Defendant failed to correctly calculate the overtime premiums due. Clearly, the complaint alleges a dispute over the amount due;

Plaintiffs claim overtime compensation for each hour ofovertime worked and Defendants have answered and deny those factual averments. *See Brask v. Heartland Automotive Servs., Inc.*, 2006 WL 2524212 at *2 fn.l (D. Minn.Aug. 15, 2006). Further, in the Settlement Agreement Defendants specifically deny each of the material allegations of a breach of the FLSA. They assert that those allegations are contested.

In light of the precedent and nature of the level damages the Court should recognize that the recovery in this case is reasonable.

CONCLUSION

For the foregoing reasons, the Parties respectfully request that the Court grant this Joint Motion for Final Approval, which shall:

(1) Make final the earlier conditional certification of the Settlement Class defined as: "current and former mechanics, auxiliary operators, and control operators employed in Massachusetts by Veolia Energy North America, L.L.C.at any time between August 1, 2009 and November 2, 2012, and who were entitled to shift differential payments in a week when overtime payment was required pursuant to the Fair Labor Standards Act of 1938, 29 U.S.C. §201 and/or the Massachusetts Overtime Law, M.G.L. c 151, §1B." The class certified in this case consists of 35 current and former Massachusetts employees of Veolia Energy N.A., L.L.C. All class members are or were members of International Union of Operating Engineers, Local 877.

(2) Determine that Class Counsel and Defendant have provided detailed, adequate written notice in a reasonable manner to all class members who would be bound by the settlement, and that class members have had reasonable opportunity to

file written objections or opt-out of the settlement; as well as finding that no convincing basis for rejecting this settlement has presented during this process.

(3) Conclude that the case has been conducted fairly and has protected class members' interests. That class counsel is experienced and conducted themselves in a manner consistent with their obligations to class members.

(4) Conclude that the Parties have submitted a statement identifying and describing the details of their agreement in connection with the proposed settlement.

(5) Conclude that there exists a bona fide dispute as to the application of the overtime provisions of Fair Labor Standards Act, 29 U.S.C. § 207, which will be resolved by the Parties' settlement agreement.

(6) Determine that all class members will receive full recovery under the settlement agreement.

(7) Conclude that the proposed settlement of this case as to the certified class is fair, reasonable and in the interest of the class.

(8) Find that payment of additional incentive compensation to the named Plaintiffs is fair and reasonable in light of the benefits they have provided to the Settlement Class, and Plaintiffs' Counsel.

(9) Award to Plaintiffs' Counsel attorneys' fees in the amount of $90,000, plus reimbursement of $2,491.00 in out-of-pocket expenditures that they have made in this case, such awards to compensate them for all past and future work and expenses done and made in the prosecution of this action.

Respectfully submitted,

MICHAEL CALNAN, WILLIAM MACNEIL, MICHAEL DWELLEY, WILLIAM ROGG, RUSSELL BOWDEN, NICK GALLAGHER, DON ELKINS, STEPHEN HORGAN, and MARTIN HERATY,

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Dated: May 24, 2013

CERTIFICATE OF SERVICE

I hereby certify that this document(s) filed on May 24, 2013 through the ECF system, will be served electronically through the ECF System to all registered participants as identified on the Notice of Electronic Filing ("NEF") and paper copies will be sent to those indicated as non-registered participants on May 24, 2013.

/s/ Daniel S. Field

Daniel S. Field (BBO # 560096)