

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

SUPERIOR COURT DEPARTMENT
C.A. No. 1981CV01957

_____)
MICH KAREN PIERRE LOUIS, Individually and)
On behalf of all others similarly situated)
others similarly situated,)
) **RECEIVED**
Plaintiff,) 6/6/2022
)
v.)
)
BAYADA HOME HEALTH CARE, INC.,)
DAVID BAIADA and J. MARK BAIADA,)
Defendants.)
_____)

**PLAINTIFF’S MEMORANDUM IN SUPPORT OF
MOTION FOR ATTORNEYS’ FEES AND EXPENSES**

I. INTRODUCTION

Plaintiff’s counsel have negotiated a class settlement that provides for settlement fund of \$22 342 (the “Settlement Fund”), to be paid directly to Class members without requiring Class members to submit claims, plus attorneys’ fees and expenses of up to \$50,000 and \$1,100, respectively, an incentive award to the Plaintiff in the sum of \$3,500, and payment of settlement administrative costs of \$6500. The Settlement provides that the attorneys’ fees and costs, the Plaintiff’s incentive award, and the administrative costs are to be paid separately from and in addition to the Settlement Fund.

Plaintiff’s Counsel now respectfully move this Court for an award of attorneys’ fees in the amount of \$50,000.00, which represents a *negative* lodestar multiplier of about .49 (*i.e.*, a reduction of slightly more than ½ of Class Counsel’s actual lodestar), and which is well within the range – if not significantly below the range – of awards commonly approved by

Massachusetts courts.

Defendants have agreed not to oppose a fee award of up to \$50,000.00 and litigation expenses of up to \$1,100.

II. BACKGROUND AND SUMMARY OF THE LITIGATION AND THE SETTLEMENT

The relevant factual and procedural background and the facts relating to the Settlement are set forth in Plaintiff's Memorandum in Support of Motion for Approval of Class Action Settlement, filed concurrently herewith.

III. THE COURT SHOULD APPROVE THE REQUESTED AWARD OF ATTORNEYS' FEES AND EXPENSES TO CLASS COUNSEL

Class Counsel requests an award of \$50,000 in attorneys' fees and \$1,069.94 in expenses. For the reasons stated herein, these awards are reasonable and appropriate under the circumstances. This request represents more than a 50% reduction of Class Counsel's actual lodestar and will be separate and apart from the benefits to be paid to members of the Class.¹ In their negotiations with Defendants' counsel, Plaintiff's counsel did not commence any negotiations for attorneys' fees until an agreement was reached on the settlement consideration to the Class.² Accordingly, the request merits this Court's approval.

A. Application of Fee-Shifting Statutes

Class Counsel's entitlement to a reasonable attorney's fee in this settlement is based, at least in part, on the application of a fee-shifting statute. Plaintiff brought claims under a fee-shifting statute, meaning that any judgment affording affirmative relief to the Class would result in a payment of attorneys' fees and expenses to Plaintiff's counsel. Pursuant to G. L. c. 149, §

¹ Any reduction in the amount requested by Class Counsel will only inure to the benefit of Defendants.

² Declaration of David Pastor in Support of Settlement Approval and Application for Attorneys' Fees and Expenses ("Pastor Decl."), ¶ 7.

150, a plaintiff prevailing on a claim under G.L., c. 149, § 148 “shall [in addition to damages] be awarded the costs of the litigation and reasonable attorneys fees.” G.L., c. 149, § 150.

B. Under Massachusetts Law, Counsel’s Lodestar is Presumptively Reasonable

Under Massachusetts law, counsel’s lodestar (*i.e.*, multiplying the attorneys’ reasonably spent hours by a reasonable hourly rate) is presumed to result in a reasonable fee. *See, e.g., Stratos v. Dep’t of Public Welfare*, 439 N.E. 2d 778, 786 (Mass. 1982) (“fair market rates for time reasonably spent should be the basic measure of reasonable fees, and should govern unless there are special reasons to depart from them”); *Stowe v. Bologna*, 629 N.E. 2d 304, 307 (Mass. 1994) (“the first component of the basic measure amount is the amount of time reasonably expended on the case . . . [t]he judge should begin his inquiry with the amount of time documented by the plaintiff’s attorney”); *Fontaine v. Ebtec Corp.*, 631 N.E. 2d 881, 891 (Mass. 1993) (“[t]he most recent in this line of cases, then, expresses basic approval of the lodestar approach”). Massachusetts Courts have recognized that “[t]he lodestar approach has the advantage of producing generally consistent results from case to case.” *Id.* Attorneys’ fees that are based on counsel’s lodestar are presumptively valid unless “the time invested and the results achieved . . . [were] wholly disproportionate to the interests at stake.” *Killeen v. Westban Hotel Venture, L.P.*, 872 N.E.2d 731, 741 (Mass. App. 2007), citing *Stratos*, 439 N.E.2d at 786.

The lodestar analysis starts with time spent by the attorneys on the case and the rates charged for the attorneys’ time. *Stowe*, 629 N.E. 2d at 307. The Court then assesses the reasonableness of the time spent and the rates charged. *Id.* Here, Class Counsel’s lodestar and hours are summarized by the following chart:

FIRM	HOURS	LODESTAR
Pastor Law Office, LLP	129.3	\$ 84,045.00
Bottone/Reiling	35.8	\$ 17,005.00
TOTALS	165.1	\$101,050.00

See Pastor Decl., ¶¶ 18, 26; Declaration of Richard B. Reiling in Support of Settlement Approval and Application for Attorneys' Fees and Expenses ("Reiling Decl."), ¶ 9. In addition, Plaintiff's counsel is willing to provide itemized daily timekeeping records to the Court for *in camera* review. In general, Plaintiff's counsel devoted approximately 165 hours prosecuting and settling this action. Pastor Decl., ¶ 26. This yields a lodestar in excess of \$100,000.00. *Id.* Substantial fee awards in successful cases, such as the present action, encourage and support meritorious class actions, and promote private enforcement of, and compliance with, laws designed for the protection of consumers and employees, such as the Massachusetts Wage Act. It is, therefore, important to adequately compensate plaintiff's counsel in cases like this one.

1. The Time Expended by Plaintiff's Counsel is Reasonable

Although the parties commenced settlement discussions in this action at a fairly early stage, those discussions continued over several months, and Plaintiff's counsel litigated the case and conducted substantial discovery prior to entering into an agreement in principle to settle the matter. This case involved a significant commitment of resources, taking time away from other matters. This commitment is even more substantial given that Plaintiff's lead counsel, David Pastor, is a sole practitioner. The hours expended by Plaintiff's counsel (*i.e.*, approximately 165 hours) are therefore reasonable. Awards of attorney fees help to ensure adequate enforcement of

class members' legal rights which might otherwise go unenforced. "[A] financial incentive is necessary to entice capable attorneys, who otherwise could be paid regularly by hourly-rate clients, to devote their time to complex, time-consuming cases for which they may never be paid." *Mashburn v. Nat'l Healthcare, Inc.*, 684 F. Supp. 679, 687 (M.D. Ala. 1988).

Contingency fees awarded to class counsel must be greater than the fees that the same attorneys would charge their clients in non-contingency cases. "No one expects a lawyer whose compensation is contingent on success of his services to charge, when successful, as little as he would charge a client who in advance has agreed to pay for his services, regardless of success." *In re Sumitomo Copper Litig.*, 74 F. Supp. 2d 393, 396 (S.D.N.Y. 1999); *In re Veeco Instruments Inc. Sec. Litig.*, 2007 WL 4115808, at *6 (S.D.N.Y. Nov. 7, 2007) (same).

For these reasons, attorney fee awards that exceed damage awards are common in fee-shifting cases and are routinely upheld on appeal. *See, e.g., Atlantic Pipe Corp. v. R.J. Longo Constr. Co.*, 35 Mass. App. Ct. 459, 461-462 (1993) (principal recovery of \$69,409.87; fee award of \$172,924); *J.P. Constr. Co. v. Stateside Builders, Inc.*, 45 Mass. App. Ct. 920, 921 (1998) (damages of \$29,095.38; fee award of \$39,583). Indeed, the purposes of a fee-shifting statute are to ensure that plaintiffs are made whole and to enable plaintiffs with viable claims that would not otherwise be cost effective to litigate to find competent and capable counsel to represent them. Thus, "[a] judgment denying [the plaintiff] compensation for genuinely necessary fees because they exceed its damages would fail th[e] purpose [of the fee shifting provision]." *City Rentals, LLC v. BBC Co.*, 79 Mass. App. Ct. 559, 568 (2011).³

Here, Plaintiffs' counsel spent substantial time conferring with the Plaintiff and

³ *See also Kelley v. CVS Pharmacy, Inc.*, 1997 WL 2781163, 23 Mass. L. Rptr. 87 at *15 (Mass. Super. Aug. 24, 2007, Gants, J.) ("Kelley shall be awarded the minimum statutory award under G.L. c. 93A, § 9(3) of \$25, plus reasonable attorney's fees and costs under G.L. c. 93A, § 9(4)").

performing an initial investigation; preparing and submitting a complaint to the Fair Labor Division of the Massachusetts Attorney General's Office; preparing the class action complaint; discovery, including preparing interrogatories and document requests to Defendant, preparing for and taking a 30(b)(6) deposition of BAYADA, and preparing and serving a second set of interrogatories; discussions with Defendants' counsel concerning the scope of documents to be produced; review of documents produced by Bayada; and extensive discussions with Defendants' counsel concerning their investigation of the matter and possible settlement and settlement negotiations, culminating in an agreement to settle the case on a class-wide basis.

In addition to the work done prior to reaching the Settlement, Plaintiff's counsel also expended substantial time after the Settlement was agreed upon, including negotiating the language of and preparing, reviewing and revising the Settlement Agreement and the related settlement documents, such as the class notice and the proposed orders for settlement approval; conferences with Defendants' counsel and the Settlement Administrator concerning the language and content of the class notice and certain of the other settlement documents; appearance at court conferences (remote) regarding the status of the matter, the schedule for submitting papers in support of the Settlement and preliminary settlement approval; and preparing, reviewing and revising the submissions to the Court in support of preliminary and final settlement approval.

2. Class Counsel's Rates are Reasonable and Consistent with Rates Charged for Similar Work by Attorneys of Comparable Experience

Class Counsel's hourly rates are reasonable and consistent with rates charged by firms in this area for similar work by attorneys of comparable experience. *Stratos*, 387 Mass. at 323. The rates for all professionals working toward a successful resolution of this case are reflected in the following chart:

ATTORNEY(S)	FIRM	HOURLY RATE
David Pastor	Pastor Law Office, LLP	\$ 650.00
Richard B. Reiling	Bottone/Reiling	\$ 475.00

Plaintiff's counsel are experienced in class action litigation, are highly qualified, have extensive experience in complex civil litigation, and have routinely been appointed Class Counsel by courts, including this Court. Counsel understand the duties imposed upon Class Counsel in class actions, and have proven adept at all phases of litigation, from discovery and motion practice to trial and appeal or settlement. As detailed in his Declaration, David Pastor has more than 40 years of experience, most of which have been devoted to class action litigation. Richard Reiling similarly has more than 25 years of experience and has devoted much of his practice to complex commercial litigation and litigation under various consumer protection statutes. Combined, the unique experience of Plaintiff's counsel resulted in a great settlement. As evident from the attached Declarations (including exhibits), Plaintiff's Counsel's rates easily fall within the standard range of hourly rates for this type of work.⁴ These rates have been approved by state and federal courts and are consistent with comparable billing rates in the Boston area. *See* Pastor Decl., ¶¶20-22, Exhibits B and C (appending as exhibits surveys of prevailing rates from 2013; counsel's rates are comparable to these rates, which have presumably increased significantly since 2013). Accordingly, the rates charged by Plaintiff's counsel are

⁴ The Court should use current hourly rates assessed by Plaintiff's counsel, even if they have changed over time, to compensate for inflation and loss of use of funds that could have been devoted to other endeavors. *Missouri v. Jenkins*, 491 U.S. 274, 284 (1989); *In re Union Carbide Corp. Consumer Prods. Bus. Sec. Litig.*, 724 F. Supp. 160, 163-64 (S.D.N.Y. 1989) (citing cases); *In re NASDAQ Mkt.-Makers Antitrust Litig.*, 187 F.R.D. 465, 489, n. 25 (S.D.N.Y. 1998).

reasonable and should be accepted by the Court.

C. Although the Circumstances Justify an Increase in Lodestar Based on a Reasonable Modifier, no Such Request to Increase the Lodestar is Sought Here

Although counsel's lodestar is presumptively valid, Plaintiff's counsel could request (and often receive) an increased fee award based on a multiplier of their lodestar. **To be clear, no such request to increase the lodestar by a multiplier is being made here.** However, an upward increase is warranted under various circumstances that do exist here, and if Class Counsel sought to multiply its lodestar, there would be a justifiable basis to do so. While these factors justify an increase (which is not sought here), they support the overall reasonableness of this \$50,000.00 fee request.

When requesting an increase, courts can assess the following:

the ability and reputation of the attorney, the demand for his services by others, the amount and importance of the matter involved, the time spent, the prices usually charged for similar services by other attorneys in the same neighborhood, the amount of money or the value of the property affected by the controversy, and the results secured.

Cummings v. National Shawmut Bank of Boston, 188 N.E. 489, 492 (Mass. 1934); see also *Linthicum v. Archambault*, 379 Mass. 381, 388-389 (1979) (factors justifying an adjustment include "the nature of the case and the issues presented, the time and labor required, the amount of damages involved, the result obtained, the experience, reputation and ability of the attorney, the usual price charged for similar services by other attorneys in the same area, and the amount of awards in similar cases"). The rationale for a multiplier is explained as follows:

A multiplier recognizes that the lawyer who does not charge for his services until and unless he recovers for his client has essentially made a loan of his time: where there is a high risk that loan will "default" (i.e. there will be no recovery), the interest rate must be high enough to compensate the lawyer accordingly.

Commonwealth Care All. v. Astrazeneca Pharm. L.P., 2013 WL 6268236, at *2 (Mass. Super. Aug. 5, 2013). A cursory review of such factors shows that the requested fee (which is less than 50% of counsel's lodestar) is reasonable.

D. The Court Should Approve Plaintiff's Counsel's Request for \$1,069.94 in Litigation Costs and Expenses

The Court should also approve Class Counsel's request for \$1,069.94 in litigation costs and expenses. The same fee-shifting statutes that form the basis for an award of attorneys' fees in this litigation also provide for an award of litigation costs and expenses. *See* G.L., c. 149, 150. The expenses incurred by Plaintiff's counsel are clearly reasonable and necessary for this litigation.

IV. THE PROPOSED INCENTIVE AWARD SHOULD BE APPROVED

Defendants have also agreed to pay Plaintiff Mich Karen Pierre Louis an incentive award of \$3,500.00, separate from and in addition to the Settlement Fund. Courts approve incentive awards to plaintiffs who prosecute actions because there would be no class-wide benefit absent their lawsuits. *See In re Relafen Antitrust Litig.*, 231 F.R.D. 52, 82 (D. Mass. 2005) ("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.") (citation omitted). "In granting incentive awards to named plaintiffs in class actions, courts consider not only the efforts of the plaintiffs in pursuing the claims, but also the important public policy of fostering enforcement laws and rewarding representative plaintiffs for being instrumental in obtaining recoveries for persons other than themselves." *Bussie v. Allmerica Fin. Corp.*, 1999 U.S. Dist. LEXIS 7793, at *11-12 (D. Mass. May 19, 1999). Here, Plaintiff has been actively involved in the litigation. Indeed, Plaintiff's own investigation and discovery of the apparent discrepancy in

her earnings statement was the catalyst for this action; without Plaintiff's efforts, there would be no recovery for the Class. Plaintiff added the listed and itemized deductions on her earnings statement, deducted this total from her gross earnings, and noticed that the difference from that calculation was higher than her net earnings listed on the statement; in other words, the amount of her net earnings (both for the applicable pay period and for the year to date) appeared to be less than they should be. Declaration of Mich Karen Pierre Louis in Support of Motion for Settlement Approval, ¶ 6.⁵ Plaintiff also pursued the interests of the Class by undertaking the responsibilities attendant with serving as a class representative, including, without limitation, periodically conferring with counsel, providing relevant documents and information, and reviewing pleadings and other documents in the case. Accordingly, given Plaintiff's efforts in initiating the litigation, combined with the risks and burdens of serving as a class representative, the application for a \$3,500.00 incentive award should be granted.

CONCLUSION

For all the foregoing reasons, the Court should approve the requested award of attorneys' fees and expenses and the requested incentive awards to the Plaintiff.

Dated: June 6, 2022

Respectfully submitted,

/s/ David Pastor
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⁵ BAYADA's designated 30(b)(6) representative testified that it was the receipt of Plaintiff's Complaint that made BAYADA aware of the unlisted deduction issue that is the gravamen of this action. See Deposition of Christopher J. Robbins, Nov. 5, 2020, Tr. at 30:21-31:8 (Pastor Decl., **Exhibit D**).

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CERTIFICATE OF SERVICE

I hereby certify, under penalty of perjury, that on June 6, 2022 I caused copies of the foregoing Plaintiff's Memorandum in Support of Motion for Attorneys' Fees and Expenses to be served via email upon counsel for Defendants as follows:

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/s/ David Pastor _____
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