UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

DANIEL GLOVER and NICOLE GLOVER, GARY LUNETTA and LORI LUNETTA, JEANETTE ANDERSON, on behalf of themselves and others similarly situated, **Plaintiffs,** **v.** **BANK OF AMERICA, N.A. and BAC HOME LOANS SERVICING, LP,** **Defendants.**	**Civil Action No. 13-40042-TSH**

PLAINTIFFS' MEMORANDUM IN SUPPORT OF UNOPPOSED MOTION FOR FINAL APPROVAL OF SETTLEMENT AGREEMENT, AND APPLICATION FOR ATTORNEYS' FEES AND COSTS AND CLASS REPRESENTATIVES' INCENTIVE AWARDS

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Table of Contents

Table of Authorities

Cases

Other Authorities

Rules

Introduction

The Parties have negotiated and the Court has preliminarily approved a settlement that will fully resolve this consumer class action. A copy of the Settlement Agreement is on file with the Court [Dkt. No. 53-1]. The proposed settlement, preliminarily approved by this Court on February 10, 2015 [Dkt. No. 58] provides monetary relief to class members who were charged certain late fees on their mortgages by the Defendants, Bank of America, N.A. and BAC Home Loans Servicing, LP (collectively BOA). The settlement establishes a fund of $750,000 which will be used to provide credits to class members' mortgage balances, or checks in cases where the class member no longer has a BOA mortgage, and attorneys' fees and settlement costs.

This Settlement Agreement is now subject to final approval by the Court. In accordance with the Court's Preliminary Approval Order, a Notice was sent by first class mail to the last known address of all Settlement Class Members, advising them of the final approval hearing and how their rights may be affected by the proposed settlement. *See* Preliminary Approval Order Approving Class Action Settlement, Dkt. No. 58, and Affidavit of José Fraga of Garden City Group, Settlement Administrator ("Fraga Aff."), filed herewith. Because there are no objections to the Settlement, and because BOA does not oppose the motion for final approval, the motion should be treated as unopposed.

The Settlement Agreement reflects a compromise of the Parties' positions for the purpose of resolving, without further litigation, all issues and claims relating to the allegations made in this Action on behalf of all members of the Class. As demonstrated below, the Settlement negotiated by the Parties is fair, adequate, and reasonable, and provides a substantial benefit to the Settlement Class. By this motion, Plaintiffs' counsel also request approval of the attorneys' fees and costs, and incentive payments to the Named Plaintiffs. The Settlement Agreement provides that Class Counsel will apply for fees in an amount not to exceed $250,000, and that

BOA will not oppose such request. This amount represents one-third of the economic benefit the Settlement provides to the class, and represents less than the total combined lodestar of $266,613.03. The agreed upon fee is consistent with relevant case law governing attorneys' fees in class actions, and is fair compensation in light of the results achieved for the Class. No Class Member has objected to the requested fees.

The Parties request that the proposed order attached as Exhibit 1, and filed with the Court previously, be entered. The order will fully dispose of this matter.

I. Statement Of The Case

The Plaintiffs filed this class action in January 2013 in the Worcester County Superior Court. The case was removed to this Court by the Defendants on April 8, 2013, pursuant to the Class Action Fairness Act, 28 U.S.C. §§ 1332 and 1441.

The First Amended Complaint alleged, *inter alia*, that BOA violated Massachusetts law, M.G.L. c. 183, § 59. That section limits the amount of late fees a mortgage lender may charge and provides as follows:

> A late payment penalty or late charge may not be charged more than once with respect to a single late payment.…. **If a late payment fee has been once imposed with respect to a particular late payment, a fee shall not be imposed with respect to any future payment which would have been timely and sufficient, but for the previous default.**

M.G.L. c. 183, § 59 (emphasis added).

To illustrate, assume a borrower's payment is due January 1 and the borrower misses that payment; BOA may charge a late fee for January. Assume further that the same borrower makes a full principal and interest payment on time for February, but does not include in that payment an amount to cover the January payment. Under Section 59, Plaintiffs allege that BOA could not assess a late charge for February. In other words, Plaintiffs contend that if a late payment fee has been once imposed with respect to a particular late payment (January), a fee shall not be imposed

with respect to any future payment (February) which would have been timely and sufficient, but for the previous default (January), because of the bolded language of Section 59. BOA denies any and all liability, has disputed Plaintiffs' interpretation of the statute, and disputed the appropriateness of this case for class treatment except for settlement purposes.

The Complaint further alleged, *inter alia*, that the charging of late fees as described violated c. 93A.

II. The Terms of the Settlement

The full text of the Parties' Settlement Agreement is on file with the Court (Dkt. No. 53-1). The key terms are as follows.

1. *Settlement Class*: The Settlement Class is composed of all individuals who satisfy each of the criteria set forth below:

> All Massachusetts mortgage loan borrowers who (1) had a Loan that was serviced by Bank of America, (2) on which Bank of America assessed a late fee between January 9, 2007 and January 9, 2013 in a month where a full monthly payment was made between the 1st and 16th days of the month, (3) were assessed a late fee in a prior month, and (4) appear on the Class Member List described in ¶ 2.02 of the Settlement Agreement.

2. *Monetary Relief for Settlement Class Members*: Following Final Approval, BOA will fund the Settlement Fund with $750,000. The $750,000 will be used to provide relief to Settlement Class Members, pay attorneys' fees and incentive awards for the Class Representatives, and to pay Settlement Administration Costs. [Settlement Agreement, ¶¶ 1.22, 2.17, 2.22, 2.24].

3. *Notice and Administration*: Pursuant to this Court's preliminary approval of the Agreement, the Settlement Administrator mailed notice to Settlement Class members in accordance with the schedule contained in the Order, and the terms of the Agreement. [Settlement Agreement, ¶ 2.03]. Class Notice was sent by first class mail. The costs of notice and administration were paid from the Settlement Fund. The form Notice was filed with the Court at

Dkt. No. 53-1, Exhibit B. A copy of the mailed Notice is attached as Exhibit A to the Affidavit of Jose C. Fraga Regarding the Mailing of the Notice of Proposed Settlement, filed herewith.

4. *Attorneys' Fees and Costs*: The Settlement Agreement provides that Class Counsel may seek up to $250,000 in attorneys' fees to be paid solely from the Settlement Fund. [Settlement Agreement, ¶ 2.22]. BOA has agreed not to object to a request for this amount, which will be paid from the Settlement Fund if awarded by the Court, subject to the terms of the Settlement. The Parties did not address the issue of attorneys' fees until after agreement was reached on all material terms of this Settlement. *See* Affidavit of Elizabeth Ryan ("Ryan Aff."), attached hereto as Exhibit 2, ¶ 12. All attorneys' fees and expenses shall be paid from the Settlement Fund and the amounts of such fees and expenses shall not increase in any way BOA's $750,000 payment.

5. *Identification of Class Members*: BOA has represented that, to the best of its knowledge based on researching customer accounts, the Settlement Class encompasses approximately 11,000 individuals.

6. *Cy Pres Award*: Subject to the Court's approval, the residue of the Settlement Fund in the form of uncashed checks, if any, after payment to Settlement Class Members and other amounts identified above will be distributed pursuant to the terms of this Agreement to a *cy pres* trust, with the monies to be donated to Worcester Community Action Council, Inc., (WCAC) a non-profit organization whose mission is economic self-sufficiency. [Settlement Agreement, ¶ 3.06]. A description of WCAC's work is attached as Exhibit 3.

7. *Release*: Settlement Class Members will release all claims related to the assessment of late fees or charges. [Settlement Agreement, ¶ 4.01].

8. Right to Opt Out or Object. Settlement Class Members had until April 26, 2015, to opt out or to object to the Settlement Agreement. Settlement, ¶¶ 2.06, 2.11, 2.12. The Notice contained opt-out instructions for Settlement Class Members who wished to be excluded from the Settlement. Only eight Class Members elected to opt out. *See* Fraga Aff. ¶ 10.

The Settlement provided an opportunity for Class Members to object by serving a statement of his or her objection upon Class Counsel, the attorneys for BOA, and the Court. Settlement ¶ 2.11. The Notice instructed any objectors to include the reasons for objection, attach any documents supporting the objection, and to appear at the Fairness Hearing. No Class Members have objected.

III. Argument

A. The Court Should Grant Final Approval of the Settlement

1. The Standard for Final Approval

The settlement of a class action requires court approval. Fed. R. Civ. P. 23(e) (a district court can approve a class action settlement only if it is fair, adequate and reasonable.) *See In re Celexa & Lexapro Mktg. & Sales Practices Litig.*, No. MDL 09-2067-NMG, 2014 WL 4446464, at *4 (D. Mass. Sept. 8, 2014), *citing Nat'l Ass'n of Chain Drug Stores v. New England Carpenters Health Benefits Fund*, 582 F.3d 30, 44 (1st Cir. 2009).

As a general matter, the First Circuit has long recognized that there is an overriding public interest in favor of settling class actions. *See Lazar v. Pierce*, 757 F.2d 435, 439 (1st Cir. 1985); *In re Lupron Mktg. and Sales Practices Litig.*, 228 F.R.D. 75, 88 (D. Mass. 2005) ("the law favors class action settlements."); *Durrett v. Housing Auth. of City of Providence*, 896 F.2d 600, 604 (1st Cir. 1990) (citing "long-recognized policy of encouraging settlements"). Where "the parties negotiated at arm's length and conducted sufficient discovery, the district court must presume the settlement is reasonable." *In re Pharm. Indus. Average Wholesale Price Litig.*, 588

F.3d 24, 33 (1st Cir. 2009). In fact, there is a "strong initial presumption" that an arms-length settlement arrived at by counsel experienced in the type of litigation on the basis of sufficient information concerning the claims at issue is fair. *In re Celexa & Lexapro Mktg. & Sales Practices Litig.*, at *4; *Drug Stores, supra,* 582 F.3d at 44; 2 H. Newberg, A. Conte, *Newberg on Class Actions*, § 11.41 (3d ed. 1993).

There is no single test in the First Circuit for determining the fairness, reasonableness and adequacy of a proposed class action settlement. *Walsh v. Popular, Inc.*, 839 F. Supp. 2d 476, 480 (D. P.R. 2012); *In re Relafen Antitrust Litig.*, 231 F.R.D. 52, 72 (D. Mass. 2005) (citing *In re Compact Disc Minimum Advertised Price Antitrust Litig.*, 216 F.R.D. 197, 206 (D. Me. 2003). District courts have instead looked to a variety of factors derived from other circuits in making this assessment. In *Relafen*, the court identified two lists of such factors. One of those lists, which is drawn from Second Circuit authority and was applied by the district court in *Lupron Mktg.*, 228 F.R.D. at 93-98, is labeled by the Court in *Relafen* as the "*Grinnell*" list. *Relafen*, 231 F.R.D. at 72. It calls for consideration of:

> (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

Id., (*quoting City of Detroit v. Grinnell Corp.*, 495 F.2d 488, 463 (2nd Cir. 1974)). *See also In re Celexa*, at *5, *citing In re Tyco Int'l, Ltd. Multidistrict Litig.*, 535 F. Supp. 2d 259, 259–60 (D. N.H. 2007). The second list of factors identified by the Court in *Relafen*, quoted from the *Compact Disc* opinion, include:

> (1) comparison of the proposed settlement with the likely result of litigation; (2)

> reaction of the class to the settlement; (3) stage of the litigation and the amount of discovery completed; (4) quality of counsel; (5) conduct of the negotiations; and (6) prospects of the case, including risk, complexity, expense and duration.

Relafen, 231 F.R.D. at 72; *Compact Disc*, 216 F.R.D. at 206.

This *Compact Disc* list includes some of the same or similar factors as the *Grinnell* factors, and has been described by some district courts in this circuit as "a modified version of the *Grinnell* factors." *Tyco*, 535 F. Supp. 2d at 259; *Walsh*, 839 F. Supp. 2d at 480. Because the First Circuit has not specified a checklist of factors for determining whether a settlement is fair, reasonable, and adequate, district courts in this circuit have the discretion to apply the factors most appropriate to the case, and engage in a studied review of the overall reasonableness of the settlement based on a wide variety of factors "bearing on the central question of whether the settlement is reasonable in light of the uncertainty of litigation." *Tyco*, 535 F. Supp 2d at 259 (*quoting Bussie v. Allmerica Fin. Corp.*, 50 F. Supp. 2d 59, 72 (D. Mass. 1999)).

Beyond consideration of the above-identified factors and the over-arching presumption favoring the approval of a class action settlement where the parties have conducted sufficient discovery and engaged in arm's length bargaining, the district court should also be satisfied that the settlement is untainted by collusion. *Relafen*, 231 F.R.D. at 71. Finally, although the district court must carefully scrutinize the settlement for fairness, public policy favors settlements, particularly in large or complex cases. *Tyco*, 535 F. Supp. 2d at 259. Ultimately, the decision of whether to approve the settlement "involves balancing the advantages and disadvantages of the proposed settlement against the consequences of going to trial or other possible but perhaps unattainable variations on the proffered settlement." *Walsh*, 839 F. Supp. 2d at 480.

2. The Settlement is Fair, Reasonable and Adequate Based on the Relevant Factors and an Overall Review of the Terms of the Settlement

An overall review of the Settlement, with due consideration of each of the relevant *Grinell* or *Compact Disc* factors, supports the presumption that the Settlement Agreement is fair, reasonable, and adequate and warrants final approval.

First, given the complexity of the legal issues raised by the litigation, and the logistical complexity of analyzing relevant data regarding late fees, achieving a resolution of this matter through further litigation rather than by means of a settlement would involve substantial time, resources and risk, further discovery, class certification motions, expert testimony, summary judgment, and possibly trial and appeal. The appropriate interpretation of Section 59, the issue at the heart of this litigation, is a novel issue; there are no reported cases addressing this aspect of the statute.

The stage of the litigation and the amount of discovery completed, supports approval as well. This case has been pending for over two years, and in that time the Parties have conducted extensive discovery, both formal and informal. BOA has produced over 126,000 pages of documents, and the Parties have conducted multiple discovery conferences before exchanging additional information necessary for settlement discussions. Plaintiffs had more than adequate information about the case before commencing negotiations.

The Settlement provides financial relief to Class Members without requiring any claim forms, and there is no reverter. All Massachusetts mortgagors who were charged late fees by BOA, in the manner challenged by the Amended Complaint, will receive benefits under the Settlement. Settlement, ¶ 3.02. The amount negotiated by the Parties is fair, adequate, and reasonable. The value of the benefits provided by the Settlement is enhanced by the fact that they will be provided to the Class now, without the delay, risks and burdens of further litigation.

See Rolland v. Cellucci, 191 F.R.D. 3, 10 (D. Mass. 2000) (the certainty of recovery through settlement in contrast to the expense, length and uncertainty of litigation, is a strong argument in favor of settlement). The amount of the settlement relates to the estimate of the amount of late fees paid by Class Members during the Class period. Because BOA has now changed its practice as to assessment of late fees, and no longer charges late fees in the way Plaintiffs challenge, Class Members will not be subject to the alleged overcharges in the future. Thus the Settlement will produce substantial benefits for the Class. These benefits must be considered in the context of the risk that Plaintiffs would recover nothing if this case were litigated to conclusion, the time and resources that would have been expended, and the substantial delay in obtaining relief through litigation. *Lupron Mktg.*, 228 F.R.D. at 97 ("[i]n applying this test of reasonableness, 'the present value of the damages plaintiffs would likely recover if successful, *appropriately discounted for the risk of not prevailing*, should be compared with the amount of the proposed settlement").

No Class Member has objected to the settlement. Only eight Class Members have opted out. When few members object to the settlement, the court may infer that the settlement is fair. *See Bussie*, 50 F. Supp. 2d at 77.

The manner in which the settlement was negotiated further supports approval. The settlement began after sufficient discovery, and was arrived at following extensive, arm's length negotiations. After substantial discovery, the Parties met in May 2014 to first discuss a possible resolution of the case. That meeting led to protracted, and at times very contentious, negotiations that spanned a period of nearly seven months. They involved detailed discussions regarding the claims raised in the case and the underlying facts, including analysis of the relevant loan histories, and whether it was logistically possible to identify Class Members with any degree of

certainty. Ryan Aff., ¶ 10. Virtually every issue underlying the Settlement Agreement, as well as the terms of the Agreement itself, has been vigorously contested. In January of 2015, the Parties finally executed the Settlement Agreement that is now before the Court for approval.

Based on their review and analysis of the relevant facts and legal principles, Plaintiffs and their counsel believe that, in consideration of all the circumstances and after prolonged and serious arm's length settlement negotiations with BOA's counsel, the terms and conditions of the Settlement are fair, reasonable, and adequate, and beneficial to and in the best interests of Plaintiffs and the proposed Settlement Class. The opinion of Plaintiffs' counsel as to the desirability of settlement is an important consideration. *See Rolland*, 191 F.R.D. at 10; *Compact Disc*, 216 F.R.D. at 212 (determining fairness of settlement proposed by counsel, the court considers the experience and level of competence of class counsel). Counsel for Plaintiffs and the Class have substantial experience in consumer class action litigation and their legal practices are devoted to the representation of consumer interests. *See* Ryan Aff., ¶ 3.

IV. All Class Members Were Given Proper and Reasonable Notice

The Settlement provided reasonable and adequate notice to Class Members, to be paid for from the Settlement Fund. Notice is adequate if it is "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 174 (1974), *quoting, Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1985); *Compact Disc*, 216 F.R.D. at 203-04 (notice satisfied Rule 23 because it provided sufficient information for class members to decide whether to file claims, opt out, seek exclusion or object). Notice of the Settlement was mailed, per this Court's order, to all Class Members by first class mail. See Fraga Aff. ¶ 6. Sending notice by first class mail to class members identifiable by reasonable means is

adequate notice. *Reppert v. Marvin Lumber & Cedar Co., Inc.*, 369 F.3d 53, 56-57 (1st Cir. 2004).

A total of 11,303 notices were mailed to identified Class Members. Fraga Aff., ¶ 6. The content of the notice satisfies due process. It was clear, straightforward and sufficiently detailed to allow Class Members to determine the potential costs and benefits involved by participating in the Settlement. It clearly outlines the nature of the case and the remedies offered by the Settlement, and provides clear and conspicuous notice of the Class Member's alternative rights to object or opt out.

V. The Settlement Class Is Appropriately Certified

Class certification is appropriate if (1) the class is sufficiently numerous to make joinder of all parties impracticable, (2) there are common questions of law and fact, (3) the claim of the named plaintiff is typical of the claims of the class, and (4) the named plaintiff will fairly and adequately represent the interests of the class. Fed. R. Civ. P. 23(a). In addition, a plaintiff must show that common questions of law and fact predominate over individualized questions, and that the class action is superior to other available methods for adjudication of the controversy. Fed. R. Civ. P. 23(b). For the reasons set forth more fully in the motion for preliminary approval, all of the Rule's requirements are met in the settlement class for which the Parties request certification.

The Class is more than sufficiently numerous. The Class encompasses 11,160 individuals (some of whom are co-obligors), which is enough to make joinder impracticable. *Gorsey v. I.M. Simon & Co.*, 121 F.R.D. 135, 138 (D. Mass. 1988) (800 to 900 member class made joinder impracticable); *Gordon v. Johnson*, 300 F.R.D. 31, 35-36 (D. Mass. 2014).

The questions of law and fact raised by this action are all common to all Class Members. The statutory limitations on late fees are identical as to each Class Member, and BOA's method of assessing late fees was a uniform practice built into its servicing software system. The

overriding common legal question is whether BOA's late fee practices violated M.G.L. c. 183, § 59. There are no individual legal issues to be resolved. Under these circumstances, commonality is readily met. *See, e.g. Kaminski v. Shawmut Credit Union*, 416 F. Supp. 1119, 1122-1123 (D. Mass. 1976) (common questions exist where all bank customers were given the same form and were treated in identical manner by bank); *Perry v. Equity Residential Mgmt., L.L.C.*, No. CIV.A. 12-10779-RWZ, 2014 WL 4198850, at *7 (D. Mass. Aug. 26, 2014) (commonality satisfied where class members each paid the same fee and allege violation of the same laws); *Glass Dimensions, Inc. v. State St. Bank & Trust Co*., 285 F.R.D. 169, 176-77 (D. Mass. 2012) (commonality met where plaintiffs show that there are common questions of law or fact in the case); *In re Evergreen Ultra Short Opportunities Fund Sec. Litig.*, 275 F.R.D. 382, 388 (D. Mass. 2011) (accord).

The claims of Plaintiffs are typical of the claims of the Class. To meet the typicality requirement, Plaintiffs must demonstrate that their injuries arise from the same course of conduct as the rest of the Class, and that their claims are based on the same legal theory as those of the class. *Glass Dimensions, Inc*., 285 F.R.D. at 178, *citing In re Credit Suisse–AOL Secs. Litig.*, 253 F.R.D. 17, 23 (D. Mass. 2008); *Swack v. Credit Suisse First Boston*, 230 F.R.D. 250, 264 (D. Mass. 2005) (accord). *See Adair v. Sorenson*, 134 F.R.D. 13, 17 (D. Mass 1991) (claims are typical when the plaintiff's injuries arise from "the same events, practice or course of conduct of the defendant as do the injuries which form the basis of the class claims"). Plaintiffs' claims and those of all Class Members arise from BOA's alleged practice of assessment of late fees. The Class Members, and Plaintiffs, assert similar claims and requests for relief, arising out of the same course of conduct.

Plaintiffs and Class Counsel have and will fairly and adequately protect the interests of

the Class. There are no conflicts of interest between Plaintiffs and the Class, and the undersigned counsel are active practitioners with extensive experience in consumer law and class action litigation. *See* Ryan Aff., ¶ 13. *Amchem Products v. Windsor*, 117 S.Ct. 2231, 2251, & n.20 (1997) (courts look simply at whether the representatives' interest are in any way antagonistic to or in conflict with those of the class members).

Questions of law or fact common to the members of the Class predominate over any individual questions. The courts have routinely found predominance of common questions where the claims relate to a common course of conduct. *Waste Mgt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 296 (1st Cir. 2000) (predominance requirement satisfied by "sufficient constellation of common issues [that] bind class members together" and "cannot be reduced to a mechanical, single-issue test"); *see also Glass Dimensions, Inc.*, 285 F.R.D. at 180 (where central issue is reasonableness of fee split, predominance met); *Overka v. American Airlines, Inc.*, 265 F.R.D. 14, 18 (D. Mass. 2010); *Duhaime*, 177 F.R.D. at 64 (requirement is "readily met in cases alleging consumer…fraud" where claim alleges single course of conduct, *quoting Amchem*, 117 S.Ct. at 2250).

Finally, a class action is the superior method for addressing these claims. The superiority test ensures that "resolution by class action will 'achieve economies of time, effort, and expense, and promote ... uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results.'" *Glass Dimensions, Inc.*, 285 F.R.D. at 180, *citing Relafen*, 218 F.R.D. at 346. Here, each Class Member's claim is small relative to the cost of individual litigation, making it uneconomic for individuals to pursue these claims on their own, and therefore unlikely they will do so. *Grace v. Perception Tech., Inc.*, 128 F.R.D. 165, 171 (D. Mass. 1989); *Randle v. SpecTrain*, 129 F.R.D. 386, 393 (D. Mass. 1988).

Moreover, most Class Members are unlikely to even be aware that they have a claim. Absent a class action, these claims might never be brought at all.

VI. The Requested Attorneys' Fees Are Reasonable And No One Has Objected To The Fees

Class Counsel has litigated this case for almost two and one-half years, committing their time and resources on an entirely contingent basis. Their fees are and have always been contingent upon achieving a financial recovery for the Class, which they have done. In light of these circumstances, the Parties have agreed that Class Counsel will apply for an award of attorneys' fees and costs not to exceed $250,000. Settlement, ¶ 2.21. BOA has agreed not to oppose this application. No Class Member has objected to the requested fee. The efforts of Plaintiffs and their attorneys in prosecuting this case have resulted in a negotiated settlement that provides for a Settlement Fund of $750,000. The requested fee, which was addressed after relief for the Class was agreed upon, represents one third of the total benefits provided by the Settlement, and represents less than the total lodestar of $266,613.03. Class Counsel's total fees and expenses are $4,234.52.

To determine the reasonableness of the fee award provided for in the Settlement Agreement, the Court may apply two standards of evaluation: the lodestar method or the percentage-of-the-fund approach. *In re Puerto Rican Cabotage Antitrust Litig.,* 815 F. Supp. 2d 448, 457-58 (D. P.R. 2007); *Wells v. Dartmouth Bancorp, Inc.*, 813 F. Supp. 126, 129-30 (D. N.H. 1993). Under the percentage-of-the-fund analysis, the court fashions the fee award based on a reasonable percentage of the fund recovered for those benefitted by the litigation. *In re Thirteen Appeals Arising Out of the San Juan Dupont Plaza Hotel Fire Litig.,* 56 F.3d 295, 305 (1st Cir. 1995). The lodestar approach multiplies the reasonable hours spent in litigating the case by the reasonable hourly rates of those who spent time on the case, subject to a multiplier or

discount for special circumstances. *Thirteen Appeals*, 56 F.3d at 305, *citing Blum v. Stenson*, 465 U.S. 886 (1984); *Lipsett v. Blanco*, 975 F.2d 934, 937 (1st Cir. 1992).

The requested fee is reasonable under either method.

A. The Fee Request is Reasonable Under The Percentage Of Recovery Method, Given the Results Obtained And The Number of Class Members Who Will Benefit

While the First Circuit has not adopted any particular criteria or set of factors to be applied in determining the reasonableness of a fee request under the percentage of recovery approach, district courts within the circuit have made use of factors identified by the Second and Third Circuits. Those factors, as identified by the district court in *Relafen*, 231 F.R.D. at 79, include (1) the size of the fund created and the number of persons benefitted; (2) the presence or absence of substantial objections by members of the class to the settlement terms and/or fees requested by counsel; (3) the skill and efficiency of the attorneys involved; (4) the complexity and duration of the litigation; (5) the risk of nonpayment; (6) the amount of time devoted to the case by plaintiffs' counsel; and (7) the awards in similar cases. *Id., citing Gunter v. Ridgewood Energy Corp*., 223 F.3d 190, 195 n. 1 (3rd Cir. 2000) and *Goldberger v. Integrated Res., Inc*., 209 F.3d 43, 50 (2d Cir. 2000) (articulating additional factors including "the risk of the litigation," "the requested fee in relation to the settlement," and "public policy considerations"). Applying these considerations to the facts of this case supports the requested fee of $250,000.

Courts have frequently emphasized that the most significant factor in setting fees is the results obtained. *Duhaime v. John Hancock Mut. Life Ins. Co*., 989 F. Supp. 375, 377 (D. Mass. 1997) (fee should be relative to value obtained for the class); *In re Fleet/Norstar Securities Litig.*, 935 F. Supp. 99, 109 (D. R.I. 1996) ("[u]ltimately, the issue is whether the settlement is beneficial to the class members"); *Puerto Rican Cabotage*, 815 F. Supp. 2d at 458 (results achieved by counsel is often the most influential factor in assessing the reasonableness of the

fee), *citing, Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983) ("most critical factor is the degree of success obtained").

The results obtained in this case are excellent. The Settlement provides economic benefits to the Class of $750,000 and this benefit will be paid automatically if approved, without any requirement for claim forms, and there is no reverter. The amount of the settlement relates to the estimate of the amount of late fees paid by Class Members during the Class period. In addition, going forward, Class Members will be free of the assessment of late fees that Plaintiffs allege violates the statute.

There have been no objections whatsoever to any aspect of the Settlement, including the fee. In terms of Class Counsels' skill and efficiency, this Court has previously considered the qualifications of Class Counsel based upon the evidence of Class Counsel's experience and areas of expertise submitted in granting the motion for preliminary approval of the Settlement. (Dkt. No. 58). Plaintiffs do not resubmit evidence of Class Counsel's qualifications here, but refer the Court to its prior submissions; including ECF Document No. 54-1, the Affidavit of Elizabeth Ryan in Support of the Motion for Preliminary Approval. Counsel have also taken steps to ensure that this matter has been litigated efficiently by dividing tasks to avoid duplication of efforts. This case has been actively litigated for more than two years. BOA is represented by experienced and sophisticated counsel; discovery has been thorough and legal issues have been extensively evaluated. With respect to the risk to Class Counsel, this matter was taken on a purely contingent basis, and the Amended Complaint raised novel legal claims that have not been resolved in this district. There are no reported decisions interpreting the late fee statute. These unknowns created uncertainty as to whether Class Counsel would be able to get a class certified, and to prevail on the class claims. Class Counsel alone bore this risk.

The requested fee of one third of the Settlement Fund is not out of proportion with awards in other large class actions. *See Relafen,* 231 F.R.D. at 82 (holding that "the one-third percentage of fund fee is not unreasonable as a matter of law" and awarding fees of one-third percentage of the fund); *In re Pacific Enters. Sec. Litig.*, 47 F.3d at 378, 379 (9th Cir.1995) (affirming the district court's award of 33% of the $12 million dollar settlement fund); *Mazola v. May Dept. Stores Co.*, No. 97CV10872-NG, 1999 WL 1261312, *4 (D. Mass. Jan. 27, 1999) ("[I]n this circuit, percentage fee awards range from 20% to 35% of the fund. This approach mirrors that taken by the federal courts in other jurisdictions."); *In re Merry-Go-Round Enterprises, Inc.*, 244 B.R. 327 (Bankr. D. Md. 2000) (allowing a 40% fee on a recovery of $185 million); *In re Combustion, Inc.*, 968 F. Supp. 1116, 1133 (W.D. La. 1997) (noting that 50% is the upper limit for the fee from a common fund, listing five class action cases awarding 33.3% fees, and awarding a maximum fee of 36% on a $127 million settlement fund); *In re Initial Pub. Offering Sec. Litig.*, 671 F. Supp. 2d 467 (S.D.N.Y. 2009) (awarding 33.3% fee from the net settlement fund in securities class action); *Jenkins v. Trustmark Nat. Bank*, 3:12-CV-00380-DPJ, 2014 WL 1229661 (S.D. Miss. Mar. 25, 2014) (awarding 33.33% fee from the $4 million settlement fund); *Waters v. Int'l Precious Metals Corp.*, 190 F.3d 1291 (11th Cir. 1999) (upholding district court's granting of a 33.3% fee of $13.3 million from a $40 million class action settlement fund); *Burford v. Cargill, Inc.*, CIV.A. 05-0283, 2012 WL 5471985 (W.D. La. Nov. 8, 2012) (holding that "the benchmark percentage in this case is one-third" of the common fund). *See also Glass Dimensions, Inc. v. State Street Bank and Trust*, No. 10-10588, Final Order and Judgment Approving Class Action Settlement, ¶12, Dkt. 409 (D. Mass. May 12, 2014) (approving one third fee for case litigated by Plaintiffs' counsel's firm).

In addition, the proposed fee was negotiated at arm's length by experienced and

sophisticated counsel for both Parties. The negotiation of fees was held in abeyance until the Parties had reached agreement on all material terms of the Settlement. *See* Ryan Aff.**,** ¶ 12. The Parties' agreement on fees and costs meets the Supreme Court's directive on this issue, which sets out consensual resolution of attorneys' fees as the ideal culmination of successful litigation. *See Hensley*, 461 U.S. at 437. A fee negotiated under such circumstances is entitled to substantial weight. *In re First Capital Holdings Corp. Fin. Prods. Sec. Litig.*, MDL No. 901, 1992 U.S. Dist. LEXIS 14337 at *13 (C.D. Cal. June 10, 1992); *In re M.D.C. Holdings Sec. Litig.*, No. CV89-0090 E (M.), 1990 WL 454747, *3 (S.D. Cal. Aug. 30, 1990) ("[b]ecause this Court believes the parties should be encouraged to settle all their disputes as part of the settlement … including the amount of the fee, it believes that if the agreed-to fee falls within a range of reasonableness, it should be approved as part of the negotiated settlement between plaintiffs and defendants").

B. The Requested Fee Is More Than Reasonable When Compared With Counsel's Lodestar

The requested fee is reasonable using the lodestar approach as well, as it is represents less than Class Counsel's combined total lodestar. *See Relafen*, 231 F.R.D. at 82 (citing examples where court awarded a lodestar multiplier, noting that generally, multipliers range from 1.6 to as high as 19.6), *citing In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 298–99, 303–04 (3rd Cir. 2005) (finding no abuse of discretion where district court approved attorney's fees with a "fairly common" lodestar multiplier of 4.07). *See* also *Bilewicz v. FMR LLC*, C.A. No. 13-10636-DJC (Oct. 16, 2014) (approving attorneys' fee award with multiplier of 3.3); *In re Cendant Corp. PRIDES Litig.*, 243 F.3d 722, 742 (3d Cir. 2001) (suggesting a multiplier of 3 as the ceiling for a case that was "neither legally nor factually complex"); *Conley*, 222 B.R. at 181 (awarding multiplier of 8.9).

Here, Class Counsel's lodestar is $266,613.03, representing 604.85 hours billed over more than two and one-half years of litigation. *See* Ryan Aff., ¶ 17, and Exhibit 1 to Ryan Aff. The hours expended by Counsel in this case are reasonable under the circumstances, particularly in light of the protracted litigation and the lengthy negotiations that led to this Settlement. The rates used by Counsel are reasonable given the experience and expertise of Class Counsel, and are comparable to rates charged by attorneys with similar experience. *See* Ryan Aff., ¶¶ 18, 19.

The requested fee is reasonable in light of all of the relevant considerations. Ultimately, the question at the heart of all attorneys' fee determinations is whether the proposed fee fairly and reasonably compensates counsel for what they have accomplished, not which method, percentage, or multiplier to apply. *See Branch v. FDIC*, 1998 WL 151249, *4 (D. Mass. 1998). In view of the results obtained for the Class, the Court should approve Class Counsel's request.

VII. The Requested Incentive Award Is Also Proper

Finally, Plaintiffs seek approval of a total incentive award of $15,000, to be paid on a per loan basis, that is, $5,000 total to the Glovers, $5,000 total to the Lunettas, and $5,000 to Ms. Anderson. BOA does not oppose the incentive payments (and which, like attorneys' fees, was the result of a negotiated compromise). The rationale for awarding incentive payments to named plaintiffs is that they should be compensated for the expense or risk they have incurred in conferring a benefit on other members of the class. *Relafen*, 231 F.R.D. at 82. Here, each named Plaintiff spent considerable time and effort locating and providing documents, participating in interviews with counsel, reviewing and commenting on pleadings, participating in discovery, and discussing and approving settlement. Accordingly, they should each be rewarded and compensated for their time and efforts undertaken on behalf of the Class. Ryan Aff. ¶ 23. Incentive awards are appropriate "to encourage or induce an individual to participate" in a class action law suit. *Id.*

Moreover, and similar to the fee request, comparisons to incentive awards in other class action settlements demonstrate that this amount is reasonable and fair. In fact, the incentive awards requested here are modest in relation to awards approved for class representatives in other cases in this circuit. *See, e.g.*, *Puerto Rican Cabotage*, 815 F.Supp.2d at 468-9 (approving payment of $8,000 for each of six plaintiffs, even though none had been deposed or subjected to discovery requests); *Relafen*, 231 F.R.D. at 82 (approving incentive awards in the range of $8,000 to $14,000 for three categories of named plaintiffs); *Bussie v. Allamerica Fin. Corp.*, No. Civ.A. 97-40204-NMG, 1999 WL 342042, *3 (D. Mass. May 19, 1999) (approving incentive awards in the amount of $5,000 each for four named plaintiffs in 1999).

Accordingly, Class Counsel respectfully request that the Court approve these payments, in addition to the attorneys' fees and litigation costs discussed above.

Conclusion

The Settlement is fair and reasonable and no Class Member has objected. It meets all of the requirements for final approval. The attorneys' fees and costs requested, and the incentive payments to the Named Plaintiffs, are reasonable and should also be approved. For all of the foregoing reasons, the Plaintiffs respectfully request that this Court approve the Settlement and certify the Class. Plaintiffs further request that the Court approve the requested fee and incentive payments, in accordance with the Settlement Agreement.

Date: May 4, 2015

Respectfully submitted

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CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic File (NEF) and paper copies will be sent to those indicated as non-registered participants on May 4, 2015.

/s/ Elizabeth Ryan
Elizabeth Ryan