UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

MOLLY CRANE, Individually and on Behalf of All Other Persons Similarly Situated,

Plaintiff,

v.

SEXY HAIR CONCEPTS, LLC, and ULTA SALON COSMETICS & FRAGRANCE, INC.,

Defendants.

Case 1:17-cv-10300

MEMORANDUM IN SUPPORT OF PLAINTIFF'S ASSENTED-TO MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT

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Plaintiff Molly Crane submits this memorandum in support of her motion for final approval of the Settlement Agreement and Release attached to this motion as Exhibit A (the "Settlement"), which resolves all claims asserted in this litigation on behalf of a proposed nationwide class against defendants Sexy Hair Concepts, LLC ("SHC") and Ulta Beauty, Inc. *f/k/a* Ulta Salon Cosmetics & Fragrance, Inc. ("Ulta," and together with SHC, the "Defendants").

The Court should grant final approval because the Settlement provides a fair, reasonable, and adequate recovery for the Class. Specifically, the Settlement requires SHC to pay a sum of $2.33 million, which will create a common fund to pay Claims made by Class Members and which will not be returned to SHC. The Settlement provides for substantial cash benefits to Class Members upon the submission of a simplified, one-page claim form.

Approximately 630,000 Class Members for whom a valid email address was available and approximately 315,000 Class Members for whom a physical address is available have been provided direct notice by e-mail and regular mail, respectfully. The direct notice by email included a link for the Class Member to submit a claim form populated automatically with much of that Class Member's information. Direct notice by regular mail included a unique claim code that allowed Class Members to electronically submit a claim form populated automatically with that Class Member's information, or to submit a paper form. The cash benefits provided by the Settlement, together with the provision of direct notice program and a simplified claims process, makes the Settlement highly favorable for Class Members.

As set forth below, the Settlement meets all the requirements necessary for final approval. The Court should (i) grant final approval of the Settlement; (ii) approve Plaintiff's request for reasonable attorneys' fees' and out-of-pocket expenses; (iii) approve Plaintiff's request for a reasonable service award to the Plaintiff; and (iv) approve the expenses the

Settlement Administrator incurred in providing notice to the Class and administering the Settlement.

I. PROCEDURAL HISTORY

Plaintiff filed her initial Complaint on February 23, 2017, and filed her Amended Complaint on June 6, 2017. DE 7. Plaintiff alleges that she and other similarly situated customers incurred damage as a result of misrepresentations regarding whether certain hair care products sold by SHC were "SULFATE-FREE" and "FREE OF…SALT." Plaintiff alleges that SHC violated M.G.L. c. 93A and was unjustly enriched as a result of these misrepresentations.

In response to the Amended Complaint, SHC denied that it violated the law and/or that anyone incurred damage. SHC asserted various affirmative defenses to Plaintiff's and the Class's claims. Before answering, SHC also moved to dismiss Plaintiff''s Amended Complaint, *see* DE 26, 27; the Court denied SHC's motion, *see* DE 46. After the Court denied SHC's motion to dismiss, the parties commenced discovery concerning Plaintiff's claims and SHC's defenses.

The Parties participated in arms'-length settlement negotiations including two mediation sessions with the Honorable John C. Cratsley, a mediator with JAMS, on May 30, 2018 and July 23, 2018, and the Parties subsequently agreed to a global resolution of all issues pertaining to the Action as set forth in this Settlement.

On October 19, 2018, Plaintiff filed a motion for preliminary approval of the Settlement. DE 87, 88. On November 14, 2018, the Court granted preliminary approval of the Settlement, and through that order, the Court: (i) provisionally certified the Class; (ii) preliminarily approved the Settlement; and (iii) approved Plaintiff's proposal for notice to the Class of the Settlement. DE 91. On November 21, 2018, the parties filed a joint motion to modify the schedule for the Settlement to ensure maximum effectiveness of the notice program. DE 93. The Court granted that motion. DE 94.

II. THE SETTLEMENT

The Settlement's terms are detailed in the Settlement Agreement and Release, which Plaintiff attaches as Exhibit A to the motion. The forms of notice and claim form (which the Court previously approved), and proposed forms of orders, are attached as Exhibits 1 through 7 to the Settlement. A summary of the Settlement's key terms follows:

A. *Definition of the Class*

The "Class" is defined in the Settlement as:

> All purchasers of any of the Subject Products as defined below during the period between November 19, 2002 through the Effective Date (defined below), excluding any purchases made for purposes of resale. Excluded from the Class are (i) those Class Members who have previously resolved their claims through return of product, settlement, or final judgment, (ii) all persons who are officers or directors of Defendant, and (iii) Judges of the Court.

B. *Monetary Settlement Benefits*

Pursuant to the Settlement, SHC will pay $2.33 million into a common fund, which will be used to pay Claims submitted by Class Members. Settlement § II-A. Upon the submission of a valid claim form, Class Members may receive $6 for each purchase of one of the "Subject Products," which are the products that Plaintiff alleged contained misrepresentations on the product labels. *Id.* §§ II-C, II-D. Claimants presenting proof of purchase may submit a claim for as many products as they purchased; Claimants without proof of purchase will be limited to submitting a claim for two purchases. *Id.* In the event the Claims submitted do not exhaust the common fund, these cash benefits may be increased by a multiple of up to 2.0. *Id.* § II-K.

Although the cash benefits Class Members will receive are substantial given the price Class Members paid for the products (the Subject Products typically sold at retail for between $5 for a travel size and $15 per liter-sized bottle), additional features of the Settlement render it even more favorable to Class Members. Chief among those features is that Defendants have

provided data concerning Class Members, which the Settlement Administrator has used to deliver personal notice to more than 940,000 Class Members. *Id.* § IV; Perry Decl.[1] ¶¶ 3, 6–8. Those Class Members received email notice or a unique claim code, which will permit the Class Members to submit an online claim form pre-populated with that class member's identifying information and purchases as reflected in the retail records. Settlement § IV; Perry Decl. ¶¶ 4, 6. Moreover, upon attestation that none of the claimed products were returned, the retail records will satisfy the proof of purchase requirement of the Settlement, meaning that such customers may obtain the $6 per purchase cash settlement benefit for all purchases reflected in the retail records, without the need to submit any additional proof of purchase. Settlement § II-C. In short, the Parties designed the Settlement to ensure that substantial cash benefits are placed in the hands of Class Members.

C. ***Class Release***

In exchange for the benefits conferred by the Settlement, all Class Members who do not opt out will be deemed to have released SHC and any retailer from whom the Class Member may have purchased the Subject Products from claims relating to the subject matter of this action. The detailed release language is set forth in Section VIII of the Settlement.

D. ***Settlement Administration and Notice***

As noted, Defendants have provided records in their possession concerning the purchases of Subject Products for more than 990,000 Class Members, which the Settlement Administrator has used to provide personalized notice to such Class Members. Settlement § IV; Perry Decl. ¶¶ 3, 6–8. The Settlement Administrator used national databases to update Class Member addresses where necessary to reasonably ensure Class Members receive the notice. Settlement § IV-A;

[1] "Perry Decl." refers to the Declaration of Andrew Perry, attached as **Exhibit B** to the motion.

Perry Decl. ¶¶ 3, 8. The personal notice to more than 940,000 known Class Members[2] (Perry Decl. Exs. 2, 3, 4), advised Class Members of their rights in connection with the Settlement. The Class Members who received personal notice represent approximately 25% of the Class, *see id.* ¶ 11, a remarkable achievement for personal notice in a case involving consumer products sold primarily at retail outlets.

In addition to this personalized notice, the Settlement Administrator designed a media campaign to reach additional Class Members to inform them about the Settlement. The campaign was designed to reach approximately 70% of likely Class Members. Perry Decl. ¶ 9.

Moreover, the Settlement Administrator established a settlement website (http://www.sulfatesettlement.com/) that provides additional information on the Settlement and this Action, including a long-form notice providing additional detail concerning the Settlement and the Action, relevant pleadings from this Action, and contact information for Class Counsel.

III. ARGUMENT

A. *The Notice Program Was Adequate.*

"Rule 23(e)(1)(B) requires the court to direct notice in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise regardless of whether the class was certified under Rule 23(b)(1), (b)(2), or (b)(3)." Manual for Complex Lit. § 21.312 (internal quotations omitted). The best practicable notice is that which is "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency

[2] Some Class Members' email addresses were invalid and had no physical mail address. In total, the Settlement Administrator sent 749,858 email notices, *see* Perry Decl. ¶ 6, but approximately 118,456 such emails were returned as undeliverable, *id,* ¶ 8, which means approximately 630,000 email notices were sent that were not returned as undeliverable. Approximately 315,000 postcard notices were sent (69,367 initially, and 246,483 after some Class Members' emails were returned). *Id.* ¶¶ 7, 8.

of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Trust Co*., 339 U.S. 306, 314 (1950).

The Court-approved Class Notice satisfies the requirements of Rule 23(e)(1)(B). The Class Notice informed Class Members of the substantive terms of the Settlement. It advised Class Members of their options for opting out of or objecting to the Settlement, and how to obtain additional information about the Settlement. The Class Notice was presented in plain English to ensure Class Members read and understand the Class Notice. Perry Decl. Exs. 2, 3, 4.

As part of the Settlement, Defendants provided contact information for more than 900,000 Class Members, which the Settlement Administrator used to send Class Members personalized notice. Such notice made the notice program for this Settlement more vigorous than the typical consumer class action settlement, which often relies solely on publication notice. Moreover, to supplement the personalized notice and to reach additional Class Members, the Class Notice included a media campaign designed by the Settlement Administrator to reach approximately 70% of Class Members, further amplifying the adequacy of Notice. Perry Decl. ¶ 9.

Both the personalized mailed notice and the publication notice will point Class Members to the Settlement website, which provides yet further information concerning the Settlement and this Action, and will enable Class Members to contact Class Counsel or the Settlement Administrator should they have any questions. Settlement §§ IV-D, IV-E, IV-F; Perry Decl. ¶ 4; *see also* http://www.sulfatesettlement.com.. Moreover, Class Members have the additional option to obtain information about the Settlement through a toll-free number. Settlement § IV-B; Perry Decl. ¶ 5.

For these reasons, notice program the Court previously approved more than meets the requirements of Rule 23 and of constitutional Due Process.

B. *Certification of the Class is Appropriate.*

Through its order preliminary approving the Settlement, the Court has already found that the Class meet the requirements for certification under Rule 23(a) and 23(b)(3). DE 91 ¶¶ 3–6. For the same reasons as Plaintiff set forth in her motion for preliminary approval, Plaintiff requests that the Court make the same class certification findings in granting Final Approval.

C. *The Court Should Grant Final Approval of the Settlement.*

"Settlement agreements enjoy great favor with the courts as a preferred alternative to costly, time-consuming litigation." *Fid. & Guar. Ins. Co. v. Star Equip Corp.*, 541 F.3d 1, 5 (1st Cir. 2008) (quotation omitted). While the proponent of a class action settlement must demonstrate that the settlement is fair, reasonable and adequate, usually "there is a presumption in favor of the settlement" where, as here, "discovery has been adequate and the parties have bargained at arm's length." *Nat'l Ass'n of Chain Drug Stores v. New Eng. Carpenters Health Benefits Fund*, 582 F.3d 30, 44 (1st Cir. 2009) (quotation omitted).

Courts in this circuit often look to four factors to determine whether a settlement should be presumed fair: "(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." *In re Lupron(R) Mktg. & Sales Practices Litig.*, 345 F. Supp. 2d 135, 137 (D. Mass. 2004) (quotation omitted); *In re Asacol Antitrust Litig.*, Civil Action No. 1:15-cv-12730 (DJC), 2017 U.S. Dist. LEXIS 158491, at *14 (D. Mass. Sep. 14, 2017) (quoting *Lupron*).

For the reasons set forth below, the Settlement more than meets the standard for final approval.

First, the Settlement is the result of intensive, arm's-length negotiations between experienced attorneys who are familiar with class action litigation and with the legal and factual issues of this action. The parties engaged in a formal mediation before an experienced and respected mediator and retired judge, the Honorable John C. Cratsley. Vallely Decl. ¶ 4.[3] The first mediation session was unsuccessful, and only after a full second day of mediation were the Parties able to reach an agreement on the core terms of the Settlement. *Id.* Even after that, the Parties negotiated vigorously concerning additional terms of the Settlement, as reflected in the Parties' requests for additional time from the Court to complete their negotiations. *Id.* Class Counsel zealously represented their clients at mediation, procuring a substantial recovery for the Class and a settlement structure that will ensure that real, meaningful cash benefits will go to Class Members.

***Second*,** Class Counsel took sufficient discovery in this action, and was therefore well-situated to assess the Settlement. In order to intelligently discuss settlement, Plaintiff procured from Defendants before agreeing to mediation information concerning the volumes of sales of the Subject Products and other information concerning those sales (including wholesale and retail price information). *Id.* ¶ 5. Defendants also produced additional information to Plaintiff concerning Defendants' defenses, including the products' alleged compliance with the Federal Trade Commission's Green Guides, which permitted Plaintiff to consider fully the risks associated with pressing forward with her claims. *Id.* In whole, Class Counsel obtained the necessary information in order to fully evaluate the risks and benefits of the Action before negotiating the Settlement.

[3] "Vallely Decl." refers to the Declaration of Patrick J. Vallely, attached to the motion as Exhibit C.

Third, Class Counsel are highly experienced litigators specializing in consumer class actions. The attorneys of record for Plaintiff together have dozens of years' experience litigating such actions. *See* Vallely Decl. ¶ 6 & Ex. 1 (firm resume for Class Counsel). Accordingly, they have the knowledge and understanding to competently evaluate the risks and the benefits of the proposed settlement. Based on this evaluation, Class Counsel strongly believe that the proposed settlement confers a significant benefit to Class Members. Vallely Decl. ¶ 7.[4]

In addition to the above factors, the substance of the Settlement itself provides evidence of its fairness. Specifically, Class Members will receive a substantial cash settlement benefit, with or without proof of purchase (although the benefit will be limited to two products if the Class Member lacks proof of purchase). Moreover, in the event that the Claims submitted do not exhaust the fund created by the Settlement, the cash benefit to Class Members may be increased by a multiple of up to 2.0 to ensure that the largest possible portion of the proceeds of the Settlement go to Class Members.

Additionally, the claims process set forth in the Settlement is designed to ensure Class Members are the ultimate beneficiaries of the Settlement. The Parties negotiated a simplified, one-page Claim Form in order to encourage Class Members to submit claims. Moreover, more than 900,000 Class Members have received personalized notice of the Settlement, the vast majority by email. Those Class Members receiving notice by email can click on a button in the

[4] As noted, one of the factors relevant to class settlement approval is how many objections have been filed. No objections have yet been filed, but the deadline to file objections is not until March 20, 2019. The parties set the objection deadline approximately one month after the deadline for this motion so that Class Members could, in deciding whether to object, consider all materials submitted in support of approval of the Settlement and the application for attorneys' fees and expenses. Plaintiff will respond to any objections no later than March 29, 2019, or if no objections are filed, Plaintiff will confirm to the Court the absence of objections.

email to go to an online Claim Form pre-populated with the Class Member's information, thus simplifying the claims process and encouraging claims.

In summary, Plaintiff and Class Counsel are confident in the strength of their case but are also pragmatic in their awareness of the various defenses available to Defendants and the risks inherent in continued litigation. The immediate, cash recovery provided by the Settlement provides an excellent result when considering the risks inherent in this litigation and the delay that would necessary occur from protracted litigation. Based on their experience as counsel in similar complex class actions, Class Counsel concludes the Settlement is outstanding, both given the complexity of the litigation and the significant risks and barriers that would have continued to loom in the absence of the Settlement.

D. ***The Requested Attorneys Fees and Out-of-Pocket Expenses Are Reasonable***

Plaintiff and her counsel seek an award of attorneys' fees, costs, and the costs of administration of the Settlement. The Notice disclosed that Plaintiff's counsel would seek attorneys' fees in an amount up to one-third of the total recovery, plus reasonable expenses incurred in pursing this Action. Perry Decl. Exs. 2, 3, 4. Through this motion herewith, Plaintiffs' Counsel seeks an award of attorneys' fees in the amount of $750,000—a bit less than one-third of the $2.33 million common fund.

The First Circuit has endorsed the percentage of the fund method for determining attorneys' fees in common fund class action settlements such as this one. *In re Thirteen Appeals Arising out of the San Juan Dupont Plaza Hotel Fire Litig.*, 56 F.3d 295, 305 (1st Cir. 1995), *citing* Federal Judicial Center, *Awarding Attorneys' Fees and Managing Fee Litigation*, 63-64 (1994); *see also In re Lupron Marketing and Sales Practices Litig.*, No. 01-10861-RGS, 2005 WL 2006833, *3 (D. Mass. Aug. 17, 2005) (Stearns, J.) (noting the First Circuit's acknowledgment of the advantages to the percentage method, specifically that "it is less

burdensome to administer, it reduces the possibility of collateral disputes, it enhances efficiency throughout the litigation, it is less taxing on judicial resources, and it better approximates the workings of the marketplace."). The percentage of the Settlement Fund requested here is consistent with percentages typically awarded by courts in this district.[5]

Consideration of Class Counsel's lodestar provides an appropriate cross-check for the appropriateness of a common fund award. *Bezdek v. Vibram USA, Inc.*, 809 F.3d 78, 84 (1st Cir. 2015). Courts in this district also regularly award multipliers, often over 2 or 3 times class counsel's lodestar.[6] Here, the requested fee is well within that acceptable range. Specifically,

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[5] *See also In re Biopure Corp. Sec. Litig.*, C.A. No. 03-12628-NG (Sept. 24, 2007) (33 1/3% award) ; *In re: Ibis Tech. Sec. Litig.,* C.A. No. 04-10446-RCL (April 26, 2007) (33% award); *In re: Network Engines, Inc. Sec. Litig.*, C.A. No. 03-12529-JLT (July 25, 2006) (33% award); *Swack v. Credit Suisse First Boston LLC,* C.A. No. 02-11943-DPW (June 26, 2006); *Ahearn v. Credit Suisse First Boston LLC*, C.A. No. 03-10956 JLT (June 7, 2006) (33% award); *Stein v. Smith,* C.A. No. 01-10500-WGY (Oct. 18, 2005) (33% award in ERISA action); *In re Relafen Antitrust Litig.*, 231 F.R.D. 52 (D.Mass. 2005) (33⅓% award); *In re: Nx Networks Sec. Litig.*, C.A. No. 00-11850-JLT (Nov. 22, 2004) (33% award); *Wilensky v. Digital Equip. Corp.*, C.A. No. 94-10752-JLT (July 11, 2001) (33% award); *In re: Summit Tech. Sec. Litig.*, C.A. No. 96-11589-JLT (Apr. 25, 2001) (33% award); *In re: Number Nine Visual Tech. Corp. Sec. Litig.*, Master File No. 96-11207 (Feb. 6, 2001) (awarding 33⅓%); *In re: Segue Software, Inc.*, C.A. No. 99-10891-RGS (July 31, 2001) (33% award); *In re: Peritus Software Svc., Inc. Sec. Litig.*, C.A. No. 98-CV-10578 (Feb. 28, 2000) (33% award)*; Chalverus v. Pegasystems, Inc.*, C.A. No. 97-12570-WGY (Dec. 19, 2000) (33% award); *Zeid v. Open Env't Corp.*, C.A. No. 96-12466-EFH (June 24, 1999) (33% award); *In re: Picturetel Corp. Sec. Litig.*, C.A. No. 97-12135-DPW (Nov. 4, 1999) (33% award); *In re: WebSecure Sec. Litig.*, C.A. No. 97-10662-GAO (Sept. 14, 1999) (33% award); *Morton v. Kurzweil Applied Intelligence, Inc.*, C.A. No. 10829-REK (Feb. 4, 1998) (33% award); *In re: Zoll Med. Corp. Sec. Litig.*, C.A. No. 94-11579-NG (Oct. 5, 1998) (33⅓% of settlement); *In re: Copley Pharm., Inc. Sec. Litig.*, C.A. No. 94-11897-WGY (Feb. 8, 1996) (33⅓% fee awarded out of a $6.3 million settlement fund); *In re: V-Mark Software, Inc. Sec. Litig.*, C.A. No. 95-12249-EFH (Nov. 24, 1998) (33% award); *Abato v. Marcam Corp.*, C.A. 94-11625-WGY (July 29, 1996) (33% award).

[6] *See Swack v. Credit Suisse First Boston*, No. 02-11943-DPW (D. Mass. July 26, 2006) (multiplier of 1.7)*; Ahearn v. Credit Suisse First Boston LLC*, No. 03-10956-JLT (D. Mass. June 7, 2006) (multiplier of 2.8); *In re Aspen Technology, Inc. Sec. Litig.* No. 04-12375-JLT (D. Mass. March 6, 2006) (multiplier of 6); *In re CVS Corp Sec. Litig,* No. 01-11464-JLT (D. Mass. Sept. 7, 2005) (multiplier of 3.2); *In re Relafen Antitrust Litig.*, 231 F.R.D. 52, 82 (D. Mass. Sept. 28, 2005) (multiplier of 2.02); *In re Boston & Maine Corp.*, 778 F.2d 890, 894 (1st Cir. 1985) (multiplier of 6).

Plaintiffs' Counsel's lodestar through August 1, 2012 is $316,037.50. If the requested $750,000 fee were awarded, this would result in a modest multiplier of approximately 2.4. Plaintiffs' Counsel's summary lodestar information through Friday, February 15, 2019 is contained in the table below:[7]

Name	Position	Rate	Hours	Lodestar
Edward F. Haber	Senior Partner	$925.00	39.8	$36,815.00
Thomas G. Shapiro	Counsel[8]	$925.00	19.7	$18,222.50
Thomas V. Urmy	Counsel	$925.00	1.8	$1,665.00
Ian J. McLoughlin	Partner	$720.00	22.6	$16,272.00
Michelle H. Blauner	Partner	$820.00	0.4	$328.00
Adam M. Stewart	Senior Associate	$575.00	3.3	$1,897.50
Patrick J. Vallely	Senior Associate	$575.00	405.3	$233,047.50
Jonathan Dinerstein	Associate	$350.00	1.3	$455.00
Robert Erickson	Paralegal	$225.00	1.5	$337.50
Tyler Jankauskas	Paralegal	$225.00	14.4	$3,240.00
Tyler Purinton	Paralegal	$225.00	16.7	$3,757.50
		Total		**$316,037.50**

Class Counsel will incur additional time going forward addressing issues that arise throughout the administration of the Settlement, including responding to class member inquiries, responding to any objections, and directing and handling the distribution of Settlement funds. Thus, the number of hours reflected in the table above does not fully capture all the time that Class Counsel will have expended by the time that this action has been brought to its successful

[7] *See* Vallely Decl. ¶¶ 8, 9 .

[8] At the time Thomas G. Shapiro and Thomas V. Urmy performed work in this case, they were Senior Partners.

conclusion. As a result, the modest multiplier requested will be reduced once all the necessary work has been completed.

Class Counsel respectfully submit that in light of the excellent results achieved, the amount of time that Class Counsel has spent prosecuting the action, the experience of Class Counsel with consumer litigation and class actions, the amounts awarded in comparable cases in this district, the fee requested is fully reasonable.

In addition, the Plaintiffs' litigation costs should be reimbursed out of the Settlement Fund. Plaintiffs' Counsel seeks reimbursement of the $6,482.45 in out-of-pocket litigation costs that they have actually expended in this case, as described in the table below and in the Declaration of Patrick Vallely[9]:

Category	**Expense**
Delivery	$103.71
Filing Fee	$400.00
Mediation Expense	$3,948.00
Printing/Copies	$935.70
Postage	$8.45
Legal Research	$955.28
Telephone Conference	$59.31
Travel	$72.00
Total	**$6,482.45**

E. ***Costs of Settlement Administration to the Settlement Administrator***

Plaintiff will also seek through the final approval order authorization of disbursement to Settlement Administrator for costs incurred in connection with notice and the administration of the settlement. To be clear, the out-of-pocket expenses of Class Counsel identified in the

[9] Vallely Decl. ¶ 10.

preceding section do **not** include costs relating to the provision of notice and the administration of the settlement. An s of the date of this motion, the claims process is still open, and Plaintiff will make a further submission after the claims process is closed concerning the amount of costs relating to notice and settlement administration, which will be included in the final approval order as payable to the Settlement Administrator.

The primary cost incurred by the Settlement Administrator was for the provision of notice, including the physical mailing of notice to more than 315,000 Class Members (including printing costs and postage) and the printing of settlement benefit checks to Class Members. The Settlement Administrator also (i) designed and implemented a media campaign that together with the personal notice was designed to reach 70% of Class Members; (ii) created and maintained a website providing further information on the Settlement and permitting for the submission of claims online; (iii) imported data provided by Defendants concerning certain Class Members into a database that permitted Class Members to submit claims online based on data obtained from Defendants; (iv) and maintained a telephone line to provide Class Members an additional method to obtain information about the Settlement. Included in the expenses for the Settlement Administrator is also the review of claims submitted (to ensure the legitimacy of claims and denial of fraudulent claims) and the distribution of benefits to Class Members (including printing and mailing of settlement benefit checks), which are tasks that have not yet been performed because the claims deadline has not yet occurred.

F. *The Court Should Authorize Payment of a Service Award to Plaintiff Molly Crane.*

The Settlement contemplates a service award to Plaintiffs Molly Crane in the amount of $2,000, in recognition of her initiative in undertaking this action for the benefit of the Class Members, and the substantial assistance they have provided to Class Members and Class Counsel

throughout the litigation, as detailed in their Declaration of Patrick J. Vallely. Specifically, Ms. Crane assisted counsel in their investigation, responded to discovery, and consulted with her counsel in the consideration of the Settlement.

"Courts routinely approve incentive awards to compensate representative plaintiffs for the services they provided and the risks they incurred during the course of the class action litigation." *Ingram v. The Coca-Cola Co.*, 200 F.R.D. 685, 694 (N.D. Ga. 2001) (citations omitted). The leading class action treatise explains:

> Class members who serve as named plaintiffs, or class representatives, in class actions often have their service acknowledged by a court-approved "incentive award." …[C]ourts regularly approve such awards, reasoning that class representatives take on risks and perform services that benefit the class, although they aim to keep the award commensurate to the work actually performed.

4 Newberg on Class Actions § 11:38 (4th ed.). Courts routinely approve awards substantially greater than the service award Plaintiff seeks here. *See, e.g., Olmeda v. AM Broadband,* LLC, No. 3:06-cv-30051-KPN, Doc. No. 141 at 4 (D. Mass. Oct. 14, 2009) (awarding additional compensation of $7,500 to plaintiff); *In re Dun & Bradstreet Credit Servs. Customer Litig.*, 130 F.R.D. 366, 373-74 (S.D. Ohio 1990) (awarding incentive awards ranging from $35,000 to $50,000 and citing cases); *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998) (granting request for $25,000 incentive award); *Winnell v. Couto*, No. 09-15070-BLS2 (Mass. Super. Ct. Feb. 9, 2011) (awarding additional compensation of $10,750 and $5,000 to representative plaintiffs); *Kane v. Gage Merchandising Servs., Inc., et al.*, C.A. No. 00-40185 (NMG) (D. Mass. May 22, 2002); *Loughran v. United Servs. Automobile Ass'n, Inc.*, C.A. No. 00-12387 (RWZ) (D. Mass. Oct. 19, 2002).

As reflected in the authorities cited above, the requested service award of $2,000 for Ms. Crane is modest compared to service awards granted in other cases, and appropriately reflects the relatively early stages of this litigation. The Court should grant the requested service award.

IV. CONCLUSION

The Settlement with Defendants for $2.33 million in cash compensation recovered for the benefit of Class Members represents an outstanding result. The Settlement satisfies the fairness and reasonableness standards of Rule 23(e). Further, Class Counsel's application for attorneys' fees and expenses is reasonable.

Based on the foregoing, Plaintiff and Class Counsel respectfully request the Court:

1. grant final approval to the Settlement;
2. certify the Class as defined in this motion and the Settlement;
3. find that the notice afforded to Class Members as reflected in the affidavit of Andrew Perry, was adequate;
4. bar and enjoin any Class Members who do not seek exclusion from asserting, instituting, or prosecuting, directly or indirectly, any Released Claims in any court or other forum against any of the Released Parties.; and
5. award Class Counsel $750,000 in attorneys' fees and $6,482.45 for out-of-pocket expenses Class Counsel has incurred in prosecuting this Action;
6. authorize a distribution to compensate the Settlement Administrator for its services (in an amount to be determined after the claims period is closed, which will be presented to the Court in a further submission);
7. approve a service award of $2,000 to plaintiff Molly Crane for her service as class representative in this Action;

For the Court's convenience, Plaintiff and Class Counsel attach as Exhibit D to the motion a proposed order granting final approval of the Settlement (this same proposed order in substance is attached as Exhibit 3 to the Settlement, except for the insertion of paragraph 14A, which expressly authorizes payment to the Settlement Administrator —a term that was inadvertently omitted from the original proposed final approval order).

Dated: February 19, 2019

Respectfully submitted,

/s/ Patrick J. Vallely

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CERTIFICATE OF SERVICE

I hereby certify that the above and foregoing pleading and its attachments was filed electronically through the Court's electronic filing system and that notice of this filing will be sent to all counsel of record in this matter by operation of the Court's ECF system.

Dated: February 19, 2019

/s/ Patrick J. Vallely
Patrick J. Vallely