UNITED STATE DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

STEPHEN DEL SESTO, AS RECEIVER AND ADMINISTRATOR OF THE ST. JOSEPH HEALTH SERVICES OF RHODE ISLAND RETIREMENT PLAN, ET AL.	:	
Plaintiffs	:	
v.	:	C.A. No:1:18-CV-00328-WES-LDA
PROSPECT CHARTERCARE, LLC, ET AL.	:	
Defendants.	:	

PLAINTIFFS' COUNSEL'S MOTION FOR ATTORNEYS' FEES IN CONNECTION WITH SETTLEMENT WITH THE PROSPECT ENTITIES, RELATED INDIVIDUALS, AND THE ANGELL PENSION GROUP, INC.

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INTRODUCTION

The law firm of Wistow, Sheehan & Loveley, PC ("WSL") submits this motion for attorneys' fees.

WSL represents Plaintiffs Stephen Del Sesto (as Receiver and Administrator of the St. Joseph Health Services of Rhode Island Retirement Plan) (the "Plan Receiver"), and Gail J. Major, Nancy Zompa, Ralph Bryden, Dorothy Willner, Caroll Short, Donna Boutelle, and Eugenia Levesque, individually as named plaintiffs (the "Individual Named Plaintiffs").[1] WSL also has been preliminarily appointed class counsel for the Settlement Class in connection with the settlement (the "Proposed Settlement") with Defendants Prospect Medical Holdings, Inc., Prospect East Holdings, Inc., Prospect Chartercare, LLC, Prospect Chartercare SJHSRI, LLC, Prospect Chartercare RWMC, LLC, (collectively referred to herein as "Prospect"), and The Angell Pension Group, Inc. ("Angell") (Prospect and Angell being collectively the "Settling Defendants").

WSL was previously appointed class counsel in connection with the two prior settlements (Settlement A and Settlement B) that this Court has previously approved in this case.

WSL seeks an attorneys' fee of 23 1/3% of the gross recovery from the Proposed Settlement. This is the contingent fee set forth in WSL's Retainer Agreement with the Plan Receiver and approved by the Rhode Island Superior Court at the outset of WSL's

[1] The Court has preliminarily certified the Settlement Class and the Individual Named Plaintiffs as Settlement Class Representatives in connection with the Proposed Settlement.

representation of the Plan Receiver in the latter half of 2017.[2] This is also the attorneys' fee approved by this Court in connection with Settlement A and Settlement B.[3] It is also the fee approved by the Rhode Island Superior Court subject to the approval of this Court, in connection with the Proposed settlement.

In support of this motion, WSL herewith files the Supplemental Declaration of Stephen P. Sheehan dated April 8, 2021 ("Sheehan Supp. Dec."). WSL also incorporates by reference Plaintiffs' Motion for Preliminary Settlement Approval and related relief (ECF ## 206 & 206-1 through 206-4) ("Plaintiffs' Motion for Settlement Approval") and the Declaration of Stephen P. Sheehan ("Sheehan Dec.") (ECF ## 207 & 207-1 through 207-27) which were filed on March 11, 2021.

These submissions of March 11th include the following five declarations, which were initially filed in the Rhode Island Superior Court on January 25, 2021 in connection with seeking the Superior Court's approval of the Proposed Settlement, as exhibits to the Plan Receiver's Petition for Settlement Instructions and Approval:

- The Declaration of the Hon. Frank J. Williams, C.J. (Ret.) ("Williams Dec."), sworn to on January 19, 2021, concerning the mediation and terms of the Proposed Settlement, and the fees to be awarded to Plaintiffs' counsel Wistow, Sheehan & Loveley, PC ("WSL");[4]

[2] ECF # 207 (Sheehan Dec.) ¶ 14; ECF # 207-12 (WSL Retainer Agreement) (the Retainer Agreement provides that "[i]f suit is brought, the [Plan] Receiver agrees to pay as legal fees twenty-three and one-third percent (23 1/3%) of the gross of any amount thereafter recovered by way of suit, compromise, settlement, or otherwise.").

[3] As a result of the Special Master's referring to WSL's contingent fee under the Retainer Agreement as 23.3% instead of 23 1/3%, WSL ultimately was paid a fee in the lesser amount of 23.3%.

[4] ECF # 207-2.

- The Declaration of Arlene Violet, Esq. ("Violet Dec."), sworn to on January 21, 2021, who represents over 285 Plan participants,[5] in support of the Proposed Settlement and the fees to be awarded to WSL;[6]

- The Declaration of Christopher Callaci, Esq. ("Callaci Dec."), sworn to on January 15, 2021, who in his capacity as General Counsel for United Nurses and Allied Professionals ("UNAP") represents the approximately 400 Plan participants who are members of UNAP, in support of approval of the Proposed Settlement and the fees to be awarded WSL;[7]

- The Declaration of Jeffrey W. Kasle, Esq. ("Kasle Dec."), sworn to on January 18, 2021, who represents 247 Plan participants, in support of approval of the Proposed Settlement and the fees to be awarded WSL;[8] and

- The Declaration of the Plan Receiver ("Del Sesto Dec."), sworn to on January 22, 2021, concerning the fees to be awarded WSL.[9]

BACKGROUND

The facts relevant to WSL's Motion for Attorneys' Fees are part of the much broader factual scenario set forth in Plaintiffs' Motion for Preliminary Settlement Approval.

As stated therein, the Plan Receiver obtained permission from the Superior Court to retain WSL as his "Special Litigation Counsel" to investigate and assert possible claims that may benefit the Plan, pursuant to Special Counsel's retainer agreement ("WSL's Retainer Agreement"). WSL's Retainer Agreement was submitted to and

[5] Attorneys Violet, Kasle and Callaci were originally retained by certain Plan participants in connection with negotiations with the Plan Receiver and advocacy in the Plan Receivership Proceedings concerning the allocation of possible cuts in benefits. That is an issue in which WSL has not been and will not be involved.

[6] ECF # 207-3.

[7] ECF # 207-4.

[8] ECF # 207-5.

[9] ECF # 207-6.

approved by the Superior Court prior to its execution.[10] The Order granting the Plan Receiver's petition to retain WSL referred to the retainer agreement as the "Engagement" and stated in pertinent part:

> That for the reasons stated in the Receiver's Petition and in accordance with the terms of the Engagement, attached to the Petition as Exhibit A and incorporated herein by reference, the Receiver is hereby authorized to retain the law firm of Wistow Sheehan & Love[e]ly PC ("WSL") to act as the Receivership Estate's special litigation counsel for the purposes more specifically set forth in the Petition and the Engagement . . . .[11]

As previously noted, WSL's Retainer Agreement provided for a contingent fee after the commencement of suit of 23 1/3% of the gross recovery.[12]

With the approval of the Plan Receiver, WSL was also retained by seven individual Plan participants, Gail J. Major, Nancy Zompa, Ralph Bryden, Dorothy Willner, Caroll Short, Donna Boutelle, and Eugenia Levesque (the aforementioned Individual Named Plaintiffs) to investigate and assert claims on their behalf.[13] The Individual Named Plaintiffs agreed to act on their own behalf and on behalf of the other Plan participants in a class action (the "Class Action").[14] Each of the Individual Named Plaintiffs entered into a separate retainer agreement with WSL which stated in pertinent part as follows:

> WSL believes that the Receiver has standing to bring all necessary claims to protect participants and participants' beneficiaries. However, it is expected that there may be issues raised as to whether or not participants and participants' beneficiaries have the standing as to certain claims. To

[10] ECF # 207 (Sheehan Dec.) ¶ 12; ECF # 207-10 (Order authorizing Receiver to retain WSL as Special Counsel).

[11] ECF # 207 (Sheehan Dec.) ¶ 10; ECF # 207-11 (Order granting emergency petition).

[12] ECF # 207 (Sheehan Dec.) ¶ 14; ECF # 207-12 (WSL Retainer Agreement).

[13] ECF # 207 (Sheehan Dec.) ¶ 15.

[14] ECF # 207 (Sheehan Dec.) ¶ 15.

> mitigate that potential issue, WSL is proposing to join class action claims along with the claims of the Receiver. You will be one of several persons represented by WSL named with regard to the class action claims.[15]

In other words, because the damages in the case concerned underfunding of the Plan and the remedy sought was payment into the Plan, it was believed that the Plan Receiver was the proper and sufficient party to assert all claims.[16] The Individual Named Plaintiffs and the putative class were included, notwithstanding that they would receive no recovery apart from the obvious benefit they derive from the increase to the assets of the Plan, to moot any argument to the contrary.[17]

Plaintiffs filed their Complaint in this case on June 18, 2018.[18] The Complaint set forth Plaintiffs' claims in 527 detailed paragraphs and twenty-one counts.[19]

The Plan Receiver subsequently entered into two settlement agreements, both of which were subject to (and ultimately received) the approval of this Court and the Rhode Island Superior Court.[20]

The first settlement ("Settlement A") was of the Plan Receiver's claims against CharterCARE Community Board ("CCCB"), St Joseph Health Services of Rhode Island ("SJHSRI"), and Roger Williams Hospital ("RWH"), and involved an initial gross cash recovery of $12,681,202.91 and certain additional transfers, commitments and

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[15] ECF # 207 (Sheehan Dec.) ¶ 16; ECF # 207-13 through ECF # 207-19 (WSL Retainer Agreements with the seven Individual Named Plaintiffs).

[16] ECF # 207 (Sheehan Dec.) ¶ 17.

[17] ECF # 207 (Sheehan Dec.) ¶ 17.

[18] ECF # 1 (Complaint dated June 18, 2020).

[19] ECF # 1 (Complaint dated June 18, 2020). Plaintiffs filed their First Amended Complaint on October 5, 2018. ECF # 60 (First Amended Complaint).

[20] ECF # 207 (Sheehan Dec.) ¶ 20.

stipulations, which were intended to position the Plan Receiver for additional recoveries on behalf of the Plan,[21] which included the following:

- CCCB's percentage interest (initially 15%) in Prospect Chartercare, LLC[22] and CCCB's claims against Prospect (which were collectively identified as "CCCB's Hospital Interests") would be held by CCCB in trust for the Plan Receiver;
- CCCB's membership interest in Defendant CharterCARE Foundation ("CCF") was assigned to the Plan Receiver to further support the Plan Receiver's claim against CCF;[23]
- SJHSRI, CCCB and RWH stipulated to liability at least for breach of contract and to damages of at least $125 million; and
- SJHSRI, RWH and CCCB committed to file petitions for liquidation in the Rhode Island Superior Court with the Plan Receiver as the sole secured creditor with priority to all of their assets up to the amount of the unpaid balance of at least $125 million.[24]

The second settlement ("Settlement B") was of the Plan Receiver's claims against CCF (principally concerning allegedly fraudulent transfers from CCCB, SJHSRI and RWH to CCF) and involved a gross recovery of $4.5 million.[25]

The Court appointed Deming Sherman, Esq. as Special Master to review WSL's fee application and make a report and recommendation to the Court.[26]

[21] ECF # 207 (Sheehan Dec.) ¶ 21.

[22] Prospect Chartercare, LLC is the sole member of the entities that acquired Our Lady of Fatima Hospital and Roger Williams Medical Center in 2014. CCCB received a membership interest in Prospect Chartercare, LLC in connection with that 2014 transaction.

[23] This interest was ultimately assigned by the Plan Receiver to CCF in connection with Settlement B (which involved the payment of $4.5 million).

[24] ECF # 207 (Sheehan Dec.) ¶ 21.

[25] ECF # 207 (Sheehan Dec.) ¶ 22; ECF # 207-21 (Settlement Agreement in Settlement B).

[26] Text Order dated September 5, 2019.

The Special Master submitted his Report and Recommendation on Award of Attorneys' Fees on October 14, 2019.[27] The Special Master noted that WSL sought no fees for representing the Class in addition to the fees to which WSL was entitled under the Retainer Agreement, "[s]ince WSL was working toward a common goal for both the Receiver and the class members for the ultimate benefit of the Plan participants…."[28] The Special Master noted that, pursuant to the Retainer Agreement approved by the Rhode Island Superior Court, WSL had been paid fees totaling $552,281.25 for time charges incurred in connection with pre-suit investigation, which had been billed at the significantly reduced hourly rate of $375 per hour stipulated in the Retainer Agreement.[29] The Special Master also noted that WSL had voluntarily agreed to reduce the amount of its contingent fee by $552,281.25, giving a credit for its hourly time charges against its contingent fee.[30]

The Special Master recommended "that WSL be awarded fees consistent with the Fee Agreement negotiated with the Plan Receiver in 2017, that is, 23.3%[31] of the

[27] ECF # 165.

[28] ECF # 165 at 7.

[29] ECF # 165 at 6 n.7 ("WSL states that $375/hour is a discounted rate and that WSL's usual blended rate is $600 in non-contingent fee cases. Plaintiffs' Counsel's Final Approval Memorandum (Settlement B), p.36, ECF No. 140; Wistow Second Supplemental Declaration ¶¶8-10, ECF No. 145; Declaration of Stephen P. Sheehan, ECF No. 161.").

[30] ECF # 165 at 7 ("**While the Fee Agreement does not require this**, WSL has agreed that the $552,281.25 that it received for the investigation should be deducted from the contingent fees awarded.") (emphasis supplied).

[31] As previously noted, Special Master Sherman referred to WSL's contingent fee as being 23.3% rather than 23 1/3%.

common fund less the credit for work in the investigative stage…plus 23.3%[32] of any additional funds recovered."[33]

The Special Master offered two reasons for his recommendation: a) the fee was in accordance with WSL's Retainer Agreement which had been approved by the Superior Court; and b) the fee was below the benchmark of 25% regularly approved in the First Circuit for attorneys' fees in connection with class action settlements involving recovery of a common fund.[34]

With respect to the first reason, the Special Master noted as follows:

> The Fee Agreement is a significant factor in support of WSL's request. The Fee Agreement between WSL and the Receiver was negotiated by the Receiver and approved by the Superior Court. Wistow Declaration, Ex. 5, ECF No. 65-5. Judge Stern of the Superior Court is, to my knowledge, a highly capable judge, sophisticated in complex litigation, and his approvals of both the Fee Agreement and the fees awarded in Settlement B are noteworthy. While his approvals are not necessarily binding on this Court, they are entitled to considerable deference….
>
> The Receiver has a fiduciary responsibility to the Plan as well as obligations to the Court as an officer thereof. Therefore, it makes a difference that the Receiver negotiated the Fee Agreement, approved the award of fees for both Settlement A and B, and obtained the blessing of the Superior Court for both the Fee Agreement as well as for the award of fees pursuant to that Agreement.[35]

With respect to the second reason, the Special Master noted as follows:

> There is First Circuit authority for the proposition that the benchmark percentage for POF cases is 25% of the common fund. "Within the First

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[32] See n.31, *supra*.

[33] ECF # 165 at 19. The reference to "any additional funds recovered" referred to both Plaintiffs' additional initial recoveries in connection with Settlement A and any future recovery pursuant to the aforementioned transfers, commitments and stipulations in Settlement A which were intended to position the Plan Receiver for additional recoveries on behalf of the Plan.

[34] ECF # 165 at 19.

[35] ECF # 165 at 14-15.

> Circuit, courts generally award fees 'in the range of 20-30%, with 25% as "the benchmark." ' " Bezdek v. Vibram USA Inc., 79 F. Supp. 3d 324, 349-350 (D. Mass. 2015) (quoting Latorraca v. Centennial Techs., Inc., 834 F. Supp. 2d 25, 27-28 (D. Mass. 2011), *aff'd*, 809 F. 3d 78, 85 (1st Cir. 2015).[36]

The Court accepted the Special Master's Report and Recommendations "in full" and granted WSL's fee applications for both Settlement A and Settlement B.[37]

Plaintiffs represented by WSL continued this action against the remaining defendants and WSL also represented Plaintiffs in connection with related litigation, including the following:

- in the Rhode Island Superior Court matter captioned Chartercare Community Board, individually and derivatively, as member of Prospect Chartercare, LLC and as trustee of the beneficial interest of its membership interest in Prospect Chartercare, LLC v. Samuel Lee, et al., C.A. No. PC-2019-3654 ("CCCB v. Lee");[38]

- in the administrative proceeding captioned In re: Change in Effective Control Applications by Prospect Chartercare RWMC, LLC and Prospect Chartercare SJHSRI, LLC, et al. (the "CEC Applications"), concerning *inter alia* Fatima Hospital and Roger Williams Medical Center;[39]

- in the administrative proceeding captioned Hospital Conversion Initial Application of Chamber Inc.; Ivy Holdings Inc.; Ivy Intermediate Holdings, Inc. [sic]; Prospect Medical Holdings, Inc.; Prospect East Holdings, Inc.; Prospect East Hospital Advisory Services, LLC; Prospect CharterCARE,

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[36] ECF # 165 at 15.

[37] Docket Entry dated October 24, 2019 ("TEXT ORDER adopting [165] Report and Recommendations, granting [64] Motion for Attorney Fees, and, granting [78] Motion for Attorney Fees: After considering the Report and Recommendations of the Special Master, and having heard no objections, the Court ACCEPTS and ADOPTS [165] Report and Recommendations in full. Accordingly, the Court GRANTS [64] Motion for Attorneys' Fees and [78] Second Motion for Attorneys' Fees. So Ordered by Chief Judge William E. Smith on 10/24/2019.").

[38] ECF # 207 (Sheehan Dec.) ¶ 28. On January 17, 2020, Thomas Hemmendinger was appointed the permanent liquidating receiver (the "Liquidating Receiver") for CCCB, SJHSRI, and RWH. ECF # 207 (Sheehan Dec.) ¶ 38. On April 21, 2020, the Plan Receiver joined in CCCB v. Lee as a party plaintiff and together with the Liquidating Receiver filed a First Amended Complaint in CCCB v. Lee. ECF # 207 (Sheehan Dec.) ¶ 39.

[39] ECF # 207 (Sheehan Dec.) ¶ 34.

LLC; Prospect CharterCARE SJHSRI, LLC; Prospect CharterCARE RWMC, LLC (the "HCA Applications");[40]

- in the Rhode Island Superior Court matter captioned In re: CharterCare CharterCARE Community Board, St. Joseph Health Services of Rhode Island And Roger Williams Hospital (C.A. No. PC-2019-11756) (the "Liquidation Proceedings"); and

- in the Chancery Court of Delaware in the proceeding captioned Prospect Medical Holdings, Inc.; Prospect East Holdings, Inc. v. Chartercare Community Board (Case No. 2019-1018).[41]

It is impossible to fully summarize either the scope or complexity of the various lawsuits (and the legal and factual issues) between the Plan Receiver and the Settling Defendants without making this memorandum even more lengthy. WSL has devoted over 8,085 hours to the representation of Plaintiffs in connection with this matter and the related litigation and administrative proceedings involving the Prospect Entities that are listed on pages 9-10 above.[42] Another especially significant measure is that the parties have made over 700 separate filings in the state courts and in this Court.[43] These court filings total nearly 23,000 pages.[44] In addition to the court filings, the submissions to state regulators in connection with the administrative proceedings arising out of the CEC and HCA Applications and the objections thereto of the Plan Receiver and the Liquidating Receiver involve many more thousands of pages.[45]

In early November of 2020, Plaintiffs, Prospect and Angell agreed to participate in a settlement mediation with retired Rhode Island Supreme Court Chief Justice Frank

[40] ECF # 207 (Sheehan Dec.) ¶ 35.

[41] ECF # 207 (Sheehan Dec.) ¶ 37 (Exhibit 24) (complaint).

[42] Sheehan Supp. Dec. ¶ 2.

[43] ECF # 207 (Sheehan Dec.) ¶ 64.

[44] ECF # 207 (Sheehan Dec.) ¶ 64.

[45] ECF # 207 (Sheehan Dec.) ¶ 64.

Williams as mediator.[46] As of December 30, 2020, Plaintiffs and the Settling Defendants agreed on the terms set forth in the Settlement Agreement.[47]

In summary, the agreement provides for payment of thirty million dollars ($30,000,000) upon final approval of the Proposed Settlement by the Court in this case.[48] Prospect's contribution to the settlement is twenty-seven million two hundred fifty thousand dollars ($27,250,000).[49] Angell's contribution is two million seven hundred fifty thousand dollars ($2,750,000).[50]

Five million dollars of Prospect's contribution to the settlement is allocated to what the Settlement Agreement refers to as "CCCB's Hospital Interests," that the Plan Receiver obtained in connection with Settlement A. Thus, five million dollars of the Proposed Settlement is also attributable to WSL's representation of the Plaintiffs against the defendants involved in Settlement A. CCCB's Hospital Interests consist of both CCCB's membership interest (of nominally 15%) in Prospect Chartercare, LLC and CCCB's other claims against Prospect Chartercare, LLC.[51] These Hospital Interests were assigned to the Plan Receiver in connection with Settlement A, but Prospect (prior to the instant settlement) was contesting even the validity of that assignment.[52] The Settlement Agreement provides that of such sum, four million dollars is allocated to the

[46] ECF # 207 (Sheehan Dec.) ¶ 50.

[47] ECF # 207-1 (Settlement Agreement) at 1.

[48] ECF # 207-1 (Settlement Agreement) at 11–12.

[49] ECF # 207-1 (Settlement Agreement) at 11.

[50] ECF # 207-1 (Settlement Agreement) at 11.

[51] ECF # 207-1 (Settlement Agreement) at 15.

[52] See ECF # 165 (Special Master Sherman's Report and Recommendations on Award of Attorneys' Fees) at 5 (CCCB's Hospital Interests "could be of significant value, but the value is not known at this time and the assignment is contested.").

purchase price for CCCB's membership interest in Prospect Chartercare, LLC, and the remaining balance of one million dollars is allocated to the rest of CCCB's Hospital Interests.[53] Special Master Sherman's recommendation, approved by this Court, was that WSL should be awarded 23.3% of the initial recovery in Settlement A "plus 23.3% of any additional funds recovered."[54] Now that the validity and value of CCCB's Hospital Interests have been established and quantified, the Special Master's recommendation, adopted by the Court, that WSL be paid an attorneys' fee for this recovery in accordance with WSL's Retainer Agreement comes into effect.

On January 25, 2021, the Plan Receiver filed his Petition for Settlement Instructions and Approval with the Rhode Island Superior Court, with notice to all parties who had participated in the Plan Receivership Proceedings, including the Diocesan Defendants.[55] At the same time the Liquidating Receiver filed his Petition for Settlement Instructions Regarding Settlement with Prospect Parties and the Angell Pension Group in the Liquidation Proceedings. There was no objection asserted to either petition.[56]

Both petitions were heard by the Rhode Island Superior Court on February 12, 2021. At the conclusion of the hearing Judge Stern put on the record his reasons for granting both petitions, and made the following statement concerning WSL's representation of the Plan Receiver and the appropriateness of WSL's contingent fee of 23 1/3%:

> As the Liquidating Receiver spoke about, he is compensated on an hourly basis and those fees, costs, and expenses will come before the Court in

[53] ECF # 207-1 (Settlement Agreement) at 15.

[54] ECF # 165 at 19.

[55] ECF # 207 (Sheehan Dec.) ¶ 56; ECF # 207-29 (Plan Receiver's Affidavit of Notice).

[56] ECF # 207 (Sheehan Dec.) ¶ 56.

> due course for approval. However, the Special Counsel to the Plan Receiver is paid at this point on a contingency fee basis. That contingency fee which was negotiated between the Plan Receiver and Special Counsel was previously approved by this Court and was approved by this Court in the prior settlement as well. With respect to the case presently before the Court and the petition, the Court finds that the contingency fees and costs are fair, reasonable, and certainly for the benefit of the plan receivership estate and that contingency fee as well as reasonable costs are approved.
>
> I understand completely that this Court only has the ability to grant the petition that is before the Court which includes allowing this case to proceed before the United States District Court with respect to the class actions and other claims. I understand that Judge Smith and Chief Judge Smith had appointed Attorney Deming Sherman as a special master to look at the fees, costs, and expenses in the prior application, and my understanding is that Attorney Sherman concurred that those fees were, in fact, fair and reasonable. I certainly understand that Judge Smith is going to need to consider these fees with respect to the class action. And that is one of the main reasons, as I mentioned before, that while the Court is giving a decision from the bench at this point so we can proceed forward, I will issue a set of findings as well to supplement the decision.[57]

On March 4, 2021, Judge Stern issued his written Decision (amended March 8, 2021)[58] setting forth the relevant facts and that court's reasoning in support of the court's finding that the Settlement Agreement "is fair, equitable, and in the best interests of the receivership estate" and "that the attorneys' fees [of 23 1/3%] are reasonable."[59]

Judge Stern devoted eight pages of the Decision to the Plan Receiver's request for authorization to pay attorneys' fees to WSL pursuant to the terms of the Retainer

[57] ECF # 207 (Sheehan Dec.) ¶ 57; ECF # 207-30 (Transcript of hearing on February 12, 2021) at 31-32.

[58] ECF # 206-1 (St. Joseph Health Services of Rhode Island, Inc. v. St. Joseph Health Services of Rhode Island Retirement Plan (C.A. No. PC-2017-3856) and In re: Chartercare Community Board; St. Joseph Health Services of Rhode Island; and Roger Williams Hospital (C.A. No. PC-2019-11756) (Rhode Island Superior Court, March 8, 2021)).

[59] ECF # 206-1 (St. Joseph Health Services of Rhode Island, Inc. v. St. Joseph Health Services of Rhode Island Retirement Plan (C.A. No. PC-2017-3856) and In re: Chartercare Community Board; St. Joseph Health Services of Rhode Island; and Roger Williams Hospital (C.A. No. PC-2019-11756) (Rhode Island Superior Court, March 8, 2021)) at 23.

Agreement, in the amount of 23 1/3 percent of the gross settlement amount.[60] Judge Stern analyzed WSL's fee application under the percentage of the fund ("POF") approach, stating that the POF approach "was previously contemplated by this Court when it approved the Retainer Agreement, including the amount of 23 1/3 percent of any settlement obtained."[61] Judge Stern specifically rejected analysis of WSL's fee application under the lodestar approach, stating that "it would be impracticable to apply the lodestar approach under the circumstances of the 'global settlement' due to the vast amount of proceedings, parties, filings, and efforts of counsel…."[62]

Pursuant to the POF approach, Judge Stern analyzed WSL's fee application under the "Goldberger factors":

> "'(1) the size of the fund and the number of persons benefitted; (2) the skill, experience, and efficiency of the attorneys involved; (3) the complexity and duration of the litigation; (4) the risks of the litigation; (5) the amount of time devoted to the case by counsel; (6) awards in similar cases; and (7) public policy considerations.'"[63]

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[60] ECF # 206-1 (St. Joseph Health Services of Rhode Island, Inc. v. St. Joseph Health Services of Rhode Island Retirement Plan (C.A. No. PC-2017-3856) and In re: Chartercare Community Board; St. Joseph Health Services of Rhode Island; and Roger Williams Hospital (C.A. No. PC-2019-11756) (Rhode Island Superior Court, March 8, 2021)) at 23 ("In addition, the Court finds that the attorneys' fees are reasonable. Accordingly, the Court approves the PSA, pursuant to § 23-17.14-35 as a good-faith settlement, including Receiver's request to pay attorneys' fees to Special Litigation Counsel pursuant to the terms of the Retainer Agreement, in the amount of 23 1/3 percent of the gross settlement amount.").

[61] ECF # 206-1 (St. Joseph Health Services of Rhode Island, Inc. v. St. Joseph Health Services of Rhode Island Retirement Plan (C.A. No. PC-2017-3856) and In re: Chartercare Community Board; St. Joseph Health Services of Rhode Island; and Roger Williams Hospital (C.A. No. PC-2019-11756) (Rhode Island Superior Court, March 8, 2021)) at 19.

[62] ECF # 206-1 (St. Joseph Health Services of Rhode Island, Inc. v. St. Joseph Health Services of Rhode Island Retirement Plan (C.A. No. PC-2017-3856) and In re: Chartercare Community Board; St. Joseph Health Services of Rhode Island; and Roger Williams Hospital (C.A. No. PC-2019-11756) (Rhode Island Superior Court, March 8, 2021)) at 18 (quoting ECF # 207-2 (Williams Dec.) ¶ 8.

[63] ECF # 206-1 (St. Joseph Health Services of Rhode Island, Inc. v. St. Joseph Health Services of Rhode Island Retirement Plan (C.A. No. PC-2017-3856) and In re: Chartercare Community Board; St. Joseph Health Services of Rhode Island; and Roger Williams Hospital (C.A. No. PC-2019-11756) (Rhode Island Superior Court, March 8, 2021)) at 18 (quoting In re Neurontin Marketing & Sales Practices Litigation,

Judge Stern concluded that each of the factors weighed in favor of WSL's fee application.[64]

Judge Stern also evaluated the reasonableness of the proposed fee under Rule 1.5 of the Rhode Island Supreme Court Rules of Professional Conduct, including specifically each of the factors set forth in subsection (a).[65] Judge Stern concluded that "the Court is confident that a POF in the amount of 23 1/3 percent of the gross recovery could be analyzed similarly under Rhode Island law and found to be reasonable."[66]

On March 4, 2021, Judge Stern also issued his order granting the Plan Receiver's Petition, stating:

> Special Counsel's contingent fee for representing the Plan Receiver of 23 1/3% (as set forth in the Petition for Settlement Instructions and Approval and which the Court has previously approved) is fair, reasonable, and a benefit to the Receivership estate and, subject to the approval of the Proposed Settlement and the fee by the court in the Federal Court Action,

58 F. Supp. 3d 167, 170 (D. Mass. 2014) (internal quotation omitted) (citing Goldberger v. Integrated Resources, Inc., 209 F.3d 43, 50 (2nd Cir. 2000)).

[64] ECF # 206-1 (St. Joseph Health Services of Rhode Island, Inc. v. St. Joseph Health Services of Rhode Island Retirement Plan (C.A. No. PC-2017-3856) and In re: Chartercare Community Board; St. Joseph Health Services of Rhode Island; and Roger Williams Hospital (C.A. No. PC-2019-11756) (Rhode Island Superior Court, March 8, 2021)) at 20-23.

[65] ECF # 206-1 (St. Joseph Health Services of Rhode Island, Inc. v. St. Joseph Health Services of Rhode Island Retirement Plan (C.A. No. PC-2017-3856) and In re: Chartercare Community Board; St. Joseph Health Services of Rhode Island; and Roger Williams Hospital (C.A. No. PC-2019-11756) (Rhode Island Superior Court, March 8, 2021)) at 21 n.8 ("Pursuant to Rule 1.5(a), "[t]he factors to be considered in determining the reasonableness of a fee include the following: '(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; '(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; '(3) the fee customarily charged in the locality for similar legal services; '(4) the amount involved and the results obtained; '(5) the time limitations imposed by the client or by the circumstances; '(6) the nature and length of the professional relationship with the client; '(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and '(8) whether the fee is fixed or contingent.'") (quoting R.I. Sup. Ct. R. Professional Conduct 1.5(a)).

[66] ECF # 206-1 (St. Joseph Health Services of Rhode Island, Inc. v. St. Joseph Health Services of Rhode Island Retirement Plan (C.A. No. PC-2017-3856) and In re: Chartercare Community Board; St. Joseph Health Services of Rhode Island; and Roger Williams Hospital (C.A. No. PC-2019-11756) (Rhode Island Superior Court, March 8, 2021)) at 21.

> the Plan Receiver is authorized to pay said fee to Special Counsel from the proceeds of the Proposed Settlement…[67]

WSL's fee application has the support of all of the Plan participants that are represented by counsel in the Receivership Proceedings.[68] Over one thousand (1,000) of the Plan participants are represented by counsel in the Plan Receivership Proceedings: Attorneys Arlene Violet represents 357 Plan participants;[69] Attorney Jeffrey Kasle represents 247 Plan participants;[70] and Attorney Christopher Callaci, as General Counsel of for the United Nurses & Allied Professionals ("UNAP"), represents 400 Plan participants.[71] All of these Plan participants through their counsel have affirmatively indicated their support for WSL's fee application.[72]

The Mediator has also addressed WSL's fee application:

> Based upon my experience as a judge and as a mediator, it is my opinion that a request by WSL for an attorneys' fee in the amount of twenty-three and one-third percent (23 & 1/3%) of the $30,000,000 settlement fund, in accordance with their Court-approved fee agreement with the Plan

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[67] ECF # 206-2 (March 4, 2021 Order) ¶ 6.

[68] ECF # 207 (Sheehan Dec.) ¶ 6; ECF # 207-3 (Violet Dec.) ¶¶ 9-10 ("I understand that the Plan Receiver and his Special Counsel, Wistow, Sheehan & Loveley, will be asking for approval of attorneys' fees of 23 1/3 % pursuant to the original retainer agreement approved by this Court on October 17, 2017…On behalf of my clients, I urge the Court to approve the Proposed Settlement (including attorneys' fees) with the aforesaid entities."); ECF # 207 (Sheehan Dec.) ¶ 6; ECF # 207-5 (Kasle Dec.) ¶ 7 ("I understand that the Plan Receiver and his Special Counsel, Wistow Sheehan & Loveley, PC, will be asking for approval to bring that settlement to the U.S. District Court, and, in connection therewith, for payment of the contingent legal fee agreed upon in the Engagement and Fee Agreement approved by this Court on October 17, 2017, i.e. 23 & 1/3%. My support for the Proposed Settlement includes support for this request for attorneys' fees."); ECF # 207 (Sheehan Dec.) ¶ 6; ECF # 207-4 (Callaci Dec.) ¶¶ 3-4 (quoting previous statement to the Rhode Island Superior Court in support of WSL's fee application and stating that "I repeat to the Court my above-quoted comments, which apply to the present settlement as well as to the legal fees requested therewith.").

[69] ECF # 207 (Sheehan Dec.) ¶ 6; ECF # 207-3 (Violet Dec.) at 1.

[70] ECF # 207 (Sheehan Dec.) ¶ 6; ECF # 207-5 (Kasle Dec.) at 1.

[71] ECF # 207 (Sheehan Dec.) ¶ 6; ECF # 207-4 (Callaci Dec.) at 1.

[72] ECF # 207 (Sheehan Dec.) ¶ 6; ECF # 207-3 (Violet Dec.) ¶¶ 9-10; ECF # 207-5 (Kasle Dec.) ¶ 7; ECF # 207-4 (Callaci Dec.) ¶¶ 3-4.

> Receiver, is reasonable and appropriate given the complexity of this matter and the significant relief recovered by WSL.[73]

Finally, the Plan Receiver explained to Judge Stern the basis for his support for WSL's fee application, as follows:

> 13. The proposed settlement now presented to the Court, if approved by this Court and the United States District Court, will result in a payment to the Plan in the gross amount of $30,000,000 before attorneys' fees. Consistent with the Court's orders approving WSL's fees and expenses, I believe that a fee application by WSL for 23 1/3% of the proposed settlement recovery in connection with the pending Petition for Settlement Instruction is fair, reasonable, and, most importantly, within WSL's express contractual undertaking. Notably, that fee is also less than the presumptively reasonable "benchmark" fee of 25% for class action settlements within the First Circuit where members of the class receive direct payments from the settlement, whereas here the gross payment is to the Plan Receiver for deposit into the Plan for the ultimate benefit of the Plan's beneficiaries. Here, that payment is within the express terms of WSL's fee agreement with the Plan.
>
> 14. It is important that Plaintiffs' Counsel have a strong financial incentive to pursue the claims in this litigation, which are legally and factually complex and extremely document-intensive, and span many decades of Plan administration. I believe the existing fee structure gave them that incentive, and their zealous prosecution of Plaintiffs' claims to date vindicates that belief. It would be detrimental to the Plan Receivership Estate for that financial incentive to be lessened, and for WSL to be awarded fees that are less than the fees to which they would be entitled under the Retainer Agreement.
>
> 15. I have read the Declaration of Frank J. Williams (C.J., Ret.) dated January 19, 2021,[74] and I concur with everything stated therein. I would add that, as to the litigation history of this case, which began in the fall of 2017 almost precisely three years before the mediation, the relationship between the plaintiffs and the Prospect Entities had been marked by an extraordinary degree of rancor. This was manifested by such actions as the filing of motions to adjudge each other in contempt, and the waging of

[73] ECF # 207 (Sheehan Dec.) ¶ 6; ECF # 207-2 (Williams Dec.) ¶ 14.

[74] Referring to ECF # 207-2.

> a take-no-prisoners campaign by the Prospect Entities against the Plan. That campaign was conducted on multiple fronts and across multiple legal and regulatory forums, in both Rhode Island and Delaware. Not only had the Prospect Entities refused to acknowledge their own liability to the Plan, but they had actively sought to prevent the two prior settlements that ultimately were approved by this Court and by the United States District Court. Those prior settlements provided millions of dollars of badly needed relief to the Plan. In sum, the proposed settlement represents the culmination of more than three years of intensive and adversarial activity. In my more than two decades of practice, I have not been involved in another matter so fiercely litigated.[75]

On March 26, 2021 this Court granted Plaintiffs' motion for Preliminary Settlement Approval (without objection) and directed WSL to submit its motion for attorneys' fees by April 9, 2021.[76]

ARGUMENT

WSL's fee application is proper based upon any reasonably applicable analytical approach, as discussed below.

I. An award of fees pursuant to the Retainer Agreement is proper because this action is brought primarily by the Plan Receiver on behalf of the Plan, and very much secondarily on behalf of the Settlement Class

Fed. R. Civ. P. 23(h) recognizes: "In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law **or by the parties' agreement**." (emphasis supplied). In connection with the Proposed Settlement, it is the Plan Receiver's fee agreement with WSL that appropriately governs WSL's fee award.

[75] ECF # 207 (Sheehan Dec.) ¶ 6; ECF # 207-6 (Del Sesto Dec.) ¶¶ 13-15.

[76] ECF # 209.

This action has been brought primarily by the Plan Receiver on behalf of the Plan. The Plan Receiver's right to sue on behalf of the Plan derives both from his appointment by the Superior Court[77] and by the resolution of the Board of Trustees of SJHSRI transferring to and vesting in the Plan Receiver "all rights and powers of the Corporation [SJHSRI] as sponsor and administrator of the Plan…"[78] While Plan beneficiaries will certainly and obviously benefit from the proposed settlements, their benefit is indirect, inasmuch as the net settlement proceeds are to be deposited into the Plan and will ultimately be distributed to Plan beneficiaries in the form of their normal Plan benefits. That is exactly what happened with the prior two settlements approved by this Court in 2019.

The Retainer Agreements with the Individual Named Plaintiffs reflect that while it was believed that the Plan Receiver was the proper and sufficient party to assert all claims, the reason suit was also brought on behalf of any Plan participants was to moot any argument that the Receiver lacked standing.[79] Indeed, the law of trusts is clear that a trustee has standing to bring suits on behalf of the trust and need not join the beneficiary. See Bogert's The Law of Trusts and Trustees § 594 (June 2020 update) ("The trustee brings suit in his own name and ordinarily need not join the beneficiary as a party. The very nature of a trust implies a power in the trustee to represent the beneficiary in actions against or by a third party.") and § 593 ("If suit is brought by or

[77] The order appointing the Plan Receiver gives him plenary authority over the Plan, including specifically "full power to prosecute, defend, adjust and compromise all claims and suits of, by, against or on behalf of" the Plan. ECF # 207 (Sheehan Dec.) ¶ 11; ECF # 207-9 (Order dated October 27, 2017) ¶ 5.

[78] ECF # 174-4 (Resolutions of SJHSRI's Board of Trustees adopted on October 20, 2017).

[79] ECF # 207 (Sheehan Dec.) ¶ 16; ECF # 207-13 through ECF # 207-19 (WSL Retainer Agreements with the seven Individual Named Plaintiffs).

against the trustee, is the beneficiary a necessary party? Generally, the beneficiary is held not to be a necessary party.") (citations omitted). It was the concern that the defendants might argue that an exception to the general rule might apply here that led to this suit also being a class action.

Indeed, this Court recognized the uniqueness of this situation in adopting Special Master Sherman's Report and Recommendations on Award of Attorneys' Fees. See id. (ECF # 165) at 12 ("This is a complex case, both factually and legally. It is not a pure class action; it is a partial class action along with an action by the Receiver.").

Thus, while the Proposed Settlement seeks certification of the Settlement Class and can be understood as creating a common fund on behalf of the Settlement Class, it can also be understood as a recovery on behalf of the Plan, through WSL's performance of the terms of a contractual fee agreement that the Plan Receiver entered into on behalf of the Plan, with the approval of the Superior Court. In this respect, the posture of this fee application is very different from other more typical class action contexts (for which the instant fee application, in any event, would still be appropriately granted).

II. An award of fees based on the Retainer Agreement is also proper because the stipulated fee is below the benchmark of 25%

Plaintiffs' Counsel has negotiated a proposed settlement that establishes a common fund. "Under the 'common fund' doctrine, a lawyer responsible for creating a common fund that benefits a group of litigants is entitled to a fee from the fund." 5 Newberg on Class Actions § 15:53 (5th ed.) (citation omitted). See Boeing Co. v. VanGemert, 444 U.S. 472, 478 (1980) ("[T]his Court has recognized consistently that a

litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole.") (citations omitted).

The First Circuit recognizes two methods for calculating attorneys' fees in the class action context involving a common fund: the "percentage of the fund" ("POF") method, or the lodestar method. See In re Thirteen Appeals Arising Out of San Juan Dupont Plaza Hotel Fire Litigation, 56 F.3d 295, 307 (1st Cir. 1995) ("[W]e hold that in a common fund case the district court, in the exercise of its informed discretion, may calculate counsel fees either on a percentage of the fund basis or by fashioning a lodestar."). The POF "method functions exactly as the name implies: the court shapes the counsel fee based on what it determines is a reasonable percentage of the fund recovered for those benefitted by the litigation." Thirteen Appeals, 56 F.3d at 305.

The POF method is preferred in common fund cases. See In re Cabletron Systems, Inc. Securities Litigation, 239 F.R.D. 30, 37 (D.N.H. 2006) ("The POF method is preferred in common fund cases because 'it allows courts to award fees from the fund in a manner that rewards counsel for success and penalizes it for failure.' This is something the lodestar method cannot do.") (quoting In re Rite Aid Corp. Sec. Litig., 396 F.3d 294, 300 (3d Cir. 2005)) (internal quotations omitted). "In complex litigation—and common fund cases, by and large, tend to be complex— the POF approach is often less burdensome to administer than the lodestar method." Thirteen Appeals, *supra*, 56 F.3d at 307.

> Using the POF method in a common fund case enhances efficiency, or, put in the reverse, using the lodestar method in such a case encourages inefficiency. Under the latter approach, attorneys not only have a monetary incentive to spend as many hours as possible (and bill for them)

> but also face a strong disincentive to early settlement. . . . If the POF method is utilized, a lawyer is still free to be inefficient or to drag her feet in pursuing settlement options—but, rather than being rewarded for this unproductive behavior, she will likely reduce her own return on hours expended."

Thirteen Appeals, *supra*, 56 F.3d at 307. Finally:

> Another point is worth making: because the POF technique is result-oriented rather than process-oriented, it better approximates the workings of the marketplace. We think that Judge Posner captured the essence of this point when he wrote that "the market in fact pays not for the individual hours but for the ensemble of services rendered in a case of this character." In fine, the market pays for the result achieved.

Thirteen Appeals, *supra*, 56 F.3d at 307 (quoting In re Continental Ill. Sec. Litig., 962 F.2d 566, 572 (7th Cir. 1992)).

Moreover, Judge Stern expressly chose the POF method and not the lodestar method, as noted in the Decision:

> As it would be impracticable to apply the lodestar approach under the circumstances of the "global settlement[,]" due to the vast amount of proceedings, parties, filings, and efforts of counsel, the POF method is not only reasonable but was previously contemplated by this Court when it approved the Retainer Agreement, including the amount of 23 1/3 percent of any settlement obtained.

St. Joseph Health Services of Rhode Island, Inc. v. St. Joseph Health Services of Rhode Island Retirement Plan (C.A. No. PC-2017-3856) and In re: Chartercare Community Board; St. Joseph Health Services of Rhode Island; and Roger Williams Hospital (C.A. No. PC-2019-11756) (Rhode Island Superior Court, March 8, 2021) (ECF # 206-1) (quoting ECF # 207-2 (Williams Dec.) ¶ 8) at 18.

The benchmark percentage considered reasonable in the First Circuit is 25%. "Within the First Circuit, courts generally award fees 'in the range of 20-30%, with 25% as the benchmark.'" Bezdek v. Vibram USA Inc., 79 F. Supp. 3d 324, 349-50 (D. Mass

2015) (quoting Latorraca v. Centennial Techs., Inc., 834 F. Supp. 2d 25, 27-28 (D. Mass. 2011) (collecting cases)), *aff'd*, Bezdek v. Vibram USA, Inc., 809 F.3d 78, 85 (1st Cir. 2015) (affirming allowance of attorneys' fees of 25% of the settlement). This benchmark is consistent with the empirical data concerning fee awards across the United States. See 5 Newberg on Class Actions § 15:83 (5th ed.) ("An earlier edition of the Treatise reported that (then-available) empirical studies showed that fee awards in class actions average around one-third of the recovery, a statement quoted by many courts. More recent empirical data on fee awards demonstrate that percentage awards in class actions are generally between 20-30%, with the average award hovering around 25%. . . .").

Here, thanks to the credit that WSL previously and voluntarily gave to the Plan (in connection with Settlement A) for the $552,281.25 in hourly fees that WSL earned during its pre-suit investigation, WSL's total fee percentage inclusive of the instant fee application would be 22.15%.[80] That percentage is closer to 20% than it is to even the "benchmark" 25%.

Indeed, twice within the last year, this Court has approved class action attorneys' fee awards as high as 33 1/3% of the settlement fund. See In re Loestrin 24 Fe Antitrust Litig., No. 1:13-MD-2472-WES-PAS, 2020 WL 4038942, at *7 (D.R.I. July 17, 2020) (surveying the "evolving case law" to support an award of 33 1/3% of the settlement fund), *report and recommendation adopted*, No. 1:13-MD-2472-WES-PAS, 2020 WL 5201275 (D.R.I. Sept. 1, 2020) (Smith, J.) ("The Court has reviewed the Magistrate Judge's thorough and well-reasoned Fee and Expense R&R and hereby

[80] I.e. $10,449,272.36 in total fees divided by $47,181,202.91 total gross recoveries = 22.147%.

ADOPTS and APPROVES IN FULL the findings and recommendations set forth therein."); Kondash v. Citizens Bank, Nat'l Ass'n, No. 18-CV-00288-WES-LDA, 2020 WL 7641785, at *5 (D.R.I. Dec. 23, 2020) (granting fee award of 33 1/3% of the settlement fund as "eminently reasonable"), *report and recommendation adopted*, No. CV 18-288 WES, 2021 WL 63409 (D.R.I. Jan. 7, 2021) (Smith, J.) ("After having carefully reviewed the relevant papers, and having heard no objections, the Court ACCEPTS the report and ADOPTS the recommendations and reasoning set forth therein.").

> As held by the First Circuit, in a contingent class case like this one, the "percentage of fund" approach is appropriate because it is easy 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. *In re Thirteen Appeals Arising out of the San Juan Dupont Plaza Hotel Fire Litig.*, 56 F.3d 295, 307 (1st Cir. 1995). For these reasons, the "use of the [percentage of fund] method in common fund cases is the prevailing praxis." *Id.* **Indeed, it is fair to say that a "clear consensus among federal and state courts" has emerged that the percentage of fund approach is the more efficient, better reasoned, and effective method.** *Gordan v. Massachusetts Mut. Life Ins. Co.*, No. 13-CV-30184-MAP, 2016 WL 11272044, at *2 (D. Mass. Nov. 3, 2016) (internal quotation marks omitted). **Consistent with these principles, the traditional one-third of the fund has been routinely approved** as appropriate for TCPA settlements in courts in other circuits.
>
> [Emphasis supplied]

Kondash, 2020 WL 7641785, at *4.

The leading treatise on Class Actions also notes that the determination of what constitutes a fair and reasonable attorneys' fee should take into account the public policy in favor of incentivizing plaintiffs' counsel:

> Rule 23 of the Federal Rules of Civil Procedure provides that "[i]n a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement." Courts that employ the percentage method must ensure that the particular

> percentage of the fund counsel seek, and the resulting fee, are reasonable. This section considers the ways in which courts might think about that question, while the succeeding sections canvas the rules that courts have adopted in doing so. Rule 23 requires that the fee award, and hence the percentage approved by courts utilizing the percentage method, be reasonable, but the Rule provides no measuring stick by which courts must make this assessment, nor does it explain in what way the fee should be reasonable. Reasonable compared to what?
>
> In analyzing this question, a good starting point would be to assume that the fee should further the goals underlying common fund litigation. Thus, one key purpose of the fee is to encourage lawyers to invest their own resources in pursuing small claims cases and hence to enable them, through organizing a practice around receipt of such fees, to operate as private attorneys general.

5 Newberg on Class Actions § 15:73 (5th ed.). As noted by the Plan Receiver, "[i]t is important that Plaintiffs' Counsel have a strong financial incentive to pursue the claims in this litigation, which are legally and factually complex and extremely document-intensive, and span many decades of Plan administration. I believe the existing fee structure gave them that incentive, and their zealous prosecution of Plaintiffs' claims to date vindicates that belief."[81]

III. Plaintiffs' Counsel's fee application is also fair and reasonable under the individual facts of this case

Under the POF method, "the court shapes the counsel fee based on what it determines is a reasonable percentage of the fund recovered for those benefitted by the litigation." Thirteen Appeals, *supra*, 56 F.3d at 305.

In the First Circuit, this determination is made on an individualized basis, case by case. In re Fidelity/Micron Securities Litigation, 167 F.3d 735, 737 (1st Cir. 1999)

[81] ECF # 207 (Sheehan Dec.) ¶ 6; ECF # 207-6 (Del Sesto Dec.) ¶ 14.

("Moreover, because each common fund case presents its own unique set of circumstances, trial courts must assess each request for fees and expenses on its own terms.") (citation omitted). See 5 Newberg on Class Actions § 15:96 (5th ed.) ("The First Circuit has not identified any particular list of factors for assessing the reasonableness of proposed percentage awards in common fund cases, instead holding that the district courts—when employing the percentage method—should award fees on an individualized, case-by-case basis.") (citing In re Fidelity/Micron Securities Litigation, *supra*, 167 F.3d at 737).

The facts of this case, including especially the fact that WSL's fee was previously submitted to and approved by the Rhode Island Superior Court, establish that WSL's fee application is fair and reasonable.

A. WSL's percentage fee was negotiated with the Plan Receiver and approved by the Rhode Island Superior Court in connection with the Receivership Proceeding

What especially sets this case apart from other common fund cases and establishes the reasonableness of Plaintiffs' Counsel's proposed fee is the probably unique fact that this percentage was negotiated with the Plan Receiver and approved by the Rhode Island Superior Court in connection with the Receivership Proceeding, in advance of the filing of this case; again, in connection with the prior two settlements; and, finally, again in connection with the Superior Court's approval of the Proposed Settlement.

Another reason to adhere to the percentage fee provided in the Retainer Agreement is that it is indisputable that the Individual Named Plaintiffs and the Settlement Class have fully benefitted from Plaintiffs' Counsel's representation of the

Plan Receiver, both during the Investigative Phase and since. Indeed, it is impossible to separate the fruits of Plaintiffs' Counsel's labors on behalf of the Plan Receiver from the benefits to be obtained by the Individual Named Plaintiffs and the Class of Plan participants, or to allocate attorney time between Plaintiffs' Counsel's representation of the Plan Receiver and Plaintiffs' Counsel's representation of the Settlement Class. See ECF # 165 (Special Master's Report and Recommendations on Award of Attorneys' Fees) at 6 ("Since WSL was working toward a common goal for both the Receiver and the class members for the ultimate benefit of the Plan participants, it is difficult to distinguish hours spent for the class versus the Receiver. This is understandable and is reasonable.") (citation omitted).

Thus, it is equally impossible to allocate any portion of the Proposed Settlement between the Settlement Class and the Plan Receiver, which would be necessary to provide a basis to separately calculate Plaintiffs' Counsel's fee for representing the Plan Receiver.

WSL does not seek additional compensation for representing the Settlement Class, apart from the fee to which it is entitled for representing the Plan Receiver. From this perspective it could be said that WSL is not seeking any fee whatsoever for representing the Settlement Class, but, rather, is merely asking the Court's permission to obtain the fee to which WSL is entitled for representing the Plan Receiver, which is to be paid out of the gross recovery to a Plan which is under receivership in the Superior Court, and which has been approved by the Superior Court.

There can be no doubt that the Plan Receiver is essentially acting on behalf of the Settlement Class. The genesis and *raison d'etre* of the Complaint is the

underfunded status of the Plan and the investigation undertaken on behalf of the Plan Receiver. The Plan is in Receivership. The Plan Receiver seeks recovery solely in his representative capacity, for the ultimate benefit of Plan participants. The net recovery from the Proposed Settlement will be paid into the Plan, in accordance with the orders of the court in the Receivership Proceeding. In short, the interests of the Receivership Estate and the Settlement Class are identical. Thus, the Superior Court's conclusion "That Special Counsel's contingent fee for representing the Plan Receiver of 23 1/3% (as set forth in the Petition for Settlement Instructions and Approval and which the Court has previously approved) is fair, reasonable, and a benefit to the Receivership estate"[82] is equally true as applied to the Settlement Class.

In determining the amount of WSL's fees, the Court "functions as a quasi-fiduciary to safeguard the corpus of the fund for the benefit of the plaintiff class." In re Fidelity/Micron Sec. Litig., *supra*, 167 F.3d at 736. The Plan Receiver and the Superior Court have the same responsibility. Here, the Plan Receiver, in his capacity as both a fiduciary and an officer of the Superior Court, negotiated the Plan Receiver's Retainer Agreement, and the Superior Court itself approved the agreement, both at the outset of potential litigation and again in connection with the prior settlements, and, finally, in connection with the Superior Court's approval of the Proposed Settlement. Both the Plan Receiver and the Superior Court, by definition, were charged with ensuring that the fee was reasonable and not excessive.

In October 2017, when the Superior Court authorized the Plan Receiver to enter into WSL's Retainer Agreement, that court was already familiar with the Plan and the

[82] ECF # 206-2 (Superior Court Order dated March 4, 2021) ¶ 5.

interests of Plan participants. Since then, the Superior Court's familiarity with the Plan and with WSL's representation deepened through the court's administration of the Plan in Receivership. The Court no doubt recognizes Judge Stern's long experience in handling receiverships and ancillary litigation, upon which he could draw to ensure that the fee he approved would be fair to the Plan and the Plan participants.

However, movants do *not* contend that, due to the Superior Court's involvement, this Court is obligated or even permitted to abdicate its duty to independently ascertain whether WSL's fee application is fair and reasonable. Movants also do *not* contend that, as a matter of law, state court determinations in parallel proceedings are necessarily binding in the adjudication of fee applications in federal court class actions. To the contrary, the significance of such rulings must be determined on an individualized, case by case basis. See In re Fidelity/Micron Securities Litigation, *supra*, 167 F.3d at 737 ("Moreover, because each common fund case presents its own unique set of circumstances, trial courts must assess each request for fees and expenses on its own terms.").

Movants *do* contend, however, that the role and actions of the Plan Receiver and the Rhode Island Superior Court in approving WSL's proposed fee have a great deal of significance and should be accorded some deference (as this Court previously did when the Court adopted the Special Master's Report and Recommendation) when weighing the specific facts of this case relevant to WSL's fee application.

B. WSL's fee application has the affirmative support of nearly 1,000 Settlement Class Members

Another fact specific to this case that justifies WSL's fee application is that it has the affirmative support of the nearly 1,000 class members who are represented by counsel.[83] See Fickinger v. C.I. Planning Corp., 646 F. Supp. 622, 631 (E.D. Pa. 1986) ("[U]nanimous approval of the proposed settlement by the class members is entitled to nearly dispositive weight."); Wallace v. Powell, 301 F.R.D. 144, 165 (E.D. Pa. 2014) ("'The absence of objections supports the reasonableness of the fee request.'") (quoting Frederick v. Range Resources–Appalachia, LLC, No. 08–288, 2011 WL 1045665, at *10 (W.D. Pa. Mar. 17, 2011)); In re Amer. Inv. Life Ins. Co. Annuity and Mktg. & Sales Practices Litig., 263 F.R.D. 226, 244 (E.D. Pa. 2009) ("The small number of objections and the objections' lack of merit indicate that the class is satisfied with the fee award").

C. WSL's fee has been agreed to by sophisticated parties

"In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law **or by the parties' agreement**." Fed. R. Civ. P. 23(h) (emphasis supplied). The Retainer Agreement constitutes both an advance determination of the reasonableness of Plaintiffs' Counsel's fee and memorializes the agreement between WSL, the Plan Receiver, the Superior Court, and the Individual Named Plaintiffs. Here, both the Superior Court and the Plan Receiver

[83] See ECF #207-3 (Declaration of Arlene Violet dated January 21, 2021) ¶ 10 ("On behalf of these clients I urge the Court to approve the proposed settlements (including attorneys' fees) with the aforesaid entities."); ECF # 207-4 (Declaration of Christopher Callaci dated January 15, 2021) ¶ 4 ("With regard to the present settlement, I repeat to the Court my above-quoted [favorable] comments, which apply to the present settlement as well as to the legal fees requested therewith."); ECF # 207-5 (Declaration of Jeffrey Kasle dated January 18, 2021) ¶ 7 ("My support for the Proposed Settlement includes support for this request for attorneys' fees.").

are sophisticated and have a substantial interest in ensuring that WSL's fees are duly earned and not excessive.

Accordingly, their agreement is entitled to the presumption of reasonableness which applies in the class action context when the lead plaintiffs are sophisticated litigants. See In re Cendant Corp. Litigation, 264 F.3d 201, 282 (3d Cir. 2001) ("[C]ourts should accord a presumption of reasonableness to any fee request submitted pursuant to a retainer agreement that was entered into between a properly-selected lead plaintiff and a properly-selected lead counsel.") (citing Elliott J. Weiss and John S. Beckerman, Let the Money Do the Monitoring: How Institutional Investors Can Reduce Agency Costs in Securities Class Actions, 104 Yale L.J. 2053, 2105 (1995) ("[A] court might well feel confident in assuming that a fee arrangement an institutional investor had negotiated with its lawyers before initiating a class action maximized those lawyers' incentives to represent diligently the class's interests, reflected the deal a fully informed client would negotiate, and thus presumptively was reasonable.")); In re Carter's, Inc. Sec. Litig., No. 1:08-CV-2940-AT, 2012 WL 12877943, at *2 (N.D. Ga. May 31, 2012) (noting, as supporting fee award of 28%, that "[t]he request for attorneys' fees and reimbursement of litigation expenses has been reviewed and approved as fair and reasonable by Lead Plaintiff, a sophisticated institutional investor that was directly involved in the prosecution and resolution of the claims and who has a substantial interest in ensuring that any fees paid to Lead Counsel are duly earned and not excessive"). In addition to the role of the Superior Court and the Plan Receiver in approving WSL's fee, the approval of WSL's fee application by Attys. Violet, Kasle, and Callaci is also significant in this regard.

D. WSL's fee represents an appropriate incentive to Plaintiffs' Counsel

The Court may consider that Plaintiffs' Counsel is an experienced but nevertheless small firm, and it was clear from the outset that their undertaking of representing the Plan Receiver and seeking class certification and representation would inevitably require them to decline undertaking other matters that they otherwise would have accepted, and, therefore, represent significant lost opportunity costs.

Moreover, by agreeing to a contingent fee for representing the Plan Receiver, Plaintiffs' Counsel relieved the Plan Receiver (and, through the Plan Receiver, the Plan) of the very substantial expense of legal fees in the event the claims were unsuccessful or the recoveries were so modest as to be insufficient to form the basis of a reasonable fee. As Judge Stern noted:

> Furthermore, the Retainer Agreement that was approved by this Court contemplated that a percentage of the fund be utilized for attorney's fees, as the Court understood that in order to obtain the greatest outcome for the receivership estate, **an hourly rate absent any reward would only further diminish the Plan**. The POF method not only "enhances efficiency" but encourages efforts to get to the end game, albeit by settlement or otherwise, for the benefit of the estate.

St. Joseph Health Services of Rhode Island, Inc. v. St. Joseph Health Services of Rhode Island Retirement Plan (C.A. No. PC-2017-3856) and In re: Chartercare Community Board; St. Joseph Health Services of Rhode Island; and Roger Williams Hospital (C.A. No. PC-2019-11756) (Rhode Island Superior Court, March 8, 2021) at 19 (emphasis added).

The Plan Receiver both supports WSL's fee application and believes it would be detrimental to the Receivership Estate and to the Plan participants for WSL to be

awarded fees that are less than the fees to which they would be entitled under the Retainer Agreement:

> 14. It is important that Plaintiffs' Counsel have a strong financial incentive to pursue the claims in this litigation, which are legally and factually complex and extremely document-intensive, and span many decades of Plan administration. I believe the existing fee structure gave them that incentive, and their zealous prosecution of Plaintiffs' claims to date vindicates that belief. It would be detrimental to the Plan Receivership Estate for that financial incentive to be lessened, and for WSL to be awarded fees that are less than the fees to which they would be entitled under the Retainer Agreement.[84]

Kondash v. Citizens Bank, National Association, *supra*, is instructive. After surveying the risks of bringing a Telephone Consumer Protection Act class action[85] on a contingent basis, this Court observed:

> Mindful of these risks, Class Counsel accepted this case on a purely contingent basis, exposing himself, his small firm and his local counsel to the hazards of investing substantial time and treasure over a protracted period (to the exclusion of other work) with no return. And by ending this case with a certified class and a Settlement Fund large enough for meaningful compensation for the class, Class Counsel successfully sidestepped all of these potential landmines and achieved an outcome that confers a substantial benefit on the class.

Kondash, 2020 WL 7641785, at *3.

[84] ECF # 207 (Sheehan Dec.) ¶ 6; ECF # 207-6 (Del Sesto Dec.) ¶¶ 14-15.

[85] The Court's analysis of those risks was prescient. Just last week, the U.S. Supreme Court handed down its decision in Facebook, Inc. v. Duguid, No. 19-511, 2021 WL 1215717 (U.S. Apr. 1, 2021) (Slip Op.), ruling that the Telephone Consumer Protection Act, as a matter of statutory construction, only encompasses "robocall" technology that uses a "random or sequential number generator" to store or produce telephone numbers.

IV. WSL's fee application is also fair and reasonable under the *ex ante* method, the market-mimicking approach, and the multifactor test

As noted, in the First Circuit the determination of whether a proposed fee is fair and reasonable is made on an individualized, case-by-case basis, without the requirement that any particular set of factors be considered. As previously discussed, WSL's fee application is fair and reasonable under that approach, based upon the specific facts of this case.

WSL's fee application is also fair and reasonable applying the standards other courts, including District Courts in the First Circuit, have utilized to make that determination. Although there apparently has been no occasion in the First Circuit to address it, the reasonableness of attorneys' fees is also sometimes determined through negotiating the fee at the outset of the representation, *ex ante*. See 5 Newberg on Class Actions § 15:7 (5th ed.). Moreover, some District Courts in the First Circuit have employed a market-mimicking approach that seeks to predict the fee would have been if it were determined in advance of the representation, and other courts in the First Circuit have employed a multifactor test. 5 Newberg on Class Actions § 15:96 (5th ed.) ("District courts in the First Circuit have sometimes utilized the multifactor tests used in the Second and Third Circuits[86] and at other times have employed the Seventh Circuit's market mimicking approach.[87]").

[86] Citing Walsh v. Popular, Inc., 839 F. Supp. 2d 476, 483 (D.P.R. 2012); In re Tyco Intern., Ltd. Multidistrict Litigation, 535 F. Supp. 2d 249, 265–66 (D.N.H. 2007); In re Relafen Antitrust Litigation, 231 F.R.D. 52, 79 (D. Mass. 2005); In re Lupron Mktg. & Sales Practices Litig., No. 01-CV-10861-RGS, 2005 WL 2006833, at *3 (D. Mass. Aug. 17, 2005).

[87] Citing In re Cabletron Systems, Inc. Securities Litigation, 239 F.R.D. 30, 41 (D.N.H. 2006) and Nilsen v. York County, 400 F. Supp. 2d 266, 278-79 (D. Me. 2005).

We submit that, in addition to WSL's fee application being fair and reasonable under the specific facts of this case, as discussed above, the roles of the Plan Receiver and the Superior Court in approving the Retainer Agreement demonstrate that the fee was reasonably determined *ex ante*. Moreover, WSL's fee application is also reasonable under both the market-mimicking approach and the multifactor approach.

A. WSL's fee application is appropriate under the *ex ante* method

The *ex ante* method involves a judicial determination of an appropriate fee prior to the commencement of litigation.

The Seventh Circuit, which instructs trial judges to set fees to mimic market rates, has summarized the *ex ante* approach as follows:

> [A] district court must estimate the terms of the contract that private plaintiffs would have negotiated with their lawyers, had bargaining occurred at the outset of the case (that is, when the risk of loss still existed). The best time to determine this rate is the beginning of the case, not the end (when hindsight alters the perception of the suit's riskiness, and sunk costs make it impossible for the lawyers to walk away if the fee is too low). This is what happens in actual markets. Individual clients and their lawyers never wait until after recovery is secured to contract for fees. They strike their bargains before work begins. . . . Many district judges have begun to follow the private model by setting fee schedules at the outset of class litigation—sometimes by auction, sometimes by negotiation, sometimes for a percentage of recovery, sometimes for a lodestar hourly rate and a multiplier for riskbearing. (The greater the risk of loss, the greater the incentive compensation required.) Timing is more important than the choice between negotiation and auction, or between percentage and hourly rates, for all of these systems have their shortcomings. Only *ex ante* can bargaining occur in the shadow of the litigation's uncertainty; only *ex ante* can the costs and benefits of particular systems and risk multipliers be assessed intelligently. Before the litigation occurs, a judge can design a fee structure that emulates the incentives a private client would put in place. At the same time, both counsel and class members can decide whether it is worthwhile to proceed with that compensation system in place.

5 Newberg on Class Actions § 15:7 (5th ed.) (quoting In re Synthroid Marketing Litigation, 264 F.3d 712, 718-19 (7th Cir. 2001) (citations omitted).

There are "a series of advantages to *ex ante* fee setting." 5 Newberg on Class Actions § 15:7 (5th ed.) ("Courts that set a fee *ex ante* cannot finalize that fee, for procedural reasons, until the conclusion of the litigation, but there may nonetheless be a series of advantages to *ex ante* fee setting.") (citation omitted).

> First, *ex ante* fee negotiations best mimic the private market: clients hire attorneys and work out their payment system at the outset of the retention, not at its conclusion. Second, an advantage of mimicking the market is that the *ex ante* discussion of the substance of fees sets the lawyers' expectations about their likely reward at the conclusion of the case and hence enables them to invest their resources in the litigation with some certainty as to their plausible return. Third, and relatedly, early fee setting has the potential to set incentives appropriately for class counsel; for example, counsel may be entitled to an increasing percentage the more value she obtains for the class, thus incentivizing her to push for the maximum class recovery. Fourth, courts have noted that they are not institutionally adept at judging fees *ex post* and thus *ex ante* fee setting may have a comparative institutional advantage. Some of the problems *ex post* are technical (such as auditing thousands of fee record entries) but some are more substantive: the Seventh Circuit has noted that at the conclusion of the case, "hindsight alters the perception of the suit's riskiness, and sunk costs make it impossible for the lawyers to walk away if the fee is too low." Fifth, some limited empirical evidence suggests that *ex ante* fee negotiations reduce fee levels and thus amplify the class's recoveries.

5 Newberg on Class Actions § 15:7 (5th ed.) (quoting In re Synthroid Marketing Litigation, 264 F.3d 712, 718 (7th Cir. 2001)). Amplifying on the tendency of post-settlement analysis to underestimate the risk of litigation (i.e. hindsight bias[88]), the

[88] See Fox v. CDX Holdings, Inc., No. CV 8031-VCL, 2015 WL 4571398, at *3 (Del. Ch. July 28, 2015) ("Hindsight bias has been defined in the psychological literature as the tendency for people with outcome knowledge to believe falsely that they would have predicted the reported outcome of an event. Studies have demonstrated not only that people claim that they would have known it all along, but also that they

Seventh Circuit observed that "[o]nly *ex ante* can bargaining occur in the shadow of the litigation's uncertainty…."

The fact that the Plan Receiver was appointed by a state court, and that WSL's fees were approved by a state court judge, should not diminish the significance of their approval and oversight, notwithstanding that this is a federal class action. Judge Stern can be viewed as an eminently suitable proxy for this Court. Moreover, a strong argument can be made that state law should govern the approval of fees affecting an entity in receivership in state court.

B. WSL's fee application is fair and reasonable under the market-mimicking approach

As noted, WSL's fee application is fair and reasonable under both the specific facts of this case and the *ex ante* approach. In addition, the Retainer Agreement is conclusive evidence of what a reasonable fee would be under the market-mimicking approach.

The market-mimicking approach is "based on the goal of establishing a rate commensurate with what a free market would establish: 'The object in awarding a reasonable attorney's fee . . . is to give the lawyer what he would have gotten in the way of a fee in an arm's length negotiation, had one been feasible.'" 5 Newberg on Class Actions § 15:79 (5th ed.) (quoting In re Continental Ill. Sec. Litig., 962 F.2d 566, 572

maintain that they did, in fact, know it all along.") (citations and quotations omitted). See also In re Checking Account Overdraft Litigation, 830 F. Supp. 2d 1330, 1346 (S.D. Fla. 2011) ("Plaintiffs properly note that Objectors' argument regarding the sufficiency of the Settlement amount suffers from hindsight bias and an unduly sanguine view of Plaintiffs' litigation risks—risks that these Objectors never faced because they arrived on the scene after the Settlement was reached. A settlement fairness analysis must consider such risks at the time the settlement was reached, not after settlement.").

(7th Cir. 1992)). "When a fee is set by a court rather than by contract, the object is to set it at a level that will approximate what the market would set. The judge, in other words, is trying to mimic the market in legal services." Gaskill v. Gordon, 160 F.3d 361, 363 (7th Cir. 1998) (citations omitted).

Thus, courts called upon to approve fee applications in class action cases using the market-mimicking approach are directed to "estimate the terms of the contract that private plaintiffs would have negotiated with their lawyers, had bargaining occurred at the outset of the case (that is, when the risk of loss still existed)." In re Synthroid Marketing Litigation, 264 F.3d 712, 718 (7th Cir. 2001). The Seventh Circuit has suggested that district judges "compare the contingent-fee percentage sought by the class lawyers . . . with contingent fees set by arms-length contracts between lawyers and their clients in comparable commercial litigation." Matter of Continental Illinois Securities Litigation, 985 F.2d 867, 868 (7th Cir. 1993). This suggestion was premised on the contention that "[t]hese contracts would provide a market estimate of the value of the class lawyers' service to the class, in accordance with the principle that a judge in setting a fee award should be trying to give the lawyers what they would have got in a voluntary transaction in the market for legal services." Matter of Cont'l Illinois Sec. Litig., *supra*, 985 F.2d at 868.

As noted, two district courts in the First Circuit have adopted the market-mimicking approach, as superior to either the multifactor approach or a blindly applied fixed percentage. See In re Cabletron Sys., Inc. Sec. Litig., 239 F.R.D. 30, 41 (D.N.H. 2006) ("In spite of the limitations associated with a market based analysis, it is apparent to this Court that this approach is far more preferable than a subjective multi-factor

approach, or a blindly applied fixed percentage."); Nilsen v. York County, 400 F. Supp. 2d 266, 278–79 (D. Me. 2005) (rejecting the multifactor approach and adopting "the methodology of the Seventh Circuit as most reflective of what a judge does instinctively in setting a fee as well as most amenable to predictability and an objective external constraint on a judge's otherwise uncabined power. . . . The market-mimicking approach has its own shortcomings but it is better than the fuzzier alternatives.").

Here the Court need look no further than the Retainer Agreement between WSL and the Plan Receiver to determine what fee WSL would have obtained in a voluntary transaction in the market for legal services to the settlement class.[89] The only difference is that the Retainer Agreement was entered into between WSL and the Plan Receiver (acting under fiduciary obligation and supervision of the Superior Court), rather than with the settlement class. Otherwise the representation is identical, involving the same claims, the same defendants, and the same direct beneficiary of any recovery (the Plan). It is difficult to conceive of a more apt basis to estimate the market value of WSL's services. Moreover, the Settlement Class clearly will benefit from WSL's fees being based upon 23 1/3% set forth in the Retainer Agreement rather than WSL's usual contingent fee of between 33 1/3% and 40% of the gross recovery.[90]

[89] Retainer agreements with substantively identical fee provisions were also entered into with each of the Class Representatives. See ECF # 207 (Sheehan Dec.) ¶ 16, Exhibits 13-19 (ECF ## 207-13 through 207-19) (WSL Retainer Agreements with the seven Individual Named Plaintiffs).

[90] ECF # 145 (Wistow Second Supp. Dec.) ¶ 8.

C. WSL's fee application is fair and reasonable under the multi-factor approach

In addition, the Retainer Agreement is fair and reasonable under the multifactor approach. The multifactor test is usually based on the "so-called *Goldberger* factors":

> "(1) the size of the fund and the number of persons benefitted; (2) the skill, experience, and efficiency of the attorneys involved; (3) the complexity and duration of the litigation; (4) the risks of the litigation; (5) the amount of time devoted to the case by counsel; (6) awards in similar cases; and (7) public policy considerations."

In re Neurontin Mktg. & Sales Practices Litig., 58 F. Supp. 3d 167, 170 (D. Mass. 2014) (quoting In re Lupron Mktg. & Sales Practices Litig., No. MDL 1430, 01–CV–10861–RGS, 2005 WL 2006833, at *3 (D. Mass. Aug. 17, 2005)) (citing Goldberger v. Integrated Res., Inc., 209 F.3d 43, 50 (2d Cir. 2000)) (approving an award of 28% of the settlement fund).

As Judge Stern has already concluded, all of the Goldberger factors weigh in favor of WSL's fee request.[91] The recovery in this case, although substantial, does not involve a multi-billion dollar fund, in which even an attorneys' fee of a small percentage would be in the hundreds of millions of dollars.

Moreover, more than 2,700 individuals and their families are benefited by increased retirement benefits. WSL have demonstrated skill, experience, and efficiency. The litigation is extremely complex and has already been proceeding for over three and a half years (inclusive of the investigative phase). WSL has devoted many thousands of hours of attorney time. Finally, Plaintiffs' Counsel are seeking an

[91] ECF # 206-1 (St. Joseph Health Services of Rhode Island, Inc. v. St. Joseph Health Services of Rhode Island Retirement Plan (C.A. No. PC-2017-3856) and In re: Chartercare Community Board; St. Joseph Health Services of Rhode Island; and Roger Williams Hospital (C.A. No. PC-2019-11756) (Rhode Island Superior Court, March 8, 2021)) at 20-23.

award which is 23 1/3% of the gross settlement amount, which is below the award that would be due under the 25% benchmark for common fund cases.

As this Court recently stated in Kondash v. Citizens Bank, *supra*:

> **Consistent with what seems to be emerging as a well-settled practice, this Court also looks to the lodestar as a cross-check in examining the reasonableness of a fee request.** *In re Loestrin 24 Fe Antitrust Litig.*, 2020 WL 4035125, at *5; *see In re Cabletron Sys., Inc. Sec. Litig.*, 239 F.R.D. at 38 ("it is sufficient to conclude that when the lodestar cross-check is applied to the fee award in this case, it raises no reasonableness concerns"). While exclusive reliance on daily time records to calculate the lodestar and a multiplier is outmoded and rarely used, the lodestar is useful as a guide whether a proposed fee calculated by using a percentage-of-settlement method is an inappropriate windfall.[92] *In re Solodyn Antitrust Litig.*, Civil Action No. 1:14-md-2503 (DJC), 2018 WL 7075881, at *2 (D. Mass. July 18, 2018) (where "lodestar cross-check suggests that the request for attorneys' fees is reasonable," attorneys' fees awarded totaling one-third of settlement fund); David F. Herr, Annotated Manual for Complex Litigation § 14.122 (4th ed. May 2020 Update) ("The lodestar is ... useful as a cross-check on the percentage method"). Comparison of the percentage-based fee to the lodestar is particularly useful as long as the court is easily able to confirm the reasonableness of the lodestar. *In re Loestrin 24 Fe Antitrust Litig.*, 2020 WL 4035125, at *6 (in lengthy and complex antitrust case, court became comfortable with reasonableness of lodestar based on ongoing quarterly scrutiny of daily time entries).
>
> **Whether a particular multiplier suggests that a fee is not reasonable is a nuanced determination that depends on an array of considerations. For example, a fee that is more than double (a multiplier larger than two) the lodestar should be closely scrutinized in so-called "megafund" cases (where the fund approaches or exceeds $100 million).** *See In re Loestrin 24 Fe Antitrust Litig.*, 2020 WL 4035125, at *5 **By contrast, in a relatively smaller class case, such an**

[92] WSL's total hours in connection with this matter on behalf of Plaintiffs exceed 8,085 hours. Sheehan Supp. Dec. ¶ 2. Having reduced its fee application to account for the fees received for pre-suit investigation, the entire period of the representation is the relevant time frame to evaluate WSL's efforts. See ECF # 165 (Special Master's Report and Recommendations) at 16 (calculating lodestar cross-check based upon WSL's total hours). Here, WSL's fee of 23 1/3% results in a lodestar multiplier of 2.15, after comparing total hours to total fees, together with WSL's blended hourly fee of $600/hour in non-contingent matters.

> **amplification of the lodestar is generally accepted as appropriate.** *See, e.g.*, *Gordan v. Massachusetts Mut. Life Ins. Co.*, No. 13-CV-30184-MAP, 2016 WL 11272044, at *3 (D. Mass. Nov. 3, 2016) (fee of 3.66 times the lodestar eminently reasonable and is within a range approved by numerous other courts). **This is particularly true where there is high risk and the likelihood of receiving little or no recovery is a distinct possibility; in such cases, it is common for a court to consider a multiplier of more than two as reflecting a reasonable sum to compensate the attorneys for the risk of nonpayment.** *Id. see Mooney v. Domino's Pizza, Inc.*, No. 1:14-cv-13723-IT, 2018 WL 10232918, at *1 (D. Mass. Jan. 23, 2018) ("multiplier in this case is approximately 4.77, which is within the bounds of reasonableness for a class action"); *Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 369, 371 (S.D.N.Y. 2002) (multiplier of 4.65 reasonable).
>
> [Emphasis supplied]

Kondash, *supra*, 2020 WL 7641785, at *4-5.

CONCLUSION

WSL's fee application for 23 1/3% of the gross settlement proceeds should be approved.

Respectfully submitted,

/s/ Max Wistow

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