

**IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA**

**A.H. and ADRIANA FLEMING,  
individually and on behalf of all others  
similarly situated,**

**Plaintiffs,**

**v.**

**TO BE FILED IN: 16-C-497  
Honorable Jennifer Bailey  
*A.H. and Adriana Fleming  
v. Matulis, et al. – 18-C-176***

**STEVEN R. MATULIS, M.D.;  
CHARLESTON GASTROENTEROLOGY  
ASSOCIATES, P.L.L.C.; and  
CHARLESTON AREA MEDICAL CENTER, INC.;**

**Defendants.**

**MEMORANDUM IN SUPPORT OF REQUESTED  
SERVICE AWARDS FOR CLASS REPRESENTATIVES**

COMES NOW undersigned Settlement Class Counsel and submits to the Court the following Memorandum in Support of Requested Service Awards for Class Representatives. Settlement Class Counsel previously moved the Court to approve service awards in the amount of \$42,000 to each of the two Class Representatives appointed by the Court with respect to the pending \$23.1 million class settlement with Defendant Charleston Area Medical Center, Inc. ("CAMC"). These service awards are warranted for the following reasons:

**Discussion**

- I. Service awards serve an important public policy and are widely granted to class representatives.

Plaintiff Adriana Fleming filed her Class Action Complaint on behalf of herself and others similarly situated against the Defendants on or about March 31, 2017. Plaintiff A.H.

filed her Class Action Complaint against the Defendant on or about February 22, 2018. On or about October 15, 2018, Plaintiffs Adriana Fleming and A.H. consolidated their claims and jointly filed their Amended Class Action Complaint. As discussed at length below, both Ms. Fleming and A.H. have actively participated in the prosecution of this case, and their hard work and sacrifice have helped secure preliminary approval of a \$23.1 million class settlement against CAMC (with an opportunity to continue to pursue additional claims against CAMC as well as the other Defendants). (See the attached Affidavits of Kristina Salango, Esq., and David H. Carriger, Esq., attached hereto as **Exhibit A** and **Exhibit B**.) This class settlement stands to benefit more than 2,500 other female patients of Dr. Matulis (or the estates of such patients). Ms. Fleming and A.H. exemplify the fact that "[s]erving as a class representative is a burdensome task and it is true that without class representatives, the entire class would receive nothing." *Kay v. Equitable Production Co.*, 749 F. Supp. 2d 455, 472 (S.D.W.Va. 2010).

"Incentive awards<sup>1</sup> are fairly typical in class action cases." See *Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 958 (9<sup>th</sup> Cir. 2009) (citing 4 William B. Rubenstein et al., *Newberg on Class Actions* § 11:38 (4<sup>th</sup> ed. 2008)). "Numerous courts have authorized incentive awards." *Hadix v. Johnson*, 322 F.3d 895, 897 (6<sup>th</sup> Cir. 2003) (internal citations omitted). Courts that have approved incentive awards "have stressed that incentive awards are efficacious ways of encouraging members of a class to become class representatives and rewarding individual efforts taken on behalf of the class." *Hadix*, 322 F.3d at 897. Such awards ... are intended to compensate class representatives for work done on behalf

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<sup>1</sup> Courts have used the term "incentive payment" as well as the term "service award" to refer to those payments awarded to a class representative that are above and beyond his/her pro rata share of a class recovery.

of the class, to make up for financial or reputational risk undertaken in bringing the action.”  
*Rodriguez*, 563 F.3d at 9958.<sup>2</sup>

Service awards to class representatives serve an important public policy. Service awards can encourage people to take on the role of a class representative in important cases – like this one – that enforce the rights of others even though there is a risk that an individual recovery may be small in relation to the effort required and the risks taken. In short, service awards to class representatives are routinely recognized to “encourage socially beneficial litigation.” *Kay*, *supra*, citing *Muhammad v. Nat’l City Mortgage, Inc.*, 2008 U.S. Dist. LEXIS 103534 at \*7 (S.D.W.VA. Dec. 19, 2008). Here, the efforts of Ms. Fleming and A.H. helped create a \$23.1 million settlement fund that will benefit thousands of other female patients of Dr. Matulis. Therefore, their efforts should be rewarded consistent with public policy.

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<sup>2</sup> In the interest of full disclosure, Class Counsel advises the Court that the Eleventh Circuit Court of Appeals recently ruled that two obscure U.S. Supreme Court decisions from the 1800s precluded federal courts from granting service awards/incentive payments to class representatives in cases brought under Fed.R.Civ.P. 23. See *Johnson v. NPAS Sols., LLC* 975 F.3d 1244, 1260 (11<sup>th</sup> Cir. 2020). However, the Eleventh Circuit’s ruling has no precedential value in this action brought under West Virginia law. Moreover, courts in other federal circuits (as recently as two weeks ago) have **uniformly declined to follow** the Eleventh Circuit’s ruling in *Johnson*, and the *Johnson* decision remains an anomaly outside of the Eleventh Circuit. See, e.g., *Knox v. John Varvatos Enters.*, 2021 U.S. Dist. LEXIS 29410 (S.D.N.Y. Feb. 17, 2021); *Somogyi v. Freedom Mortg. Corp.*, 2020 U.S. Dist. LEXIS 194035 (D.N.J. Oct. 20, 2020); *Wickens v. ThyssenKrupp Crankshaft Co, LLC*, 2021 U.S. Dist. LEXIS 17884 (N.D. Ill. Jan. 26, 2021); *In re Apple Inc. Device Performance Litig.*, 2021 U.S. Dist. LEXIS 50546 (N.D. Cal. March 17, 2021); *In re Lithium Ion Batteries Antitrust Litig.*, 2020 U.S. Dist. LEXIS 233607 (N.D. Cal. Dec. 10, 2020).

II. Ms. Fleming and A.H. played a critical role in this important case. The requested service awards are consistent with awards in other cases and are warranted given the settlement amount.

The total service award (\$84,000) sought for the two Class Representatives is less than 0.4 percent (four-tenths of one percent) of the total settlement amount (\$23.1 million). The total amount of the requested service award is clearly reasonable when compared to the size of service awards that are given in other class actions where the representative plaintiffs play a crucial role in the litigation. For example, courts routinely award the most substantial service awards to class representatives in cases that are premised on employment discrimination. Theodore Eisenberg & Geoffrey P. Miller, *Incentive Awards to Class Action Plaintiffs: An Empirical Study*, 53 UCLA L.Rev. 1303, 1308 (2006). Empirical data indicates that service awards in employment discrimination cases have previously averaged 2.0 percent (two percent) of the total class recovery. *Id.*, at 1339-40. Courts justify larger awards in employment discrimination cases because in such cases “representative plaintiffs will often be key witnesses,” and they may suffer retaliation or harassment by virtue of their position as plaintiffs in such cases. *Id.*, at 1315-16.

Although this case does not involve claims of employment discrimination, the Class Representatives do allege that they (and other female patients) were victims of gender-based discrimination and harassment by CAMC. The very nature of this case has made Ms. Fleming and A.H. critical witnesses, much like plaintiffs in an employment discrimination case.<sup>3</sup> In their effort to establish damages for members the Settlement Class, Ms. Fleming and A.H. produced their personal medical and counseling records. (See

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<sup>3</sup> Because of HIPAA laws and privacy rights, the identity of members of the Settlement Class has been protected by the Court. This made the Class Representatives’ role in this litigation all the more important, as the Class Representatives were required to relinquish certain privacy rights to bring this lawsuit and to serve the interests of all members of the Settlement Class.

**Exhibits A and B.**) Their medical and counselling histories were scrutinized by potentially dozens of lawyers and an unknown number of litigation consultants. To support their claims (and the claims of the class), both Ms. Fleming and A.H. travelled out-of-state for interviews by a consulting psychiatrist. *Id.* Ms. Fleming and A.H. were also interviewed in Charleston by another consulting psychiatrist. Ms. Fleming and A.H. were each deposed for virtually an entire day. *Id.* During their depositions, Ms. Fleming and A.H. were subjected to invasive questioning from Defense Counsel about their personal sexual histories and asked to identify prior sexual partners. *Id.* Ms. Fleming and A.H. were asked numerous questions about when, with whom, and how frequently they engaged in sexual intercourse, whether they experienced pain or other symptoms during or after intercourse, and whether and to what degree they engaged in certain sexual practices.<sup>4</sup> *Id.* These depositions were attended in-person by approximately ten lawyers (both male and female) and attended by telephone by in-house counsel for CAMC. These depositions were also videotaped.

Unlike some class action lawsuits in which the class representatives might simply “lend their names” to a complaint and have little further involvement in the subsequent litigation, Ms. Fleming and A.H. have actively participated in all aspects in this important case, including assisting Settlement Class Counsel in responding to voluminous written discovery, producing their own medical and counseling records, travelling out-of-state, being interviewed by multiple psychiatrists, and testifying in depositions. *Id.* Perhaps most importantly, Ms. Fleming and A.H., sacrificed their own privacy and disclosed intimate details about their own lives so that thousands of other similarly situated women

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<sup>4</sup> Due to the invasive and sensitive nature of these questions, they are redacted from **Exhibits A and B**. An unredacted copy will be filed under seal and provided to the Court for review.

**would not have to do so** as a prerequisite to participating in the pending \$23.1 million class settlement with CAMC. This itself is an extraordinary benefit for the Settlement Class. Under these circumstances, justice would truly be served by authorizing service awards of \$42,000 each to Ms. Fleming and to A.H. for their work, dedication, and sacrifice in this litigation.

### **Conclusion**

WHEREFORE undersigned Settlement Class Counsel respectfully request that the Court authorize payment of a service award of \$42,000 to each Class Representative in addition to their pro-rata share in the class settlement.


Respectfully submitted,  
A.H. and Adriana Fleming, on behalf of herself  
and on behalf of a class of West Virginia residents similarly situated,  
Plaintiffs/Class Representatives, By Counsel:



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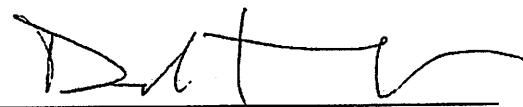


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*Settlement Class Counsel*



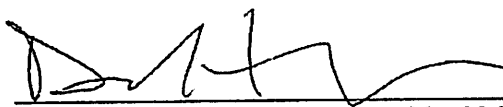
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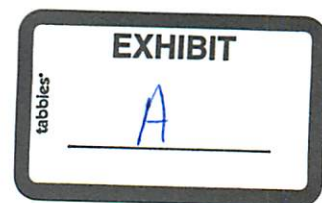
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CHARLESTON GASTROENTEROLOGY  
ASSOCIATES, P.L.L.C.; and  
CHARLESTON AREA MEDICAL CENTER, INC.;

Defendants.

AFFIDAVIT OF KRISTINA SALANGO, ESQ.

NOW COMES Kristina Salango, Esq., and being duly sworn, doth aver and state the following based on personal knowledge:

1. I am counsel of record for Plaintiff/Class Representative "A.H." in this civil action, and I am familiar with the scope and nature of her personal participation in this class action litigation.
2. During this litigation A.H. has met, in-person, with me and other staff at my law firm on numerous occasions to discuss matters relevant to the litigation, and we frequently speak by telephone to stay updated regarding progress on the case.
3. As part of this litigation, A.H. travelled overnight to Florida in to be interviewed by a consulting psychiatrist. A.H. also underwent an additional interview with another psychiatrist in Charleston, W.Va.



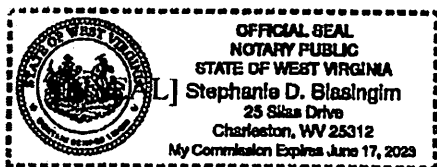
4. A.H. has reviewed and assisted in responding to voluminous written discovery in this matter – approximately 92 interrogatories, 106 requests for production, and 123 requests for admission.
5. I personally attended A.H.'s deposition in this litigation. Her deposition commenced at 9:00 a.m. on January 22, 2019. It was not completed until 5:40 p.m. that day. During her deposition, A.H. was repeatedly questioned about her medical and mental health histories and questioned at length about her sexual practices. These questions were understandably upsetting to A.H.; however, A.H. responded appropriately to all questions she was asked during her deposition. The questions that A.H. was asked in her deposition included, but were not limited to, the following:
  - (a) [REDACTED]
  - (b) [REDACTED]
  - (c) [REDACTED]
  - (d) [REDACTED]
  - (e) [REDACTED]
  - (f) [REDACTED]
  - (g) [REDACTED]
  - (h) [REDACTED]
  - (i) [REDACTED]
  - (j) [REDACTED]
  - (k) [REDACTED]
  - (l) [REDACTED]
  - (m) [REDACTED]


6. In my judgment, A.H. has taken her role as an advocate for the class very seriously throughout the duration of this litigation. In my judgment, A.H.'s hard work in this litigation has helped achieve a highly substantial monetary benefit for the entire class.

  
Kristina M. Salango, Esquire

Taken, subscribed, and sworn to before me this 31 day of March, 2021.

My commission expires: June 17, 2023.



  
Notary Public

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**A.H. and ADRIANA FLEMING,  
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**Defendants.**

**AFFIDAVIT OF DAVID H. CARRIGER, ESQ.**

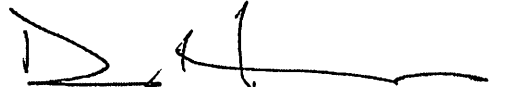
NOW COMES David H. Carriger, Esq., and being duly sworn, doth aver and state the following based on personal knowledge:

1. I am counsel of record for Plaintiff/Class Representative “Adriana Fleming” in this civil action, and I am familiar with the scope and nature of her personal participation in this class action litigation.
2. During this litigation Adriana Fleming has met, in-person, with me and other staff at my law firm on numerous occasions to discuss matters relevant to the litigation, and we frequently speak by telephone to stay updated regarding progress on the case.
3. As part of this litigation, Adriana Fleming travelled overnight to Florida to be interviewed by a consulting psychiatrist. Adriana Fleming also underwent an additional interview with another psychiatrist in Charleston, W.Va.

4. Adriana Fleming has reviewed and assisted in responding to voluminous written discovery in this matter – approximately 92 interrogatories, 106 requests for production, and 123 requests for admission.
5. I personally attended Adriana Fleming's deposition in this litigation. Her deposition commenced at 12:30 p.m. on January 23, 2019. It was not completed until 8:13 p.m. that day. During her deposition, Adriana Fleming was repeatedly questioned about her medical and mental health histories and questioned at length about her sexual practices. These questions were understandably upsetting to Adriana Fleming; however, Adriana Fleming responded appropriately to all questions she was asked during her deposition. The questions that Adriana Fleming was asked in her deposition included, but were not limited to, the following:

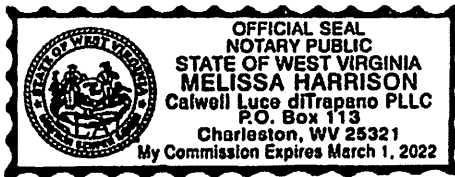
- (a) [REDACTED]  
[REDACTED]
- (b) [REDACTED]
- (c) [REDACTED]
- (d) [REDACTED]
- (e) [REDACTED]  
[REDACTED]
- (f) [REDACTED]  
[REDACTED]
- (g) [REDACTED]
- (h) [REDACTED]
- (i) [REDACTED]

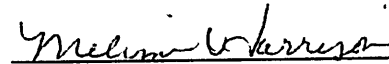
6. In my judgment, Adriana Fleming has taken her role as an advocate for the class very seriously throughout the duration of this litigation. In my judgment, Adriana Fleming's hard work in this litigation has helped achieve a highly substantial monetary benefit for the entire class.

  
David H. Carriger, Esquire

Taken, subscribed, and sworn to before me this 2 day of April, 2021.

My commission expires: March 1, 2022.



  
Notary Public

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

A.H. and ADRIANA FLEMING,  
INDIVIDUALLY, AND ON BEHALF  
OF ALL OTHERS SIMILARLY SITUATED,

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CHARLESTON GASTROENTEROLOGY  
ASSOCIATES, P.L.L.C.;  
and CHARLESTON AREA MEDICAL CENTER, INC.;

**Defendants.**

**CERTIFICATE OF SERVICE**

I, David H. Carriger, counsel for Plaintiff A.H. and Adriana Fleming, individually and on behalf of others similarly situated, do hereby certify that I have served a true and exact copy of the foregoing ***“Memorandum In Support of Requested Service Awards For Class Representatives”*** via U.S. Mail, postage prepaid, on this 2<sup>nd</sup> day of April, 2021, addressed to the following.

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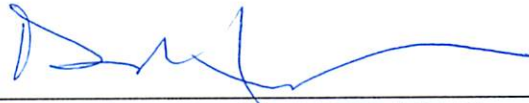
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David H. Carriger, Esquire (WVSB# 7140)