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

CHARLESTON AREA MEDICAL CENTER, INC.,

Defendants.

VERIFIED PETITION FOR AWARD OF ATTORNEYS' FEES AND EXPENSES AND PAYMENT OF SERVICE AWARDS

Settlement Class Counsel respectfully submits the instant Petition for Award of Attorneys' Fees and Expenses for Class Counsel's work in the above-referenced civil action which ultimately resulted in a proposed class settlement of Five Million and 00/100 Dollars ($5,000,000.00) with Defendant Charleston Area Medical Center, Inc. ("CAMC"), for all remaining claims, after many years of active and contentious litigation first beginning in 2016. Settlement Class Counsel also moves the Court for payment of service awards to the proposed Class Representatives. This proposed Class Settlement received preliminary approval from the Court on March 10, 2022.

Summary of Litigation

This litigation was commenced when Plaintiff/Class Representative Adriana Fleming filed her Class Action Complaint against the Defendants on or about March 31, 2017.[1] Ms. Fleming's

[1] Prior to filing her Complaint, Ms. Fleming served Notices of Claim against all Defendants pursuant to the West Virginia Medical Professional Liability Act.

case was assigned Kanawha County Civil Action No. 17-C-456 and assigned to the Honorable Joanna Tabit. The Defendants immediately sought to have the case dismissed on numerous legal grounds, leading to an in-person hearing and arguments on the pending motions on September 7, 2017. By order dated January 29, 2018, Judge Tabit denied the Defendants' motions to dismiss. Plaintiff/Class Representative A.H. filed her Class Action Complaint against the Defendants on or about February 22, 2018. A.H.'s case was assigned Kanawha County Civil Action 18-C-176 and originally assigned to the late and Honorable J. Stucky.

Shortly thereafter, Defendant Charleston Area Medical Center (CAMC) moved, pursuant to Trial Court Rule 26.06, to refer both the *Fleming* and *A.H.* cases, as well as all other pending lawsuits involving Defendant Matulis to the Mass Litigation Panel. Plaintiffs A.H. and Fleming were both opposed to such a referral and, instead, sought to consolidate their cases (and the remainder of the Matulis litigation) before this Court pursuant to W.Va.R.Civ.P. 42. This Court held a hearing on the issue of consolidation on August 15, 2018, and on September 27, 2018, this Court entered an order consolidating before it all Matulis litigation (including the Fleming and A.H. civil actions).[2]

Following the Court's consolidation of Matulis-related cases, Plaintiffs/Class Representatives Fleming and A.H. consolidated their claims and filed a joint Amended Class Action Complaint on or about October 17, 2018.[3] The Defendants immediately moved to dismiss the Amended Complaint filed motions to dismiss and asserted various arguments as to why Plaintiffs allegedly failed to state legally cognizable claims against them. On February 13, 2019,

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[2] The Supreme Court of Appeals of West Virginia would later deny CAMC's motion to refer all of the Matulis-related cases to the Mass Litigation Panel.

[3] The Consolidated Class Action Complaint retained Civil Action No. 18-C-176.

the Court entered a Scheduling Order in this matter which included both a class certification hearing date (November 22, 2019) and a trial date (April 6, 2020). The Court held a hearing and heard oral arguments on Defendants' motions to dismiss on March 1, 2019 and denied Defendants' motions from the bench.

Plaintiffs Plaintiffs/Class Representatives Fleming and A.H. settled certain claims on a class-wide basis against CAMC by Final Order on June 7, 2021, but Plaintiffs/Class Representatives continued to litigate their remaining claims against CAMC and their claims against the other Defendants, Stephen Matulis, M.D., and his practice group, Charleston Gastroenterology Associates, P.L.L.C. ("CGA"). The continued litigation of the remaining claims spawned multiple declaratory judgment actions related to whether the remaining claims were covered by certain insurance policies. Additionally, the Court re-heard Defendants' motions to dismiss and summary judgment motions and also held a class certification hearing. During this period, the Court approved a class settlement of Plaintiffs'/Class Representatives' claims against Defendants Matulis and CGA on December 3, 2021, and the Court scheduled the trial on Plaintiffs'/Class Representatives' remaining claims against CAMC for March 7, 2022.

Plaintiffs/Class Representatives engaged in extensive pretrial motions practice as the trial date drew nearer. During this period, Plaintiffs/Class Representatives and CAMC engaged in extensive settlement negotiations and conducted a mediation which culminated in a proposed class settlement of Plaintiffs' remaining claims against CAMC.

Summary of Settlement Benefits and Requested Attorneys' Fees and Service Awards

The pending class settlement negotiated by Class Counsel requires Defendant CAMC to pay a gross amount of $5,000,000.00 into a common fund. This amount will be inclusive of Class

Counsel's attorneys' fees, expenses, any service awards to Class Representatives A.H. and Ms. Fleming. In addition to the forgoing amount, the pending class settlement also requires Defendant CAMC to separately pay costs of claims administration (including the cost of a court-appointed guardian ad litem utilized in the claims administration process).

After a half-decade of litigation, Plaintiffs' pending class settlement with Matulis and CGA received preliminary approval from the Court. Class Counsel is seeking payment of attorneys' fees of up to 39%. Class Counsel is seeking reimbursement of advanced expenses in this matter in the amount of $114,697.56.[4] Class Counsel requests that each Class Representative be granted a service award of up to $2,500.00 from the gross settlement amount (for a total of $5,000.00) in addition to their regular share of the settlement proceeds as a member of the proposed Settlement Class.

Should the Court (1) grant Class Counsel's full request for payment of attorneys' fees and reimbursement of expenses and (2) grant payment of the requested service awards to the Class Representatives, then the amount available for distribution to the Settlement Class will be approximately $2,930,302.44. Under this scenario, each member of the 2,525-person proposed Settlement Class could receive an equal payment of approximately $1,160.51

Discussion

I. Class Counsel's requested attorneys' fees are fair and reasonable given the novel and complex nature of the case, the work performed, the risks taken, and the results achieved.

[4] Class Counsel did not previously seek the reimbursement of advanced expenses from the most recent class settlement with Defendants Matulis and CGA.

The pending $5,000,000.00 class settlement with Defendant CAMC is the latest result of multiple years of litigation by Class Counsel in a novel and complex case against multiple parties, including CAMC. Class Counsel's request for an attorneys' fee is supported by existing law, as well as by the work performed, the risks taken, and the exemplary results that Class Counsel achieved for the Settlement Class.

A. The appropriate measure for determining Class Counsel's fee is based on a percentage of the benefit conferred to the Settlement Class.

The common fund doctrine is one of the earliest recognized exceptions to the "American Rule" which generally requires that litigants bear their own costs and attorneys' fees. Premised on the equitable powers of the court, the common fund doctrine allows individuals who maintain a suit that results in the creation, preservation or increase of benefits in which others have a common interest, to be reimbursed from a percentage of those benefits. *Cent. R.R. & Banking Co. v. Pettus*, 113 U.S. 116 (1885); *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980).

Nearly all federal circuits that have considered the issue have found that a trial court may use the percentage method and, importantly, in West Virginia a one-third (33.3%) contingency fee is presumptively reasonable. *See Hayseeds, Inc. v. State Farm Fire & Cas.*, 177 W.Va. 323, 352 S.E.2d 73, 80 (1986). *Muhammad*, 2008 U.S. Dist. LEXIS 103534, at *18; *see Goldenberger v. Integrated Res., Inc.*, 209 F.3d 43 (2d Cir. 2000); *Cook v. Niedert*, 142 F.3d 1004, 1013 (7th Cir. 1998); *In re Thirteen Appeals Arising out of San Juan DuPont Plaza Hotel Fire Litig.*, 56 F.3d 295, 307 (1st Cir. 1995); *In re Wash. Public Power Supply Sys. Litig.*, 19 F.3d at 1291, 1295 (9th Cir. 1994); *Gottlieb v. Barry*, 43 F.3d. 474 (10th Cir. 1994); *Rawlings v. Prudential-Bache Props., Inc.*, 9 F.3d 513, 516 (6th Cir. 1993); *Longden v. Sunderman*, 979 F.2d 1095, 1099 (5th Cir. 1992); *see also In re Cont'l Ill. Sec. Litig.*, 962 F.2d 566 (7th Cir. 1992); *Paul, Johnson, Alston & Hunt v. Graulty,* 886 F.2d 268, 272 (9th Cir. 1989); *Brown v. Phillips Petroleum Co.,* 838 F.2d 451,

454, 456 (10th Cir.), *cert. denied*, 488 U.S. 822 (1988); *Camden I Condo. Ass'n*, 946 F.2d 768, 773-774 (11th Cir. 1991); *Bebchick v. Wash. Met. Area Transit Comm'n*, 805 F.2d 396, 406-7 (D.C. Cir. 1986). In fact, some circuits mandate use of the percentage of fund method. *Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261, 1271 (D.C. Cir. 1993); *Camden I Condo. Ass'n,* 946 F.2d at 774; *see generally* 1 Alba Conte, *Attorney Fee Awards* § 2.02 at 31 (2d ed. 1993); *Court Awarded Attorney Fees, Report of the Third Circuit Task Force ("Task Force Report")*, 108 F.R.D. 237 (1985) (Prof. Arthur R. Miller, Reporter).

The District Courts within the Fourth Circuit, including West Virginia Federal District Courts, have consistently endorsed the percentage method. "...application of a percentage method to calculate an attorney's fee award is now favored." *Kidrick v. ABC Television & Appliance Rental*, 1999 WL 1027050 *1 (N.D. W. Va. 1999) (citing *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980)); *see also Teague v. Bakker*, 213 F. Supp. 2d 571, 582 (W.D.N.C. 2002) ("The percentage recovery method is generally favored...."); *Goldenberger v. Marriott PLP Corp.*, 33 F. Supp.2d 434, 437-38 (D. Md. 1998) (applying percentage method, and noting general trend in favor thereof); *Strang v. JHM Mortgage Sec. Ltd. P'ship*, 890 F. Supp. 499, 504-03 (E.D. Va. 1995) (holding that calculating fees based upon percentage "is a more efficient and less burdensome than the traditional lodestar method, and offers a more reasonable measure of compensation for common fund cases"); *Edmonds v. United States*, 658 F. Supp. 1126 (D.S.C. 1987) (finding percentage method preferable). Percentage-based attorney's fees:

> (1) align the interests of claimants and lawyers by rewarding superior performance and punishing failure;
>
> (2) minimize the need to evaluate the reasonableness of attorneys' efforts *ex post*, which is both time consuming and often hard to do; and

(3) transfer the burden of financing lawsuits and other risks from claimants to attorneys who are better able to bear them.

Kirchoff v. Flynn, 786 F.2d 320, 326 (7th Cir. 1986); *see also Muhammad*, 2008 U.S. Dist. LEXIS 103534, at *19-20.

In its 1985 report, the Third Circuit Task Force recommended that a district court "should attempt to establish a percentage fee arrangement." *Task Force Report,* 108 F.R.D. 237, 255 (1985); *see also Muhammad*, 2008 U.S. Dist. LEXIS 103534, at *20. Since that time, the Third Circuit has, on several occasions, "reaffirmed that application of a percentage-of-recovery method is appropriate in common-fund cases." *In re Cendant Corporate PRIDES Litig.*, 243 F.3d 722 (3d Cir. 2001) (collecting cases). In sum, there is a clear legal support among the federal and state courts, that the award of attorneys' fees, such as the requested award in this matter of up to 39%, should be based on a percentage of the recovery. This consensus derives from the recognition that the percentage of benefits approach is a well-reasoned and more equitable method of determining attorneys' fees in such cases.

B. The fee percentage requested by Class Counsel is warranted by the work performed, risks taken, and results achieved.

The benefits conferred by the pending class settlement with Defendant CAMC are significant. As discussed above, a request for attorneys' fees of one-third (33.3%) is "presumptively fair" for an ordinary case. The instant case is, undeniably, far from the ordinary case. The Court is aware of this fact by virtue of presiding in these matters for many years and ruling upon novel and complicated issues repeatedly. While many other civil actions began and ended, this case continued to be hard-fought. The half-decade of risk, unknown outcome, and complex nature of class actions, certain claims made pursuant to the MPLA as well as certain claims related to sexual discrimination and harassment, all firmly support the fee request in this

case of up to 39%. The nature of the remaining claims in this action, even without the added complexity of class action issues, are complicated and require specialized litigation knowledge. In sum, the fee request is firmly support by the work performed, risk taken, and substantial benefits conferred to the class members.

This Court has already recognized this litigation is complex and required specialized skill and knowledge by Class Counsel. The Court has further already recognized that Class Counsel has zealously litigated this complex matter when the Court approved a contingent fee of 39% for Class Counsel relating to the previous partial class settlement with Defendant CAMC and the previous class settlement with Defendants Matulis and CGA. (See, generally, *Order Granting Final Approval of Class Action Settlement of Certain Claims Against Defendant CAMC*, June 7, 2021. and *Final Order Approving Class Action Settlement,* December 5, 2021)

Throughout the past half-decade, this litigation spawned a substantial number of declaratory judgment actions related the availability and scope of insurance coverage pertaining to Plaintiffs'/Class Representatives' claims. As a result, Plaintiffs/Class Representatives were also named as defendants in multiple lawsuits filed in both federal and West Virginia state court. (See, e.g., *Westfield Insurance Company v. Steven R. Matulis, M.D., et al.*, S.D.W.Va. Civil Action No. 2:17-CV-01269; *West Virginia Mutual Insurance Company v. Steven R. Matulis, et al*, Kanawha County Civil Action No. 17-C-748. Thus, Class Counsel had to litigate certain declaratory judgment actions simultaneously while litigating this case.

Give the complex nature of this litigation and the existence of such tagalong litigation related to insurance coverage for Plaintiffs/Class Representative' claims, Settlement Class Counsel has thousands of hours of work time invested in this litigation over many years. The amount of

time that Settlement Class Counsel has invested in this case strongly supports this request for attorneys' fees.

The risks that Settlement Class Counsel faced in pursuing Plaintiffs'/Class Representatives' claims, including the remaining claims against CAMC, were significant and numerous. As the Court will recall, the CAMC raised defenses to the remaining claims related to injury-in-fact/standing and subject matter jurisdiction given recent rulings by the West Virginia Supreme Court. If these arguments were ultimately persuasive, then Plaintiffs'/Class Representatives' recovery might be impossible. The availability of applicable insurance has been a significant issue from the start of the case. More recently, insurance carriers for CAMC had petitioned the West Virginia Supreme Court to review certain rulings by the Court on coverage issues related to the remaining claims. Thus, time and time again Settlement Class Counsel ran the real risk their investment of substantial time and money in this litigation might all be for naught. The significant risks that Settlement Class Counsel undertook in litigating this case strongly supports Settlement Class Counsel's request for attorneys' fees.

The pending CAMC class settlement that was negotiated by Class Counsel is not a "coupon" or "rebate" settlement. This class settlement will provide real and significant benefits to the Settlement Class. It can, upon final approval by the Court, provide a significant cash payment to more than 2,500 former female patients of CAMC (in addition to cash payments previously provided to the same patients because of the diligent work of Settlement Class Counsel). This represents a significant benefit to each member of entire Settlement Class.

Another substantial benefit of the settlement negotiated by Settlement Class Counsel is that it will permit members of the Settlement Class to receive significant compensation while remaining anonymous. Unlike the Plaintiffs/Class Representatives, members of the settlement

class **will not have to turn over their medical and mental health records** and **will not have to answer intrusive questions in a deposition about their sexual histories and sexual practices.** These significant benefits that are provided by the pending CAMC class settlement strongly support Settlement Class Counsel's request for attorneys' fees.

II. Settlement Class Counsel's expenses are indicative of their continued zealous litigation of a novel and complex case against CAMC and other defendants.

Settlement Class Counsel requests reimbursement of expenses totaling $110,250.23 in this matter.[5] This amount reflects the realities of continuing to litigate a novel and complex case against multiple Defendants, certain of which were represented by multiple law firms. This Court has recognized that this litigation is complex and requires specialized knowledge by Settlement Class Counsel. The Court has previously recognized that litigating a case such as this one has required Settlement Class Counsel to spend substantial time and money.

Discovery in this complex class action case was extensive and thorough. Following the initial class settlement of certain claims against CAMC, Settlement Class Counsel continued to engage in significant fact and expert discovery, engaged in extensive motions practice pursuant to Rules 12, Rule 23, and Rule 56 of the West Virginia Rules of Civil Procedure, and engaged in pretrial motions practice and prepared for a pending class action trial. The record reflects that Settlement Class Counsel has zealously prosecuted the litigation. (See *Order Granting Preliminary Approval of Proposed Class Action*, March 22, 2022, at p. 6.) The aforementioned expenses permitted Settlement Class Counsel to vigorously litigate this matter and achieve a highly successful result for the Settlement Class.

[5] Class Counsel did not previously seek the reimbursement of advanced expenses from the most recent class settlement with Defendants Matulis and CGA.

III. The requested service awards for the two Plaintiffs/Class Representatives are consistent with public policy and are reasonable given their hard work and significant participation in this litigation.

Settlement Class Counsel requests that each Class Representative receive a service award of up to $2,500.00 from the proposed class settlement (in addition to the receipt of their share of the net settlement money as a member of the proposed Settlement Class). The degree of hard work and significant participation by Plaintiffs Adriana Fleming and A.H. over the lengthy course of this litigation has already been recognized by the Court. (*Order Granting Final Approval of Class Action Settlement of Certain Claims Against Defendant CAMC*, June 7, 2021, at p. 7.) The pending 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).

As the Court is aware, "[i]ncentive awards[6] are fairly typical in class action cases." See *Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 958 (9th Cir. 2009) (citing 4 William B. Rubenstein et al., *Newberg on Class Actions* § 11:38 (4th ed. 2008). "Numerous courts have authorized incentive awards." *Hadix v. Johnson*, 322 F.3d 895, 897 (6th 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

[6] 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.

compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action." *Rodriguez*, 563 F.3d at 9958.[7]

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 significant settlement fund that will benefit thousands of other female patients who received colonoscopies at CAMC. Therefore, their efforts should be rewarded in a manner consistent with public policy.

Conclusion

WHEREFORE undersigned Class Counsel respectfully request that the Court approve payment of their requested attorneys' fees and reimbursement of expenses, and approve payment of service awards to the Class Representatives as detailed herein.

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[7] 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 (11th 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 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); *Grace v. Apple, Inc.*, 2021 U.S. Dist. LEXIS 66294 (N.D. Cal. March 31, 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).

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

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

Defendants.

VERIFICATION

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, to wit:

Comes now David H. Carriger, Esq, and after first being duly sworn, do hereby certify that the statements contained in the foregoing "*Verified Petition for Award of Attorneys' Fees and Expenses and Payment of Service Award,*" with respect to Settlement Class Counsel's time and expenses litigating this matter are true and correct.

David H. Carriger, Esq.

Taken, subscribed and sworn to before me, a Notary Public, in and for the county and state aforesaid, this 11th day of April, 2022.

My Commission expires Feb. 20, 2027

OFFICIAL SEAL
NOTARY PUBLIC
STATE OF WEST VIRGINIA
Paula A. McLane
Caldwell Luce diTrapano PLLC
500 Randolph Street
Charleston, WV 25302
My Commission Expires Feb. 20, 2027

Notary Public