

COMMONWEALTH OF MASSACHUSETTS

ESSEX, ss.

**SUPERIOR COURT
CIVIL ACTION NO. 1877CV01343G
Lead Case**

IN RE: COLUMBIA GAS CASES

**PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR FINAL
APPROVAL OF CLASS ACTION SETTLEMENT**

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I. Introduction

The Settlement Agreement before the Court resolves the twelve aggregate consolidated proceedings filed in the wake of the September 13, 2018 Merrimack Valley natural gas explosions (“the Incident”). Plaintiffs and Class Counsel¹ have negotiated an extraordinary \$143 million, non-reversionary settlement fund for the benefit of the proposed class of residents, property owners and businesses in Lawrence, Andover and North Andover. The proposed Settlement provides for substantial direct cash payments to claimants in amounts calculated to compensate them for the harms they suffered from the Incident. This case presents a rare and valuable outcome — a settlement reached within a year of the Incident, that avoids the years-long war of attrition that usually defines high stakes class action litigation, and puts compensation into the hands of those who need it as quickly as is realistically possible.

If approved, the infusion of the settlement funds will also have a stimulus-like ripple effect on the Merrimack Valley economy. A substantial portion of the settlement funds will be spent locally by Class Members which will lead to additional spending by local businesses, resulting in a multiplier effect, estimated to be at least \$37 million, and

¹ For purposes of this final approval submission, Class Counsel encompasses Co-Lead and Liaison Counsel (John Roddy, Bailey & Glasser LLP, Frank Petosa, Morgan & Morgan, PA, Elizabeth Graham, Grant & Eisenhofer P.A., and Leo Boyle and Bradley Henry, Meehan, Boyle, Black & Bogdanow, P.C.), and the members of both the Plaintiffs’ Steering Committee (Albert Farrah, Farrah & Farrah, Barry Altman, Altman & Altman, Claudine Cloutier, The Keches Law Group, P.C., Danilo Gomez, Law Office of Danilo Gomez, Douglas Sheff, Sheff Law, Kathy Cook, KJC Law Firm, LLC) and Plaintiffs’ Executive Committee (Hunter Shkolnik, Napoli Shkolnik PLLC, Michael Burg, Burg Simpson Eldredge Hersh & Jardine, P.C., Nathaniel Orenstein, Berman Tabacco, Robert K. Jenner, Jenner Law, P.C.).

potentially as much \$119 million more, with accompanying job increases as well. See Exhibit A, Declaration of Evan Schouten, Economist (“Schouten Decl.”), ¶¶ 8, 83-87, 92.

Based on their analysis of the relevant facts and legal principles, Plaintiffs and Class Counsel believe that the terms of the Settlement are fair, reasonable, and adequate, and beneficial to and in the best interests of the proposed Settlement Class. Columbia Gas denies all liability, but has agreed to the Settlement to avoid continued costs and the risks of litigation. Harvard Law School Prof. William Rubenstein, the current author of *Newberg on Class Actions* and one of the leading academics in the field, has opined that the Settlement easily meets the fair, reasonable and adequate standard. Exhibit B, Declaration of William Rubenstein (“Rubenstein Decl.”), ¶¶ 1, 12-24.

II. The Key Terms of the Settlement

The nature of Plaintiffs’ case and their sought after relief are both described in the preliminary approval filing. Dkt. # 56, 56.1. The full text of the Settlement Agreement was filed with the preliminary approval memorandum, Dkt # 56.1, as Exhibit 1. The material terms are as follows:

A. The Settlement Class

The Settlement Class is defined as:

All persons who resided, owned property, or owned a business in Lawrence, Andover and North Andover (“the Class Area”) as of September 13, 2018.

The Settlement Class excludes officers and Board of Directors of Columbia Gas, and members of their immediate families, and Columbia Gas’ legal representatives, heirs, successors or assigns and any entity in which they have or have had a controlling interest, and including insurers and insurance syndicates whose claims for damages regarding the September 13, 2018 fires and explosions arise out of a right of subrogation, whether equitable, contractual or otherwise.

Physical bodily injury and wrongful death claims are not part of the Consolidated Class Action. To the extent someone has a physical bodily injury claim and develops emotional distress, those claims are not part of the class because individuals cannot pursue both litigation and participate in the class settlement.

Individuals who suffer emotional distress, regardless if they develop some physical manifestations as a result of that emotional distress (such as insomnia, loss of appetite, headaches, digestive trouble, etc.), are included in the Settlement Class.

Settlement Agreement, ¶ 13.7.

B. Payments to Settlement Class Members

Funding of The Settlement Fund. Columbia Gas paid \$3 million into an escrow account following preliminary approval, and that amount has been applied to the ongoing costs of providing notice to the class and settlement and claims administration. Settlement Agreement, ¶ 6.04. If the Court grants final approval of the Settlement, Columbia Gas will pay the remaining balance of the \$143 million Settlement Fund within 15 business days of the Final Approval Order. And, within 15 business days of the Effective Date, the Settlement Administrator will distribute settlement proceeds to those class members who have submitted valid claims. *Id.* ¶ 7.04

Payments to Class Members. Each Settlement Class Member who submitted a valid claim will receive a *pro rata* payment in an amount determined by the Settlement Administrator under the allocation plan developed by Class Counsel and their experts. *Id.*, ¶ 7.03. Class Members had the option to submit a claim for a lump-sum payment calculated using a point based system, an itemized claim based on outstanding expenses supported by itemized receipts, or an extraordinary injury claim for severe circumstances. *See* Class Notice, Exhibit C to Preliminary Approval Motion. The point

system factors include proximity to the impact zone, number of adults in the household, length of time displaced or without gas services or appliances, number of residents over 65, whether the home sustained damage, and the number of children. Exhibit E-1, Declaration of John Roddy (“Roddy Decl.”), ¶ 24; Exhibit C, Declaration of Scott Fenwick, Chief of Operations for Heffler Claims Group (“Fenwick Decl.”), ¶¶ 28-29. Plaintiffs expect the average lump sum payment for an average family of four will be approximately \$8,750. Ex. C, Fenwick Decl., ¶ 32. Businesses which are itemized claimants will be entitled to reimbursement of expenses and lost profits on a pro rata basis, extraordinary individual claims are similarly evaluated. *Id.*, ¶¶ 34-35. Overall the allocation plan will provide each claimant with a share of the Settlement Fund proportional to the severity of the harm suffered. This uniform, equitable approach treats all Class Members fairly. Ex. B, Rubenstein Decl., ¶ 20.

C. Attorneys’ Fees, Costs and Expenses

In accordance with the Settlement Agreement, Class Counsel have submitted a separate application for attorneys’ fees, seeking 16.5% of the Settlement Fund, or \$23,595,000 in attorneys’ fees, plus notice, administration and litigation costs of up to \$2,500,000, and incentive awards of \$5,000 for each named Plaintiff.

D. Release

Upon approval of the Settlement Agreement, and in exchange for the agreed-upon payments, Plaintiffs and Settlement Class Members agreed to release any and all suits, actions, causes of actions, claims, or demands arising from the facts alleged

in the Complaint against the Released Parties, as defined in the Agreement.

Settlement Agreement, ¶ 11.

E. Cy Pres

Uncashed checks, and other residual amounts (if any) from the Settlement Fund after all payments are made shall be paid to a *cy pres* beneficiary to be determined, pursuant to Court approval.

III. The Class Notice And Outreach Programs Were Extraordinary, And The Claims Submitted In Response Identify The People And Areas Most Severely Harmed

A. Class Notice Reached Over 90% Of The Settlement Class

The Court approved the notice plan calling for direct mailed notice to all Settlement Class Members. Preliminary Approval Order, Dkt. # 59. Sending notice by first class mail to class members is adequate notice. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811 (1985); *Spence v. Reeder*, 382 Mass. 398, 408 (1981); *In re Compact Disc Minimum Advertised Price Antitrust Litig.*, 216 F.R.D. 197, 218 (D. Me. 2003).

On October 25, 2019, the Settlement Administrator, Heffler Claims Group, mailed the Notice and Claim Form in both English and Spanish to 50,575 residential addresses and 41,205 commercial addresses obtained by an address search. Ex. C, Fenwick Decl., ¶¶ 6, 12, 10.² The notices and claim forms sent to class members are attached as Exhibits A and B to the Fenwick Declaration.

² It was determined after the mailing that approximately 13,000 of the commercial addresses were not, or were no longer, valid commercial addresses, thus making the actual commercial address count approximately 28,205. *Id.* ¶ 6.

But mailed notice was just the start. Heffler engaged in an unprecedented comprehensive notice and outreach program that virtually blanketed the Merrimack Valley for months, reaching over 90% of the Settlement Class, using television, radio, and social media. Exhibit D, Affidavit of Jeanne Finegan ("Finegan Aff."), ¶¶ 6, 61. In fact, this case presented one of the most extensive and far-reaching notice programs the Settlement Administrator and Class Counsel have ever seen. Ex. D, Finegan Aff., ¶ 63; Ex. E-1, Roddy Decl., ¶ 25, by including the following measures:

- Direct mail to all residential and business Class Member addresses identified in Andover, North Andover and Lawrence;
- Local broadcast television in the Boston Designated Market Area ("DMA");
- Local cable television in the three communities;
- Local radio notice ads in the communities and the broader Boston DMA;
- Print publication of the summary notice twice in local newspapers in English or Spanish;
- Online display banner advertising in English and Spanish targeted to reach Class Members;
- Keyword Search targeting Class Members;
- A press release across PR Newswire's US 1 Newslines;
- Social media through Facebook, Instagram and Twitter;
- An informational website (www.ColumbiaGasExplosionSettlement.com) containing downloadable notices, claim forms and other important Court documents; and
- A toll-free information line by which Class Members can call 24/7 for more information about the Settlement, including, but not limited to, requesting copies of the Notice or Claim Form.

Ex. D, Finegan Aff., ¶¶ 26, 27, 29; *see also* Ex. C, Fenwick Decl., ¶¶ 5-12, 10, 14.

B. Beyond Notice: Outreach, Claims Assistance, And Extension of the Claims Deadline

After Notice was sent, Heffler set up a claims facility at 300 Brickstone Square in

Andover to help Class Members file claims. Ex. C, Fenwick Decl. ¶ 14. Two Heffler staff people worked from 9-5 weekdays (Friday closing time was 2:30) from November 4, 2019 through the January 31, 2020 end of the claims filing period. *Id.*

In addition to the initial mailed notice, on November 4, 2019, Heffler also mailed postcards to the 50,575 residential addresses informing them of the claims help available at the claims facility, its address and hours of operation. *Id.* at ¶ 15. After the Court granted Class Counsel's request to extend the claims deadline from January 9 to January 31, 2020, Heffler mailed an additional 49,045 postcards to now confirmed residential addresses informing recipients of the deadline extension. *Id.* at ¶ 16. In addition to these postcard mailings, Heffler prepared flyers that were available at a series of Town Hall events and claims fairs held in January and at the Andover claims facility, and which were also disseminated throughout the Class Area. Ex. C, Fenwick Decl., ¶¶ 17-18. The postcards and flyers are attached to the Fenwick Declaration as Exhibit F. These notice efforts far exceeded the typical class action notice plan. Ex. D, Finegan Aff., ¶ 63 (notice efforts, especially the claims center, town halls, and claim fairs, rank among the most robust efforts encountered in 30 years of experience). Substantial outreach was made to assist local businesses in submitting and documenting claims, by counsel and community members, including Ernie Citron of EN Business Solutions. Exhibit H, Declaration of Ernie Citron, ¶ 9 (assisted over 200 businesses).

C. The Claims Submitted Reflect The Class Members And Areas Most Severely Harmed

As of February 5, 2020, the Settlement Administrator had processed 9,022 claims, Ex. C, Fenwick Decl., ¶ 21, the vast majority of which are lump sum residential claims. By virtue of geography, Class Members who lived or worked in a 12.5 square mile “impact zone” defined by the National Transportation Safety Board (“NTSB”), Columbia Gas, and the three communities. This “impact zone” was most directly affected by the Incident and its subsequent evacuations, loss of natural gas services and restoration efforts. *Id.*, ¶¶ 25, 26. Of the 9,022 total claims processed so far, 7,565, or approximately 84%, originate from this area and represent between 53% to 89% of all eligible Class Members in the impact zone. *Id.*, ¶¶ 24 - 26.³ A “heat map” chart illustrating the geographical distribution of claims, and their concentration around the impact zone, is attached to the Fenwick Decl., as Exhibit I, at 4-5.

As previously noted, the average lump sum payment for a family of four will be approximately \$8,750. The 860 itemized claims will require more time to evaluate; but the Settlement Administrator anticipates being able to report on the value of these claims at Final Approval. Ex. C, Fenwick Decl., ¶¶ 33-36.

IV. The Settlement Is Fair, Reasonable, And Adequate And Should Be Approved

The settlement of a class action requires court approval. Mass. R. Civ. P. 23(c). In deciding whether to approve a proposed settlement, the court must determine whether it is fair, reasonable, and in the best interests of the class which will be affected by it. *See*

³ These figures do not include approximately 1,000 claims that have been received but not yet processed. Class Counsel will provide updated claims figures at the Final Approval hearing, if not before.

Sniffin v. Prudential Ins. Co., 395 Mass. 415, 420-421 (1985). Massachusetts courts use the same standard for approval as the federal courts. *Id.*; *City P'shp. Co. v. Atlantic Acquisition*, 100 F.3d 1041, 1043 (1st Cir. 1996), citing *Durrett v. Housing Auth. of City of Providence*, 896 F.2d 600, 604 (1st Cir. 1990).

Ultimately, the decision whether to approve a settlement “involves balancing the advantages and disadvantages of the proposed settlement against the consequences of going to trial or other possible but perhaps unattainable variations on the proffered settlement.” *Walsh v. Popular, Inc.*, 839 F. Supp. 2d 476, 480 (D.P.R. 2012). The court enjoys “great discretion to balance [a settlement’s] benefits and costs.” *Voss v. Rolland*, 592 F.3d 242, 251 (1st Cir. 2010) (citing *New England Carpenters Ass’n*, 582 F.3d at 45). That balancing, along with all other relevant considerations, supports a finding that the Settlement is fair, reasonable, and adequate.

A. The Settlement Satisfies All Applicable Criteria

Factors relevant to the court’s decision to approve a settlement include:

- the strength of the plaintiffs’ case on the merits, balanced against the amount of the settlement offer;
- the complexity, length, expense and risks of further litigation;
- and the nature and extent of opposition to the settlement.

See *Sniffin*, 395 Mass. at 420-426; Ex. B, Rubenstein Decl., ¶ 12.

As Massachusetts courts look to federal caselaw for additional insight into the workings of Rule 23, the factors outlined in *In re Relafen Antitrust Litig.*, 231 F.R.D. 52 (D. Mass. 2005) also inform the fairness determination, many of which overlap with the *Sniffin* factors:

- comparison of the proposed settlement with the likely result of litigation;
- reaction of the class to the settlement;
- stage of the litigation and the amount of discovery completed;
- quality of counsel;
- conduct of the negotiations; and
- prospects of the case, including risk, complexity, expense and duration.

Relafen, 231 F.R.D. at 72, quoting *In re Compact Disc Litig.*, 216 F.R.D. 197, 206 (D. Me. 2003). See also *Sniffin*, 395 Mass. at 420; Ex. B, Rubenstein Decl., ¶ 12.

In addition, Professor Rubenstein cites eleven components of the Settlement which support the conclusion that it is fair, reasonable, and adequate, including: (1) it is by a factor of four the largest private class action settlement in Massachusetts state court; (2) it benefits an enormous group of affected parties; (3) every class member is eligible for relief; (4) class members will receive cash; (5) the lump sum payments are significant; (6) the settlement treats class members equitably; (7) the claims process is simple and straightforward; and (8) all of the settlement fund, net of fees, will be distributed to class members; none will be returned to Columbia Gas. Ex. B, Rubenstein Decl., ¶¶ 1, 14-24.

B. The Relief Obtained Is Exceptional, Especially Taking Into Account The Risk, Complexity And Expense of Continued Litigation

The reasonableness and adequacy of the Settlement amount obtained, considering the potential outcome and the risk of not prevailing, is the starting point of the analysis, and the most important element as well. *Sniffin*, at 421; *Bezdek v. Vibram USA Inc.*, 79 F. Supp. 3d 324, 345 (D. Mass. 2015), *aff'd*, 809 F.3d 78 (1st Cir. 2015); Rubenstein Decl., ¶ 12.

Here, the \$143 million obtained represents a more than reasonable compromise between the parties' widely differing views on damages. Plaintiffs prepared a damages estimate based on data provided by their damages consultant, Baker Tilly, their economic expert, Evan Schouten, publicly available information, and information obtained from Columbia Gas during the mediation process. While a case could be made that a greater recovery might have been *possible* at trial, Class Counsel had to factor in to their assessment of a reasonable settlement that: Columbia Gas had already paid more than \$1 billion in repair and restoration efforts, determining damages for intangible harms is a subjective process, and defenses such as the tariffs and the economic loss doctrine, discussed below, could have reduced or eliminated any recovery. Ex. E-1, Roddy Decl., ¶ 22. On top of those uncertainties, a trial would guarantee years of delay. *See Sniffin*, 395 Mass. at 427 (a settlement is a compromise that avoids risk and delays, and the possibility of a greater recovery is just that, a possibility).

The Settlement, negotiated with the mediators' assistance, focused on the greatest and most immediate needs of the Class, and appropriately took into account the uncertainty of various legal issues, and the uncertainty of litigation generally. And the \$143 million valuation does not even factor in the stimulus effect that the Settlement's cash infusion will have on the local economy, Ex. A, Schouten Decl. ¶¶ 8, 83-87, 92.

A recovery in this range is more than reasonable. *See Bezdek*, 79 F. Supp. 3d at 345 (settlement that provided refund of 9% of price paid for footwear was reasonable; worst case scenario was no recovery, best case was 100% of purchase price); *In re Tyco Int'l*,

Ltd. Multidistrict Litig., 535 F. Supp. 2d 249, 261 (D.N.H. 2007) (settlement that provides approximately 27% of the alleged damages to the class is “outstanding” result); Ex. B, Rubenstein Decl. ¶ 14 (settlement is historic, and unprecedented amount obtained supports approval).

The Settlement’s value is also notable in the forms of damage it addresses. The Incident led to a mass evacuation of the residents of the three towns, forcing many individuals to incur expenses for hotels, food, and alternative forms of heating. *See Consol. Amended Class Complaint*, Dkt. # 53, at ¶¶ 159-240. Businesses and non-profits in the area also suffered damages, including forced closure, damage to physical structures, and, in the case of restaurants and individuals, spoliation of perishable goods because of lost power to refrigeration units. *See id.* at 241-257. The Settlement compensates Class Members for all of these damages; it is not limited to out of pocket costs.

The value of the benefits provided by the Settlement are further enhanced by the fact that they will be provided to the Class now, immediately, without the delay, risks and burdens of further litigation. *See Rolland v. Cellucci*, 191 F.R.D. 3, 10 (D. Mass. 2000) (the certainty of recovery through settlement in contrast to the expense, length and uncertainty of litigation, is a strong argument in favor of settlement).

C. The Settlement Avoids The Significant Risk of No Recovery

The results obtained here are even more remarkable considering the risk involved. While Plaintiffs are confident in their claims, litigation is always risky, expensive, and time consuming. *See In re Cendant Corp. Litig.*, 264 F.3d 201, 233 (3d Cir. 2001) (this factor “captures ‘the probable costs, in both time and money, of continued

litigation”). That is particularly true here, and Class Counsel’s successful avoidance of the “worst nightmare” scenario presented by some troubling jurisprudence is a major benefit of the Settlement. Some of the significant risks they faced include the following.

1. The Express Language Of The Tariff Precludes Recovery For Incidental and Consequential Damages – But The Settlement Provides Compensation For These Claims

Unlike most private entities, utilities have special protections from tort and contract liability under state law based on “tariffs” they negotiate with state regulatory agencies. At the same time, like most other civil litigants, utilities also avail themselves of more common, if not well understood, defenses like the “economic loss doctrine.” Both defenses are at play here, and pose significant risks to recovery.

Under the regulatory scheme of utility tariffs, the state secures the development, installation and operation of distribution systems, and the utilities secure protections from economic risks like rate fluctuation, market competition and, relevant here, certain types of liability. Under Massachusetts law, “[t]he process of utility rate making by a public regulatory body is the exercise of a legislative function ... which has been delegated to the [MDPU] through the enactment of G.L. c. 164 ... The result of that process is a ‘quasi statutory enactment.’” *Maryland Cas. Co. v. NSTAR Electric Co.*, 471 Mass. 416, 425 (2015) (citations omitted). Liability for damages may be “limited by properly filed and approved tariffs,” having the “force and effect of law.” *Id.* at 421-422.

Courts have routinely upheld limitations of liability in tariffs, finding “sound public policy reasons for shielding the [utility] company from certain damage claims,” thus enabling the utility to “set its rates at a reasonable level.” *Lebowitz Jewelers, Ltd. v.*

New England Tel. & Tel. Co., 24 Mass. App. 268, 273 (1987). “This not only protects the public, but also the financial integrity of the public utility.” *Lupoli v. N. Utilities Nat. Gas, Inc.*, No. 991844, 2004 WL 1195308, at *4 (Mass. Super. Feb. 11, 2004). See also *Western Union Tel. Co. v. Esteve Bros. & Co.*, 256 U.S. 566, 571 (1921) (“The limitation of liability [is] an inherent part of the rate.”).

The Columbia Gas tariff on file with the MDPU as of September 13, 2018 contained a limitation of liability clause that specifically precluded recovery for any indirect, consequential, or special damages. Section 20.2 provides:

The Company shall be *liable only for direct damages* resulting from the Company’s conduct of business when the Company ... acted in a negligent or intentionally wrongful manner. *In no event shall the Company be liable to any party for any indirect, consequential, or special damages, whether arising in tort, contract or otherwise*, by reason of any services performed ... or actions taken by the Company, or its agents or employees, under the Schedule of Rates or in accordance with or required by law (emphasis supplied)

See Tariffs, Rate Schedules, and Agreements at §§ 20.2, Art. 9, and Art. 10 (“Tariffs”).

In every Answer to every Complaint, Columbia Gas pled its tariff as one of its first affirmative defenses. Its position is that, while it may be liable for “direct damage” it caused to buildings, roadways and even persons (e.g., death and bodily injury, destroyed buildings, damaged roadways, lost inventory, etc.), it is not liable for “any indirect, consequential, or special damages” (e.g., disruption or displacement damages, lost profits, diminution of value, loss of use, emotional distress unrelated to bodily injury), under any theory of law, citing MDPU 250; *Maryland Cas. Co.*, 471 Mass. at 425; *FMR Corp. v. Boston Edison Co.*, 415 Mass. 393 (1993) (affirming summary judgment for utility on both tort and breach of contract claims).

If the tariff were upheld after extensive motion practice, Columbia Gas would only be liable for the replacement of directly damaged buildings, but not for the occupant's consequential displacement while a structure is rebuilt. It would only be obliged to repair damaged roadways, but not compensate anyone for the enormous inconvenience and time lost for hours of related detours. Columbia Gas may have been required to pay businesses for lost inventory, but not for lost profits and lost customers resulting from related to being closed for three months. And Columbia Gas has already paid more than a billion dollars to repair and restore the affected areas.

2. Navigating Between Scylla And Charybdis – The Economic Loss Doctrine And The Cautionary Tale of *Porter Ranch*

Columbia Gas also pled common law defenses that, together, comprise the Economic Loss Doctrine (“ELD”). Simply stated, the ELD is a set of judicially created rules that bar recovery of damages for purely “economic loss” (e.g., lost profits, loss of use, diminution in value, business interruption, disruption, etc.) if that recovery is based on negligence, absent specifically-related physical property damage or personal injury. See *Bay State-Spray & Provincetown S.S., Inc. v. Caterpillar Tractor Co.*, 404 Mass. 103, (1989); *Stop & Shop Companies, Inc. v. Fisher*, 387 Mass. 889, 895-896 (1983) (rejecting attempts by affected businesses to recover in negligence for purely economic losses resulting from bridge accident) cited with approval in *Southern California Gas Leak Cases (a/k/a/ “Porter Ranch”)*, 7 Cal. 5th 391 (2019).

In *Porter Ranch* the plaintiffs filed a class action asserting negligence-based claims on behalf of all businesses within five-miles of a massive, months-long leak from a

natural gas storage facility. The California Supreme Court ultimately ruled that, while the gas company owed a duty to avoid harm, it did not owe “a presumptive duty of care to guard against any conceivable harm that a negligent act might cause.” *Id.* at 399. Specifically, it ruled that, except in cases involving a “special relationship,” its version of the ELD did not permit negligence-based recovery for “purely economic losses” absent physical damage or injury. *Id.* at 400.

Here, just as Columbia Gas asserts that “indirect, consequential, or special damages” are broadly barred by its tariff, it asserts that purely economic losses such as lost profits, loss of use, diminution in value, business interruption, disruption, and inconvenience, would all be barred by the ELD for any business or residential plaintiffs who did not, themselves, suffer direct physical damage or personal injury. Viewed against the risk of non-recovery of certain damages should Columbia Gas prevail based on these and other legal arguments, the proposed Settlement is an invaluable recovery for the members of the Settlement Class.

3. Regardless Of Their Outcome, The Tariff and ELD Issues Created A Risk Of Delay

If the tariff and the ELD were litigated, and assuming Plaintiffs defeated the expected motions to dismiss, it would still take *years* of written discovery, depositions, motion practice, hearings, trials and appeals to ultimately get a ruling – much less prevail – on the tariff defense. The last major utility tariff case in Massachusetts, the *Maryland Casualty* matter, took *nine years* to complete and, ultimately, ended in victory for the utility. The residents and businesses of the Merrimack Valley simply cannot

afford to wait a decade for resolution of their many pressing claims. The same war of attrition scenario is true for the ELD defenses. *Porter Ranch* is a cautionary tale here. And even if Plaintiffs were to prevail at trial, post-trial motions and appeals could prevent Class Members from obtaining any recovery for several more years, if at all, while continuing to incur litigation related expenses. See *Bezdek*, 79 F. Supp. 3d at 346.

D. Arm's Length Negotiations Conducted By Experienced And Informed Counsel Lend A Presumption Of Fairness To The Settlement

A settlement agreement is presumed to be fair if it follows sufficient discovery and genuine, arm's length negotiations. See *In re Pharm. Indus. Average Wholesale Price Litig.*, 588 F.3d 24, 32-33 (1st Cir. 2009) (where "the parties negotiated at arm's length and conducted sufficient discovery, the district court must presume the settlement is reasonable"); *Nat'l Ass'n of Chain Drug Stores v. New England Carpenters Health Benefits Fund*, 582 F.3d 30, 44 (1st Cir. 2009). Ex. F, Green Decl., ¶ 13.

Eric Green is an experienced mediator, one of the deans of modern alternative dispute resolution. See Ex. F, Green Decl., ¶¶ 1-6. Experienced mediators Carmin Reiss and Michael Robertson also provided substantial assistance. The mediators' immersion in this unique, all encompassing, six-month long negotiation process gave them a thorough understanding of the legal nuances, practical realities of continued litigation, and parameters of a fair and reasonable settlement. All these factors informed the ultimate settlement agreement. Even at that, the negotiations were often acrimonious, there were periods when settlement seemed impossible, and the mediation process culminated only when the parties and the mediators reached a point where either the

case would be settled or further movement would lead to an impasse and back to prolonged, heated litigation. Ex. F, Green Decl. ¶ 13; Ex. E-1, Roddy Decl., ¶ 19.

E. The Settlement Was Reached At The Appropriate Stage of The Case – After Six Months of Mediation

The Parties were able to reach an agreement in principle on July 22, 2019, after six months of intensive mediation. Ex. F, Green Decl., ¶ 8; Ex. E-1, Roddy Decl., ¶ 20. The Parties entered the mediation process well-informed about the factual and legal issues underlying their claims and defenses and were well-positioned to assess the reasonableness of any settlement.

1. Plaintiffs And Their Counsel Immersed Themselves In This Case So That They Could Reach an Excellent Result Expeditiously

Class Counsel’s extensive pre-litigation and early litigation efforts laid the foundation for the Settlement. These efforts included:

- Factual investigation, legal research, and preparation of the twelve initial individual complaints and the Consolidated Amended Class Action Complaint, including development of causes of action and preparation for potential defenses against liability;
- Retention of experts (to address both liability and damages);
- Retention of, and extensive consultation with, liability and, especially, damages and economic experts;
- Communication with Class Members regarding class notice, Chapter 93A claims and associated remedies, and case development;
- Innumerable meet and confer conferences and communications with defense and third-party Counsel, including the Attorney General as well as municipal, state and federal elected officials, regarding discovery, pleadings, class notice, scheduling, settlement and other case matters;
- Briefing, research, and oral argument in connection with administrative consolidation into an aggregate proceeding;
- Preparation and participation in numerous telephonic settlement

discussions as well as twelve in-person mediation sessions before the Mediators, including extensive written mediation briefing about the claims and defenses at issue;

- Coordinating and consolidating litigation funding, including, *inter alia*, expert and mediation costs; and
- Reviewing claims data.

Ex. E-1, Roddy Decl., ¶ 31. Through these efforts, Class Counsel, who are skilled and experienced class action practitioners, *see* Exhibits E(1)-(4), are able to conclude that the settlement is fair, reasonable, and adequate, and in the best interests of the Settlement Class. The opinion of Class Counsel is an important consideration. *See Rolland*, 191 F.R.D. at 10; *In re Compact Disc. Litig.*, 216 F.R.D., at 212.

2. The Factual Record Was Well Developed Through Independent Investigation And Discovery And Produced A Fair and Reasonable Settlement

To assess the fairness of a proposed settlement, the parties must be sufficiently apprised of the facts. *Manual for Complex Litig.* (Fourth), § 22.921 (2004). Prior to the mediation, the Parties exchanged salient information and prepared extensive legal memoranda to frame the operative legal issues. Ex. F, Green Decl., ¶¶ 10-12. Plaintiffs also had the benefit of access to the conclusions of government agencies regarding the Incident. Both sides were well acquainted with the legal territory, the risks and uncertainties going forward, and the range of possible compromise resolutions. In light of this developed record and the familiarity of the Parties with the strengths and weaknesses of their respective cases, settlement at this point in the case is appropriate. Ex. F, Green Decl. ¶¶ 9-13; Ex. E-1, Roddy Decl., ¶ 18.

F. There Are Only 16 Objections, Representing Roughly .01% Of The

Settlement Class

Sixteen objections have been submitted to the Settlement Administrator, representing 22 Class Members, and amounting to .0125% of the Class. Ex. C, Fenwick Decl., ¶ 20; Ex. B, Rubenstein Decl., n.2. Plaintiffs' response to those objections will be filed separately. The Class's positive response to the Settlement strongly supports its fairness. *See Gulbankian v. MWMfrs., Inc.*, C.A. No. 10-10392-RWZ, 2014 WL 7384075, at *2 (D. Mass. Dec. 29, 2014) (small number of objections indicates positive response). When few members object to the settlement, the court may infer that the settlement is fair. *See Bussie v. Allmerica Fin. Corp.*, 50 F. Supp. 2d 59, 77 (D. Mass. 1999).

V. The Class Is Appropriately Certified For Settlement Purposes

Certification of the Settlement Class is appropriate for all the same reasons contained in the Memorandum in Support of Preliminary approval, none of which have changed. The class is sufficiently numerous to make joinder of all parties impracticable, there are common questions of law and fact, the claims of the named Plaintiff representatives are typical of the claims of the class, and the named Plaintiffs will fairly and adequately represent the interests of the class. Mass. R. Civ. P. 23(a). In addition, common questions of law and fact predominate over individualized questions, and that the class action is superior to other available methods for fair and efficient adjudication of the controversy. Mass. R. Civ. P. 23(b).

VI. Conclusion

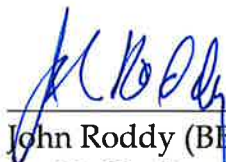
For all of the foregoing reasons, Plaintiffs request that the Court grant final approval to the Settlement Agreement and enter the proposed Order.

DATED: February 7, 2020

Respectfully submitted,

Plaintiffs,

By their attorneys:



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