COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
C.A. NO. 0984CV00576

SPENCER TATUM, GWENDOLYN BROWN, LOUIS ROSARIO JR., and FRANCISCO BAEZ, individually and on behalf of a class of individuals similarly situated,
Plaintiffs,
v.

COMMONWEALTH OF MASSACHUSETTS, and PAUL DIETL, in his capacity as Personnel Administrator for the Commonwealth of Massachusetts, Human Resources Division,
Defendants.

ORDER APPROVING CLASS ACTION SETTLEMENT

The parties have submitted to the Court a Joint Motion for Final Approval of Partial Settlement Agreement (the "Motion"). The Motion seeks final approval pursuant to Mass. R. Civ. P. 23(c) of the parties' Class Action Settlement Agreement (the "Settlement Agreement,"). The Plaintiffs are a class of current or former police officers who took a police sergeant promotional exam created and administered by the Commonwealth of Massachusetts Human Resources Division ("HRD") in 2005, 2006, 2007, 2008, 2010, or 2012. The Plaintiffs include current and former officers for the cities of Brockton, Lawrence, Methuen, Lowell, Springfield, Worcester, Boston, and other cities and towns throughout the Commonwealth of Massachusetts, as well as the Massachusetts Bay Transportation Authority ("MBTA"). Each named and class Plaintiff is either Black or Hispanic. The Plaintiffs were either not promoted to sergeant or experienced a significant delay in such promotion based on their scores on HRD's examinations.

After a Phase I trial on liability, the court found that HRD's examinations had an unlawful disparate impact upon Black and Latinx candidates in the police sergeant promotional examinations administered by HRD for the years 2005, 2006, 2007, 2008, 2010, and 2012. See Findings of Fact and Conclusions of Law on Liability (Phase I), dated November 27, 2023 ("Phase I Order"). The court concluded that "HRD interfered with the class members' rights to consideration for promotion to police sergeant without regard to race or national origin" in violation of G.L c. 151B, § 4(4A). Phase I Order at 75. The Settlement Agreement resolves most of the remedial issues resulting from this court's ruling, but leaves open questions of injunctive relief and attorneys fees.

On February 3, 2023, this Court preliminarily approved the Settlement Agreement as fair and reasonable, approved the issuance of notice of the Settlement to Class Members, and scheduled a hearing on final approval for May 10, 2023 (the "Preliminary Approval Order"). Notice was sent pursuant to the terms of the Preliminary Approval Order.

As reported in Plaintiffs' Supplemental Report Prior to Final Approval Hearing, dated May 9, 2023, the parties received no written objections were received in response to the Notice. Plaintiffs' counsel have received claims forms from 414 class members, comprising about 75% of the entire class. Those 414 members account for approximately 79% of settlement proceeds, which reflects a greater claims rate by Boston class members than those from other municipalities.[1]

On May 10 at 11:00 A.M., the Court held a hearing ("Fairness Hearing") in-person and by zoom to consider the fairness, reasonableness and adequacy of the

[1] Class members seeking promotion in Boston had a greater lost opportunity due to higher salaries and greater promotional opportunities in Boston.

proposed settlement. The parties appeared and argued through counsel. One class member, Boston Police Sergeant Sara D. Dorsey, appeared in opposition and presented her argument orally and in writing. The court has reviewed her detailed written submission, which it received as Exhibit A to the fairness hearing. No other class members or other interested person appeared in opposition.

After considering all the oral and written submissions, the Motion is ALLOWED, because the Settlement Agreement is fair, adequate and reasonable for the class, and because Settlement Agreement's dispute resolution provisions appear sufficient to address Sergeant Dorsey's concerns, as discussed in Part IV below.

DISCUSSION

I.

The Court has reviewed the Motion and the exhibits thereto, including the Settlement Agreement, as well as the written and oral arguments of the parties. The Agreement results from arm's-length negotiations, in good faith, between class counsel and HRD's counsel. Based on the papers filed with the Court, and the presentations made to the Court, the Court finds that the Settlement Agreement is fair, adequate, and reasonable.

> "[T]he essence of a settlement is compromise . . . Because settlement of a class action, like settlement of any litigation, is basically a bargained exchange between the litigants, the judiciary's role is properly limited to the minimum necessary to protect the interests of the class and the public. Judges should not substitute their own judgment as to optimal settlement terms for the judgment of the litigants and their counsel."

Sniffin v. The Prudential Insurance Company of America, 395 Mass. 415, 421 (1985) (citations omitted).

The court has considered the parties' likely prospects if it denied approval of the settlement and the plaintiffs had to litigate this case. This class action is complex with many intricate factual and legal issues. The results of litigation, including this case, cannot be predicted with certainty, because the damages issues are complex and difficult to resolve. There is every reason to believe that the plaintiffs are receiving at least as much in the Settlement Agreement as they could achieve in a litigated resolution.

Class counsel have concluded that the proposed settlement is fair, reasonable and adequate. The court agrees. In approving the Agreement, the Court has considered: (1) whether the proposed settlement was fairly negotiated; (2) whether serious questions of law and fact exist, placing the ultimate outcome of the litigation in doubt; (3) whether the value of the proposed settlement outweighs the mere possibility of future relief after protracted and expensive litigation; (4) the judgment of the parties that the proposed settlement is fair and reasonable and (5) the comments of the class members submitted orally and in writing at and after the fairness hearing. On balance, these considerations weigh strongly in favor of approval. In this challenging litigation, the Settlement Agreement cannot accomplish everything, but it will accomplish a lot. It is certainly superior to continuing this litigation and, very possibly, losing the substantial benefits that the parties have negotiated.

II.

The parties have left it to the court to address the scope of equitable relief. The Plaintiffs' papers ask for an order that their expert be empowered to "oversee" the upcoming development of a new exam and assessment process. The court agrees with the defendants that "oversight" of an executive function is not appropriate where there

are multiple ways to bring HRD's practices into compliance with G.L. c. 151B, § 4(4A). The court lacks power to tell the executive branch how to fulfill statutory or constitutional obligations, particularly where the decision involves expenditure of funds and provisions of services outside the court system proper. See Bradley v. Commissioner of Mental Health, 386 Mass. 363, 365-366 (1992) (court lacks authority to direct DMH to fulfill its statutory obligations in any particular way); In the Matter of McKnight, 406 Mass. 787, 791-792 (1990).

On the other hand, because the court has found a violation of statutory law, it has the power and duty to order an effective remedy. See Attorney General v. Sheriff of Suffolk County, 394 Mass. 624, 629-31 (1984) (It is "a purely judicial function" to "order the fulfilment of the statutory obligation of the city of Boston to provide a suitable jail under the mandate of G. L. c. 34, Section 3. It falls to the judicial branch to insure compliance with this statute. The court must have power to carry out its obligation.") and cases cited.

HRD's substantive response to the court's Phase I Order has been positive and fully consistent with the goal of remedying the violations that the court found. The court notes and approves of Exhibit A to the Class Action Settlement, which sets forth numerous agreed actions or considerations for development of the next sergeants promotional exam. Moreover, to fulfill their own statutory obligations, the defendants are motivated to develop a new test and protocol to address the court's findings expeditiously. They are not likely to delay unnecessarily. Moreover, continuing the existing promotional list in effect may (as plaintiffs suggested earlier in the case) reduce adverse impact by affording promotional opportunities to qualified candidates who

passed the test but did not obtain the highest scores. The court therefore sees no need for orders dictating the timing or substance of remedial measures at this time. Indeed, restricting the HRD's exploration of improvements in the next promotional examination might interfere with developing the fairest, most statistically valid way to identify and select the best police sergeants.

Consistent with the judicial function, however, the court has an interest in timely and effective judicial action if there is litigation over the legality of the defendants' chosen remedy. Failure to identify and resolve such disputes expeditiously and effectively can reduce the court's options, may force unnecessarily rushed or truncated proceedings, and may result in postponing the next round of sergeant promotional exams while the court assesses compliance with legal principles that the Phase I Order has articulated. No one favors that sort of delay.

The court has an interest in preserving its options to order the most effective and timely remedy possible. It therefore does take action to ensure that the parties identify, raise and, if necessary, litigate disputes before it is too late to address them in an optimal way. Based upon the oral arguments, the court's familiarity with the legal issues and practical process of developing a valid promotional exam, and the need to enable the defendants to explore and incorporate the most effective remedy into the next exam, the court believes that the following provisions will best ensure compliance with G.L. c. 151B, § 4(4A):

> In developing the next Police Sergeant's Promotional Exam, the defendants shall forthwith provide to the plaintiff's attorneys and experts (subject to a confidentiality agreement, if requested) the following documents, when completed, for review and comment:
>
> - Job analysis

- Proposed weights for components of the Exam
- Instructions to Question Writers
- Instructions to Subject Matter Experts.

The defendants need not wait for comments from the plaintiffs or their experts or delay any action pending receipt of such comments. If they choose, the defendants may provide the same information simultaneously to other parties or groups, but are not required to do so. The defendants shall not, however, give any other outside party or group (i.e. a person or group not employed by or under contract with the Commonwealth for development of the Sergeant's promotional exam) more favorable access to such materials.

This order avoids premature disclosure and interference with deliberative processes by waiting until certain milestones are complete before requiring disclosure. The defendants have argued that the court should not place plaintiffs in a favored position though early access to information, but the defendants have the power to avoid that problem, because they may, at their option, provide the same information simultaneously to other groups or parties.

III.

The parties also dispute the amount of attorneys fees to be awarded. Pursuant to paragraph 1(a)(iv), the fee award is to be paid out of the total $40,000,000 monetary award and, therefore, would reduce the total amount available for payment to class members. Accordingly, the parties agree that the appropriate method to determine attorneys is the "percent of fund" method.

The Supreme Judicial Court has "allowed attorneys' fees as part of a damage award where the party . . . has, at his or her own expense, been successful in creating, preserving or enlarging a fund in which other parties have a rightful share." Pearson v. Board of Health of Chicopee, 402 Mass. 797, 800-801 (1988) at n.3, citing Commissioner of Ins. v. Massachusetts Accident Co., 318 Mass. 238, 242 (1945). See Crowley v.

Communications for Hospitals, Inc., 30 Mass. App. Ct. 751, 767 (1991) ("[B]ecause we now provide relief in the fashion of a derivative action – a fund of money created for the benefit of all the stockholders in the company – an award of attorneys' fees to the plaintiff out of that fund is appropriate.").

Despite the parties' agreement, a cautious approach is appropriate, because awarding attorneys fees from the settlement proceeds is a zero-sum game, in which compensation to the attorneys reduces class members' recovery on a dollar-for-dollar basis. For one thing, as the Commonwealth observes, the POF approach does not eliminate the need to consider reasonable hours expended and reasonable hourly rates. See In Re Thirteen Appeals, 56 F.3d 295, 307 (1st Cir. 1995). For another thing, the Supreme Judicial Court has given guidance on this issue in a case where it declared a regulation unconstitutional, ruled that the plaintiffs could recover attorneys fees under 42 U.S.C. § 1988, and remanded for further action, including resolution of whether a class should be certified:

> If, on remand, the asserted classes are certified, we agree that any recovery received by the plaintiff classes should be placed in a common fund (or funds) in the court and that payment of attorney's fees should be made from this common fund. We reject, however, the suggestion that the plaintiffs' attorneys in this case should be compensated based on a percentage of the total amount recovered by the plaintiffs. In this case, we believe that the lodestar method is the appropriate one to determine reasonable attorney's fees under Section 1988, and is to be used to determine the amount of fees ultimately paid to the plaintiffs' attorneys from the common fund. See Skelton v. General Motors Corp., 860 F.2d 250, 253 (7th Cir. 1988), cert. denied, 493 U.S. 810 (1989).

American Trucking Associations, Inc. v. Secretary of Admin., 415 Mass. 337, 353 (1993). See also Volkswagen Grp. of Am., Inc. v. Peter J. McNulty Law Firm, 692 F.3d 4, 21 (1st Cir. 2012) ("Under Massachusetts law, there appear to be two permissible approaches to determining attorneys' fees pursuant to a contractual agreement," namely

the lodestar approach and the "multi-factor analysis . . . originally outlined in Cummings v. National Shawmut Bank of Boston, 284 Mass. 563 (1934).").

In this case, there are no contemporaneous time records. The case presented very challenging factual and legal issues before, during and after trial, as evidenced by the length of trial, the two pretrial appeals on which the plaintiffs were successful, and the length of trial and post-trial filings themselves. The results obtained were excellent, reflecting over a decade of effort. The fee request is for 22.5% of the fund, well below the 33.3% contingency often achieved by contract. These facts weight strongly in favor of a very substantial award.

At the same time, some factors suggest that not all time expended was necessary, including the high level of staffing by multiple attorneys at trial, depositions and other portions of the proceedings. Moreover, the plaintiffs previously litigated some of the factual issues in the Federal court, giving the plaintiffs in this case the benefit of a "head start" in trial preparation. The court also considers the absence of detailed, contemporaneous time records. Such records often reveal duplication or unnecessary work, as the court's experience strongly suggests.

For all of these reasons, the court agrees with the Commonwealth's suggestion of a reduction in the attorneys fees award. To a large extent, that reduction has already occurred, as the plaintiffs seek only 22.5% of the fund. The comparable cases cited by the plaintiffs suggest a range for fees between 20% to 30% of the fund. It is not clear what the ultimate fees and class awards were in this case, but a high percentage of a very large amount tends to produce an unreasonably large fee. Because of the very large amounts involved here, the lack of contemporaneous time records and the observed

duplication of effort in a number of instances, the court selects the low end of the bound, namely 20% - or $8,000,000.

In many cases, the percentage of fund covers both attorneys fees and costs. However, this case involved extensive costs for expert testimony, which was central to resolving the merits. The plaintiffs had no real choice but to spend those funds, which in no way reduced the degree of effort required by attorneys. There is no dispute that the $750,000 in litigation costs are reasonable and appropriate. It would be unfair to reduce the attorneys fees by that amount in calculating the 20% payable for attorneys costs and fees. Therefore, the court awards attorneys fees in the amount of 20% of the fund, plus litigation costs and fees.

The final award is $8,000,000 in attorneys fees and $750,000 for a total award of $8,750,000.

IV.

Sergeant Dorsey was the only class member to object to the Settlement Agreement. Her situation appears unique, or relatively unique. She took the 2008 exam, sought promotion in 2014 (when the 2008 exam list was still in effect) and was unsuccessful even though her raw score was higher than certain white candidates and even though adding 4 points to her score (the degree of disparity as calculated by plaintiffs' expert) would have placed her in a group of candidates that, without exception, received promotions. She pursued her claim in appeals, including an appeal to the Civil Service Commission, but was not successful in obtaining promotion until 2018, based upon the results of a subsequent test cycle. To be sure, her claim for failure to promote is

against her employer, the City of Boston, not against HRD or the state.[2] But she did not have the benefit in 2018 of the court's ruling that HRD interfered with her right to a fair promotional process. We now know that, on average, Black candidates should have received an additional 4 points, to adjust for the disparity in the 2008 exam. Had she received those points, she had a very high likelihood of obtaining her promotion 3 years and 8 months earlier than she ultimately did. She calculates her lost back pay as being $146,664. No other class member has presented and documented a similar claim to this court.[3]

Sergeant Dorsey proposed breaking the class relief into four tiers, largely according to test score on the challenged exams in relation to the scores obtained by successful candidates. While that approach has some appeal, it is likely to lead to disputes about who would and would not have been promoted and would require litigation over hypothetical promotion scenarios, including possible hypothetical actions by the Civil Service Commission. The parties have sensibly and reasonably decided to avoid expensive and drawn-out disputes over matters that cannot be determined with any confidence at this point.

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[2] See Exhibit A to the May 10, 2023 hearing (Sgt. Dorsey Statement) at 2: "[E]ven when we do overcome that bias and are up for consideration, there are gatekeepers who keep as many of us out of the promotions as possible. Despite that being a most damning evidence of discrimination, as allowed by the Civil Service Commission, even after my appeal to them, it was not mentioned during this case." The court understands the word "gatekeepers" to refer to decision-makers within the Boston Police Department. This case does not involve discrimination by the City or other employers, or by the Civil Service Commission in its appeals process. For that reason, discrimination by those actors is not the basis for a remedy here. The only defendant is HRD, based upon the disparate impact in the examination scoring which had an impact on promotions, not upon how individual employers made their decisions.

[3] Sergeant Dorsey also expressed a concern that the Settlement Agreement would grant as much as $60,000 to "individual candidates who did not study for the promotion exam, walked in unprepared for the exam and failed it, or barely passed the test." These are legitimate opinions, but the court expresses no view on them. Legally, no class member in this case (or, indeed, any person in any case) has a right to object to money that another person receives under a settlement agreement. The one exception might be if an award to a group of people reduced the objector's own recovery, but the dispute resolution fund appears large enough so that Sergeant Dorsey is not likely to suffer that consequence.

Moreover, the 4-point average disparity applies class-wide, but not necessarily to any individual Black or Latinx candidate. Sergeant Dorsey may well have received a raw score 4 points higher than she got, but it is important to remember that this is an assumption based upon group performance. The assumption may not hold true for any particular individual or for groups of individuals, such as candidates who obtained relatively high test scores. Proving the effect of bias upon an individual candidate is very complicated. Some candidates may have suffered more than a 4-point disadvantage from the racially disparate impact. Some less. What we know is that the class as a whole suffered that disadvantage. Trying to be more specific would likely lead to significant unfairness for individuals because it is difficult or impossible to quantify disadvantage so precisely that each candidate could prove entitlement to specific test score point increases on an individualized basis.[4] That is, it would "drag the court into `a quagmire of hypothetical judgments'" and result in "mere guesswork." Segar v. Smith, 738 F.2d 1249, 1289-90 (D.C.Cir.1984), quoting Thompson v. Boyle, 499 F.Supp. 1147, 1170 (D.D.C.1980), quoting Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 260 (5th Cir.1974))), *cert. denied,* 471 U.S. 1115 (1985).

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[4] Every member of the class is an individual with particular training, skills, abilities, educational background, prior test-taking experiences, academic inclinations (or not) and life experiences. Therefore, membership in the class does not necessarily prove that any particular candidate suffered a disadvantage that equates to 4 points. Moreover, even as a matter of statistics, it is not clear that the same differential applies independently of a candidate's total score. For instance, minority candidates who received high scores may not have suffered a full 4 percent differential, in part because they had less room to improve their scores than lower-scoring candidates. It is also important to know the specific candidate's pattern of incorrect answers. The effect of the exam's overall disparate impact upon Sergeant Dorsey probably depends upon whether, in general, she received an "incorrect" on the same questions that resulted in the greatest racial or ethnic disparity or whether her "incorrect" answers tended to occur on the same questions that caused difficulty for white candidates. In the latter case, the pattern may suggest that her score primarily reflects the difficulty of the exam for all candidates. It is also possible that overcoming disadvantage to achieve a higher score reflects positively on promotional qualifications, but the test does not even measure that phenomenon. Even if these factors still support an inference in Sergeant Dorsey's favor, they do not so clearly individualize the average discrepancy that she can definitively claim entitlement to an additional 4 points.

The parties have wisely avoided spending resources in such an effort, which would likely be no fairer and could be significantly less fair. By addressing the disparity primarily through a "shortfall analysis" – essentially a "lost opportunity" theory[5] - on a class-wide basis, rather than through individual determination, the Settlement Agreement respects the limitations of the statistical analysis in this case, which did not, and perhaps cannot, provide individualized estimates for particular candidates. See, e.g. Catlett v. Missouri Highway and Transportation Comm'n., 828 F.2d 1260, 1267 (8th Cir. 1987) (deciding to "award relief on a classwide, rather than individual, basis by calculating the number of positions for which class members should have been hired and distributing pro rata among all qualified class members the total amount of back pay for which the defendant may be held responsible.").

Fortunately, the Settlement Agreement also provides a fund for dispute resolution. Paragraph 1(a)(iii) allocates $300,000 into a "fund to resolve any disputes filed by class members who have been inadvertently omitted from the class list or otherwise provide class counsel with good cause to adjust their pro-rata share of the settlement fund." This wording is well-suited to address a claim such as Sergeant Dorsey's. To date, she is the only class member to provide documentation that class counsel could consider "good cause" for an adjustment. Since she will likely receive a base award of $65,000 to $67,000 from the settlement, her full lost wages claim against the dispute resolution fund

[5] Analogies supporting an award monetary compensation for loss of opportunity exist in other contexts under Massachusetts law, such as loss of chance of recovery in medical malpractice cases and lost earning capacity in personal injury damages. See Matsuyama v. Birnbaum, 452 Mass. 1, 2 (2008) ("Where a physician's negligence reduces or eliminates the patient's prospects for achieving a more favorable medical outcome, the physician has harmed the patient and is liable for damages."); Model Superior Court Jury Instructions, Personal Injury Damages, part (5) ("Lost Earning Capacity").

would be roughly $80,000 (with possible additional amounts for emotional distress and interest).

A settlement rarely provides full value, because litigation is never certain, and settlements involve compromise. Sergeant Dorsey makes a strong case, but there is no certainty that she could actually prove that she would have been promoted at the time she claims – as exemplified, perhaps, by her lack of success in convincing the Civil Service Commission that she was entitled to a promotion. Perhaps her claim against the dispute resolution fund will be discounted for that reason, as commonly happens in litigation settlements. Perhaps her claim will be granted in full. Even at full value, however, the fund appears capable of supporting a claim in that amount, if class counsel finds good cause.

Particularly where Sergeant Dorsey's claim would not exhaust the dispute resolution fund, the court in no way casts doubt on claims that other class members might assert. It does note, however, that she is the only class member who has made a timely objection, with extensive documentation, which puts her in a sub-class of her own. Even if others make similar claim, given the discounted payments that typically occur in settlement, the dispute resolution fund is a reasonable way to provide supplemental relief to these claimants. It is also not clear to the court whether the other individuals Sergeant Dorsey names were plaintiffs in the federal court litigation, in which case, they have no legal right to any payment and depend entirely upon the Commonwealth's willingness to include them in the base payment provided in the Settlement Agreement.

ORDER

Accordingly, THE COURT HEREBY ORDERS, ADJUDGES, AND DECREES:

1. The Court has jurisdiction over the subject matter of this action, the named Plaintiffs, the Defendant, and all Class Members.
2. The class members in this case include all Black and Hispanic police officers within the Commonwealth of Massachusetts who took promotional examinations for the position of police sergeant administered statewide and in Boston in 2005, 2006, 2007, 2008, 2010 and 2012.
3. The form and method of notice given to the class complied with the requirements of Rule 23 of the Massachusetts Rules of Civil Procedure, satisfied the requirements of due process, is the best notice practicable under the circumstances, and constitutes due and sufficient notice of the Agreement, the fairness hearing, and other matters referred to in the notice to all persons entitled to receive such notice.
4. The court hereby finally approves the Agreement pursuant to Mass. R. Civ. P. 23(c) as fair, reasonable and adequate. The Agreement shall be consummated in accordance with its terms and provisions.
5. The class members, all and each of them (including Plaintiffs), are hereby bound by the terms of the Agreement.
6. The class members are deemed to have released and forever discharged HRD with respect to the claims that are released in Part 7 of the Agreement, which is incorporated by reference into this Order.
7. The class members are hereby permanently barred and enjoined from instituting or prosecuting, either directly, representatively, derivatively or in

any other capacity, any action against HRD asserting any of the claims released by them in the Agreement.

8. In developing the next Police Sergeant's Promotional Exam, the defendants shall forthwith provide to the plaintiff's attorneys and experts (subject to a confidentiality agreement, if requested) the following documents, when completed, for review and comment:

   - Job analysis
   - Proposed weights for components of the Exam
   - Instructions to Question Writers (excluding any questions themselves)
   - Instructions to Subject Matter Experts.

The defendants need not wait for comments from the plaintiffs or their experts or delay any action pending receipt of such comments. If they choose, the defendants may provide the same information simultaneously to other parties or groups at a stakeholders meeting (or otherwise), but are not required to do so. The defendants shall not, however, give any other outside party or group (i.e. a person or group not employed by or under contract with the Commonwealth for development of the Sergeant's promotional exam) more favorable access to such materials than to plaintiffs' counsel or experts, without written consent of the plaintiffs or further order of court.

9. The Court approves the payment of attorneys' fees and litigation costs to the Plaintiffs, by their counsel, an aggregate sum of 8,000,000 for attorneys' fees and $750,000 in litigation costs (including, without limitation, expert fees and costs) for a total award of $8,750,000.

SO ORDERED:

Dated: May 11, 2023

s/ Douglas H. Wilkins
Douglas H. Wilkins,
Associate Justice, Superior Court